

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT**  
**KEROGOYA**  
**ELCA NO. E038 of 2024**

**ANTHONY GIKUNJU MUCHEMI ..... 1<sup>ST</sup>**  
**APPELLANT**

**MWANGI MUCHEMI MIGWI ..... 2<sup>ND</sup>**  
**APPELLANT**

**VERSUS**

**STEPHEN WAITHAKA MIGWI .....**  
**RESPONDENT**

*(Being an appeal from the judgment of Hon. G.W. Kirugumi, PM,  
delivered on 26<sup>th</sup> June 2023 in Kerugoya MCELC Case No. E011  
of 2022.)*

**JUDGMENT**

1. This is an appeal arising from the judgment of **Hon. G.W. Kirugumi, PM**, delivered on **26<sup>TH</sup> June 2023** in **Kerugoya MCELC No. E011 of 2022**. In that suit, the learned trial magistrate issued a declaration that Geoffrey Migwi Muchemi, the original Plaintiff herein, was registered as the proprietor of land parcel Mutira/Kaguyu/1925 to hold the same in trust for his siblings.

The court consequently directed that the property to be subdivided into eight equal portions corresponding to the number of children of the deceased.

The learned trial magistrate further observed that, where any of the deceased's children had themselves passed on, the legal representative of such deceased child would be registered to hold in trust for themselves and their siblings.

Additionally, the court directed the Land Registrar to remove the existing caution over the title and ordered the 1st appellant to produce the original title deed to facilitate subdivision, failing which the Land Registrar was at liberty to dispense with its production.

2. Aggrieved by part of the said decision, the appellants, who were the defendants in the lower court, lodged the present appeal vide a memorandum of appeal dated 22<sup>nd</sup> July 2024, setting out the following three (3) grounds:

- 1) That the learned trial magistrate erred in law by assuming jurisdiction of a probate court in respect to the distribution of the estate of Muchiri Migwi.
- 2) That the learned trial magistrate erred in fact and law by failing to appreciate that the role of the Environment and Land Court was restricted to the determination of trust.

3) That the learned trial magistrate erred in law by straying into the ambit of a probate court when she distributed **LR Mutira/Kaguyu/1925** instead of referring the suit property to the probate court for distribution to the beneficiaries of Muchiri Migwi.

The appellants, therefore, pray that this appeal be allowed and that they be awarded the costs of the appeal.

3. The appeal was canvassed through written submissions filed and exchanged in accordance with the court's directions. The learned counsel for the appellants filed their submissions dated 25<sup>th</sup> June 2025, inter alia acknowledging that the trial court had jurisdiction to determine, as it did, the issue of ownership of **Land Parcel No. Mutira/Kaguyu/1925** and to consider whether the defendants were justified in lodging a caution against the said property. However, counsel contended that the learned trial magistrate overstepped her mandate by assuming the jurisdiction of a probate court when she proceeded to appoint the substituted plaintiff as trustee to oversee the distribution of the suit property.

It was submitted that the original plaintiff, Geoffrey Migwi Muchemi, passed away during the pendency of the suit, and that the present respondent was substituted in his place by virtue of having obtained letters of administration ad litem. Counsel argued that such a grant does not

confer powers to distribute or administer a deceased's estate. Therefore, the respondent was not qualified to act as a trustee or to oversee the distribution of the property.

4. To support this position, counsel relied on the decision in the case of **Re Estate of Helena Wangechi Njoroge (Deceased) [2015] eKLR**, where the court held that:

***“Section 79 of the Law of Succession Act vests the property of the deceased in the personal representative, so that the latter can then exercise the powers set out in Section 82 and discharge the duties set out in Section 83 of the Act. It should be pointed out that the provisions in Section 82 can only be fully exercised by a substantive administrator, that is, the person holding, not a limited grant, but a full grant. Likewise, the duties imposed by Section 83 are to be discharged to their fullest by the holder of a substantive grant of representation.”***

The counsel further submitted that the trial court usurped the powers of the probate court when it directed that the land to be subdivided into eight portions, notwithstanding the fact that not all the beneficiaries of the estate of Muchiri Migwi had participated in the proceedings, or expressed their wishes regarding the proposed subdivision. In counsel's view, once the court had made a

declaration of trust, it ought to have referred the parties to the probate court seized of the estate of Geoffrey Migwi Muchemi (deceased) for the determination of the respective shares of each beneficiary.

5. The learned counsel also cited the decision in the case of ***In Re Estate of Alice Mumbua Mutua (Deceased)* [2017] KEHC 8289**, where the court held that where the subject land constitutes the estate property, the probate court is vested with jurisdiction to determine the assets of the deceased, identify survivors and beneficiaries, and oversee distribution of the estate. The function of the probate court, as emphasized therein, is to facilitate the collection and preservation of the estate and to ensure its orderly distribution among beneficiaries.

The Counsel concluded that, having rightly declared the existence of a trust, the trial court should have limited itself to that finding, and directed the parties to seek enforcement and distribution before the succession court with jurisdiction over the estate of Geoffrey Migwi Muchemi (deceased).

6. The learned counsel for the respondent filed his written submissions dated 8<sup>th</sup> July 2025, in which he one substantive issue for determination, which is whether the trial court had jurisdiction to order subdivision of **LR**

**Mutira/Kaguyu/1925** among the beneficiaries of the family trust subsisting in the land.

The counsel inter alia submitted that the main issue before the trial court was whether the late Geoffrey Migwi Muchemi, the registered proprietor of **LR Mutira/Kaguyu/1925**, held the land in trust for his siblings. He argued that once the court made a finding that such a trust existed, it was within its jurisdiction to issue appropriate consequential orders to give effect to that trust, including directing the subdivision of the property among the identified beneficiaries. Counsel maintained that the probate court did not have jurisdiction to determine the existence of or beneficial interests under a customary trust. Its mandate under the **Law of Succession Act, chapter 160 of Laws of Kenya**, is limited to identifying the assets forming part of a deceased's estate, the beneficiaries, and the mode of distribution. It does not extend to determining ownership of property or declarations of trust.

In support of that submission, counsel relied on the decision of **In the Matter of the Estate of Mbai Wainaina (Deceased) [Succession Cause No. 864 of 1996] [2015] KEHC 6978 (KLR) (Family)**, where the court observed:

***“The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determine issues of ownership of property and declarations of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court. This is the spirit of Rule 41(3) of the Probate and Administration Rules, which provides as follows:***

***‘Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to such share or estate which cannot at that stage be conveniently determined, the court may, prior to confirming the grant, by order appropriate and set aside the particular share or property comprising it to abide the determination of the question in proceedings under Order XXXVI, Rule 1 of the Civil Procedure Rules.’***

7. The Counsel, therefore, maintained that the trial court was properly seized, of jurisdiction to determine the matter as

it did. He further submitted that the learned trial magistrate did not err in directing that the respondent undertake the subdivision of the suit property into eight portions. According to counsel, the order was directed to the respondent in his capacity as the legal representative of Geoffrey Migwi Muchemi (deceased), who would thereafter avail the resultant records and subdivisions to the probate court to inform distribution among the rightful beneficiaries. Counsel further argued that the appellants' claim that the respondent lacked capacity to conduct the subdivision on account of holding only *ad litem* letters was premature.

It was his submission that the death of Geoffrey Migwi Muchemi necessitated the respondent's substitution, and that the appellants did not amend their pleadings thereafter. The substitution did not alter the cause of action, and therefore, the appellants were barred from introducing new prayers or causes of action at the appellate stage. Counsel observed that the appellants had not sought, in the lower court, for any order directing that LR Mutira/Kaguyu/1925, revert to the name of Muchiri Migwi (deceased). He contended that their current argument that the land ought to be distributed under the succession proceedings of Muchiri Migwi's estate is irregular, as it would require this court to cancel the registration of Geoffrey Migwi Muchemi as proprietor, which relief was never sought in their counterclaim.

Counsel concluded that the respondent had adequately demonstrated that the appeal is without merit and urged this court to dismiss it with costs.

8. From the record of appeal and the submissions filed by the parties, the court finds the following three issues as arising for determinations by the court:

*a. Whether the trial court had jurisdiction to determine the issue of trust in respect of **LR Mutira/Kaguyu/1925**.*

*b. Whether the trial court had jurisdiction to order subdivision and distribution among the beneficiaries.*

*c. Who pays the costs?*

9. The court has carefully given due considerations to the grounds on the memorandum of appeal, record of appeal, submissions filed by the parties through their leaned counsel, superior court decisions cited thereon, and come to the following findings:

a. The proceedings in the lower court were commenced by the original plaintiff, now substituted by the present respondent, through a plaint dated 3<sup>rd</sup> February 2022. He sought for inter alia orders compelling the defendant to surrender the original title deed to **Land Parcel No. Mutira/Kaguyu/1925**; to withdraw the caution registered against the said title; or in the alternative,

that the Land Registrar, Kirinyaga County, be ordered to remove the caution; general damages, costs of the suit, and interest thereon at court rates.

The plaintiff's case before the trial court was that he is the registered absolute proprietor of **LR Mutira/Kaguyu/1925**. He averred that prior to travelling to the United States of America, he had entrusted the title deed of the suit property to the 1st appellant, his brother, for safe custody. Upon his return to Kenya in 2021, he demanded that the 1st appellant surrender the title deed, but the latter declined without any reasonable or lawful cause. The plaintiff further averred that he later discovered that the 1<sup>st</sup> appellant had unlawfully lodged a caution against the property on 26<sup>th</sup> September 2019, and had refused to withdraw the same despite being formally requested to do so.

- b. The appellants filed an amended defence and counterclaim dated 4<sup>th</sup> August 2022, in which they denied the contents of the plaint, and contended that the original plaintiff held **Land Parcel No. Mutira/Kaguyu/1925** in trust for his siblings. The 1st appellant admitted lodging a caution against the suit land, asserting that he did so in his capacity as a beneficiary of the property. He maintained that he could not withdraw the caution because the original plaintiff held the land in trust for his brothers, and

had shown an intention to subdivide and dispose of the property. The appellants, therefore, contended that the original plaintiff was not entitled to the reliefs sought in the plaint.

In their counterclaim, the appellants reiterated that the suit property was family land held by the original plaintiff in trust for his brothers, namely, Anthony Gikunyu Muchemi and Mwangi Muchemi Migwi. They alleged that the original plaintiff had, without their knowledge or consent, caused the substitution of their late father in **Nyeri Civil Case No. 418 of 1986**, and had thereafter secretly and fraudulently procured the registration of **LR Mutira/Kaguyu/415**, and its resultant subdivision **LR Mutira/Kaguyu/1925**, in his own name.

They further averred that the plaintiff intended to subdivide and sell the land to third parties to the detriment of his brothers, who had lived on, and developed the land extensively throughout their lives, and that they had consequently suffered loss and damage. They therefore prayed for inter alia, a declaration that the plaintiff held **LR Mutira/Kaguyu/1925** in trust for his brothers Anthony Gikunyu Muchemi and Mwangi Muchemi Migwi; an order for cancellation of the title issued in the plaintiff's name and subdivision of the land into three equal portions to

be transferred to the original plaintiff, the 1<sup>st</sup> appellant, and Mwangi Muchemi Migwi; dismissal of the plaintiff's suit with costs, general damages, and interest at court rates on the sums awarded.

c. The matter proceeded to hearing on 20<sup>th</sup> March 2024, and the respondent called a total of four witnesses in support of his case. Their collective evidence was that Muchiri Migwi, the father of the parties, originally owned **Land Parcel No. Mutira/Kaguyu/415**, and that he held the same in trust for the benefit of his two houses, that of Mary Muthoni who had five children, and Joyce Wainoi who had four children.

The witnesses testified that upon the subdivision of the original parcel, **LR Mutira/Kaguyu/1925** was registered in the name of Geoffrey Migwi Muchemi, the original plaintiff, to hold in trust for the children of the two houses. PW1, the respondent, maintained that the appellants had no right to lodge a caution over the property since the land was to be shared equally among the eight children of the deceased. He explained that his late father was a trustee and that he intended to have the land subdivided into eight equal portions, one for each of the deceased's children. However, the appellants had refused to cooperate and instead placed a caution on the title. PW2 corroborated PW1's account, stating that the

appellants opposed the plan to subdivide the property into eight portions, and instead insisted that it should be divided into three, which prompted the lodging of the caution. PW3 testified that they were summoned by the appellants and informed that the land would not be subdivided, and when they later attempted to construct houses on the land, they were chased away. He noted, however, that both appellants had already developed portions of the suit land. PW4, a nephew of the original plaintiff, similarly testified that there was no justification for placing a caution, as the appellants' rights to occupy and utilize portions of the land had never been denied.

- d. The appellants also testified in their defence, maintaining inter alia that the suit property should be divided into three portions. DW1, Anthony Gikunji, testified that the land should be shared among himself, Geoffrey, and Mwangi. He asserted that their father had four surviving children as the others had passed away. He confirmed that the family initially had nine children, and that apart from one, Ngima Muchiri, the rest had their own children. He added that his father had shown him where to construct his home after marriage, and that both he and his brother, Mwangi Muchemi, had built houses on the property. He explained that he had lodged the caution because the family could not agree on how to subdivide the land. DW2, the 2nd appellant, similarly

testified that the deceased had eight surviving children, all of whom had their own families. He confirmed that he, Anthony, and Geoffrey had all built homes on the suit land, where they had lived since birth. He maintained, however, that the property should be divided into four portions, representing the four children of the late Muchiri Migwi who were alive, as they were the ones actively utilizing the land. He stated that the caution was lodged after their late brother left for the United States of America before the issue of subdivision could be resolved.

- e. Upon considering the parties pleadings and evidence presented, the learned trial magistrate found that the suit property, **LR Mutira/Kaguyu/1925**, was family land registered in the name of Geoffrey Migwi Muchemi, deceased, who held it in trust for his siblings, being the children of the late Muchiri Migwi. The court further found that the defendants' act of placing a caution on the land was unjustified. The trial court declared that the deceased plaintiff held the suit land in trust for the eight children of the late Muchiri Migwi. The court then proceeded to direct that the Respondent, who had been substituted as the plaintiff, would act as trustee for purposes of effecting subdivision and registration of the land

among the beneficiaries. In that regard, the court stated:

*“The court had directed that the Executive Officer sign the requisite documents to effect registration. The defendants wish to disinherit some of the children of the deceased, which is contrary to the provisions of **Article 27 of the Constitution**. The court therefore directs that the plaintiff, as the trustee, do subdivide the suit land into eight equal portions in accordance with the number of children of the deceased, noting that one child from the first wife died without having children, and in respect of the portion where the children are deceased, as is the case with the first house, the legal representatives shall be registered in trust for themselves and their siblings. The subdivision shall be done in accordance with the law.”*

It was thus the finding of the trial court that the respondent, as the substituted plaintiff, would hold the land as trustee for the benefit of all the children of the late Muchiri Migwi and oversee the subdivision and registration in their respective names.

- f. This being a first appeal, the duty of this Court is to re-evaluate the evidence afresh and draw its own conclusions, while bearing in mind that it did not see

or hear the witnesses. This principle was stated in **Selle & Another versus Associated Motor Boat Co. Ltd & Others [1968] EA 123**, where the **Court of Appeal** held:

***“This Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court is by way of retrial... this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”***

g. From the pleadings and submissions of both parties, it is not in dispute that the trial court, sitting as an Environment and Land Court of first instance, was properly seized of jurisdiction to determine the question of whether the deceased, Geoffrey Migwi Muchemi, held **LR Mutira/Kaguyu/1925**, in trust for his siblings. The appellants themselves, both in their defence and counterclaim, invited the trial court to pronounce itself on the same question of trust, and to make a declaration that the suit property be shared amongst the three brothers. Indeed, **Section 13 of the Environment and Land Court Act, 2011** confers upon this court, and by extension the

subordinate ELC, jurisdiction to determine all disputes relating to land and the environment, including those founded on trust. **Section 13(2)** of the said **Act** provides that:

***“In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes -***

***(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals, and other natural resources; and***

***(b) relating to land administration and management;***

***(c) relating to public, private, and community land and contracts, choses in action, or other instruments granting any enforceable interests in land; and***

***(d) any other dispute relating to environment and land.”***

h. Accordingly, where a party asserts that a registered proprietor holds land in trust for others, that is a question of title and beneficial ownership, and it falls

squarely within the jurisdiction of the ELC, and not the succession/probate court.

This position has been reaffirmed in a long line of authorities, including the case of **Isack M'Inanga Kiebia versus Isaaya Theuri M'Lintari & Another [2018] eKLR**, where the Supreme Court held that customary trusts are proprietary interests in land that are enforceable through the Environment and Land Court. Therefore, I have no difficulty in affirming that the learned trial magistrate acted within her jurisdiction when she entertained the question whether the late Geoffrey Migwi Muchemi held **LR Mutira/Kaguyu/1925** in trust for his siblings, and when she made a finding that such a trust existed.

- i. However, what falls for serious scrutiny, and indeed what has precipitated this appeal, is the extent to which the trial court could go after making that declaration. Specifically, whether the trial court could, in the same breath after making a finding on the existence of a trust over a land in the name of a deceased person, proceed to direct the respondent to subdivide and distribute the trust land into eight equal portions, among the children of the deceased. That question necessarily implicates the jurisdictional boundary between the Environment and Land Court on one hand, and the succession/probate court on

the other, and also the legal effect of the respondent holding *letters of administration ad litem*, rather than a full grant. These are questions that borders at the intersection between Environment and Land Court and succession/probate jurisdiction, which I will address in the next issue.

- j. Having found that the trial court had jurisdiction to determine the existence of a trust over **LR Mutira/Kaguyu/1925**, the next question is whether the court, upon declaring that the deceased Geoffrey Migwi Muchemi held the land in trust for his siblings, was entitled to proceed further and direct the subdivision of the land among the eight beneficiaries.

The appellants' central complaint is that, although the trial court correctly found that a trust existed, it went beyond its mandate/jurisdiction as an Environment and Land Court, by issuing orders that effectively amounted to the distribution of a deceased's estate, a power reserved for the probate court under the **Law of Succession Act Chapter 160 of Laws of Kenya**.

According to the appellants, once the trial court found that the land was held in trust, it ought to have referred the matter to the succession/probate court for administration and distribution of the estate of

Geoffrey Migwi Muchemi, who had passed on during the pendency of the suit.

- k. Counsel for the appellants emphasized that the respondent, who substituted the late Geoffrey Migwi, held only letters of administration *ad litem* and, therefore, lacked the capacity to administer or distribute the estate.

They relied on ***In Re Estate of Helena Wangechi Njoroge (Deceased) [2015] eKLR. Section 79 of the Law of Succession*** Act provides that:

***“The property of a deceased person shall vest in the personal representative of the deceased.”***

**Section 82** thereof, further provides that personal representatives shall, subject to any limitation imposed by their grant, have the power to administer and distribute the estate, including the power to sell, lease, or transfer property. However, the powers under this section are limited in the case of a grant *ad litem*, which is issued solely *“for the purpose of representing the deceased in a pending suit.”*

- l. Section 54 of the Law of Succession Act*** expressly recognizes that:

***“Limited grants shall be made in any case where it appears necessary for the protection or preservation of the estate of the deceased pending a grant of representation.”***

A holder of such a limited grant cannot therefore, administer or distribute the estate. The subdivision orders issued by the trial court would necessarily require acts of administration and transfer of title, which are powers reserved for a personal representative with a full grant of letters of administration.

- m. The respondent, through his counsel, defended the trial court’s approach by submitting that the magistrate did not usurp the powers of the probate court, but only directed the respondent, as the legal representative, to oversee subdivision in accordance with the declaration of trust. He relied on ***In Re Estate of Mbai Wainaina (Deceased) (Succession Cause 864 of 1996) [2015] KEHC 6978 (KLR)***, where the court held that the probate court has no jurisdiction to determine questions of ownership or trust in land, and that those must first be resolved by the Environment and Land Court. Counsel argued that the subdivision directed by the

trial court was merely consequential to the finding of trust and was meant to guide future succession proceedings.

n. However, this court takes the view that the impugned orders by the learned trial magistrate went beyond a mere declaration of trust. The learned magistrate directed that the *“plaintiff as trustee do subdivide the suit land into eight equal portions in accordance with the number of children of the deceased,”* and further that *“the Executive Officer of the court do sign the requisite documents to effect registration.”* These directions, in their substance and effect, amounted to a distribution of the suit property to beneficiaries, which is a preserve of the probate court under **Part V of the Law of Succession Act.**

o. The jurisdiction of the Environment and Land Court, and by extension the magistrate’s court exercising such jurisdiction, ends at the declaration of proprietary interests in the land declared to be held in trust, that is, determining who owns or is entitled to what interest in the land. The process of administering, apportioning, and vesting those interests among the beneficiaries falls within the probate/succession jurisdiction of the High Court or

the magistrates' courts designated for probate matters.

Accordingly, once the trial court established that Geoffrey Migwi held LR Mutira/Kaguyu/1925 in trust for his siblings, it should have stopped at that point and directed the parties to pursue administration and distribution of the trust property through the relevant succession/probate proceedings.

- p. The subdivision, transfer, and registration of beneficiaries can only be effected within the framework of a grant of representation duly confirmed under **Section 71 of the Law of Succession Act**. In the circumstances, this court finds that while the trial court was correct in declaring the existence of a family trust, it overstepped its jurisdiction by directing subdivision and registration of shares, which aspects fall within the purview of the succession/probate court in accordance with the **Law of Succession Act and Rule 41(3) of the Probate and Administration Rules**. The trial court's declaration of trust is thus sound in law and evidence, but its consequential orders cannot stand. Justice will therefore best be served by upholding the declaration of trust, while directing that the question of administration and

distribution of the said land held in trust be done through the appropriate succession/probate court.

10. Flowing from the above determinations, the court finds and orders as follows:

**a. That the appeal is allowed.**

**b. That the learned trial magistrate's order directing the respondent to distribute the trust/suit property in the manner stated is hereby set aside and parties directed to move to the appropriate succession/probate court for the administration and distribution of the suit/trust property.**

**c. The order removing the caution registered against LR Mutira/Kaguyu/1925 is also set aside.**

**d. That for avoidance of doubts, the learned trial magistrate declaration of the existence of a customary trust over land parcel LR Mutira/Kaguyu/1925 is hereby affirmed.**

**e. That each party is to bear their own costs in this appeal and the trial court.**

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON  
THIS 11<sup>TH</sup> DAY OF MARCH 2026.**

**S. M. Kibunja  
ELC**

**JUDGE**

In the presence of:

Appellants - M/s Wandia

Respondent - M/s Ndwiga for Magee

Kinyua - Court Assistant.

**S. M. Kibunja  
ELC**

**JUDGE**