



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA MALINDI

ELC APPEAL NO. E016 OF 2024

JAPHET

MURAMBA

NYAMBU.....APPELLANT

=VERSUS=

**PHILEMON MWAGONA KONDE (Suing as an
Administrator of the Estate of KONDE MALINGI CHAI)**

.....RESPONDENT

*(This is an appeal from the judgment of Hon. Ivy D. Wasike, PM,
delivered on April 9, 2024, in Kilifi MC ELC No. E128 of 2022).*

JUDGMENT

1. Before the trial court, the respondent filed his plaint dated October 21, 2022, seeking an eviction order against the appellant for plot number Kilifi/Vyambani/122. The respondent also requested restraining orders against the appellant.

2. The appellant properly entered an appearance upon being served with the summons and filed a statement of defense and counterclaim(sic) dated November 22, 2022.
3. The case proceeded to a full trial, and judgment was entered in favor of the respondent, as stated in the court's decision issued on April 9, 2024.
4. In a Memorandum of Appeal dated May 7, 2024, the appellant raised 14 grounds of appeal. The main point of their appeal is that the learned trial magistrate erred in law in her judgment by declaring that the suit property was not held under a customary trust.
5. The appeal was canvassed through written submissions. I confirmed receipt of submissions from the counsels representing the parties involved. I value the authorities and laws cited, as they significantly helped the court in making its decision on this appeal.
6. Based on the appeal record and submissions from both parties' counsels, the issues for the court's decision are whether the trial court improperly failed to recognize that the appellant established a customary trust, whether the orders granted to the respondents were made lacking

sufficient evidence, and who should be responsible for the costs of this appeal.

7. The role of the first appellate court involves re-evaluating the evidence on record and drawing its own conclusions. However, it must always remember that it did not see or hear the witnesses firsthand. (**Selle v Associated Motor Boat Co. Ltd [1968] EA 123**).
8. The respondent's case in the trial court was that he is the administrator of his late father, Konde Malingi Chai's, estate, who was the registered owner of plot number Kilifi/Vyambani/122. He testified that the appellant had invaded the land in 2020 and started cultivating it. The respondent presented a title deed issued on November 3, 2005, in the names of Konde Malingi Chai. The respondent relied on a witness statement dated September 14, 2022, in which the witness testified about a dispute meeting at the Assistant County Commissioner's office in Jaribuni, which he won, and another case at the Chief's office.
9. The defendant filed his Defense on December 2, 2022. The Defense argued that two families nominated the defendant/appellant as the caretaker of the land. The land

originally belonged to the family of Said Nyambu, and during adjudication in 1993, Said Nyambu, being abroad, asked Konde Malingi Chai to oversee the land's registration. The appellant stated that the dispute had been brought before other forums, and the respondent was asked to surrender the title deed. The defense further indicated that the appellant had occupied the land before the title deed was issued in 2005, and that the plaintiff's father was appointed by the clan as administrator, with the plaintiff's father appointing the defendant as custodian. In his list of documents dated April 17, 2023, the appellant included proceedings before the Marere sub-location assistant chief on October 18, 2021, and proceedings before the assistant county commissioner on January 26, 2022.

10. The appellant testified that the respondent is his cousin, and the late Konde Malingi Chai was his uncle. He stated that the land belongs to Iddi Nyambu, who is also his cousin. Iddi Nyambu is the son of Said Nyambu.

11. Joseph Chapuo Chiiwayi DW2 testified that the land belonged to Said Nyambu, who was also his cousin. During the adjudication process, Said Nyambu had moved to

Takaungu and entrusted the land to the plaintiff's father, Konde Chai, for safekeeping.

12. The appellant argues that the trial magistrate provided a superficial review of the evidence and concluded that the land belonged to the plaintiff's father. The appellant submits that the trial court erred in law and fact by failing to evaluate the defense evidence. The trial court was convinced that since the respondent's late father was the registered owner, the land belonged to him. However, registering someone as the owner is not an end in itself. The court must consider the circumstances that led to that registration. A brother of the respondent's father, Mkoka Malingi Chai, testified that his late brother, Konde Malingi Chai, did not own the land. The land belonged to Said Nyambu, who had moved to Takaungu. The trial court expected that the family of Said Nyambu or Said Iddi, including his wife, would have been buried on the suit land to establish a trust. There is no such requirement in law.

13. Furthermore, the trial court did not interrogate the appellant's defense. The appellant stated in paragraph 10 of the defense that he had been in occupation of the land even

before the title deed was issued. The title deed was issued in 2005. The trial court concluded that the appellant started cultivating the land in 2020. Possession is one of the elements of a customary trust. The appellant was in possession. The respondent's mother lived with her late husband, Konde Malingi Chai, who told her that the disputed land was not his.

14. The appellant argues that Defence Exhibit 1 is a letter dated February 28, 1994, addressed to Konde Malingi, the plaintiff's father, by Said Iddi and others. The letter reminds Konde Malingi not to forget the grandchildren of Said Iddi Nyambu, who reside in Takangu, regarding the inheritance of Said Nyambu's land.

15. The defendant also submitted two sets of proceedings. The first was held on October 18, 2021, before the respondent filed the case in court. According to the proceedings before the assistant chief, the appellant informed the elders that the land belonged to Said Nyambu. Evidence shows that Said Nyambu Barua, Konde Malingi Chai, and Mkoka Malingi Chai were brothers. Said Nyambu Barua and Konde Malingi Chai are deceased, while Mkoka

Malingi Chai is still alive and testified before the assistant chief. The land was registered in the name of Konde Malingi, a younger brother of Said Nyambu, who had moved to Takaungu.

16. Mkoka Malingi Chai, the respondent's uncle, testified that the land belonged to Said Nyambu, and Konde Malingi was registered only to help the family. The respondent's mother, Kashka Konde, also testified. She is married to Konde Malingi Chai, the registered owner of the land. She told the elders that when her husband was alive, he informed her that the land was not his but belonged to Said Nyambu Barua. At no time did the plaintiff's mother go to or cultivate the disputed land. The plaintiff claimed before the elders that the land belonged to his father because the title deed was issued in his name. The second set of proceedings (DEX3) involves several attendees. The plaintiff stated that plot number 122 Kilifi/Vyambani/122 was registered in his father's name during the 1993 adjudication.

17. The appellant argues that once they presented evidence showing that the suit property was family land belonging to Said Nyambu, the respondent bore the burden of disproving

this claim. The respondent's only defense is that the land was registered in his father's name, but this alone is not enough. His mother was aware that the land did not belong to her husband, Konde Malingi Chai. Likewise, his uncle, Mkoka Malingi Chai, knew that the land belonged to Said Nyambu.

18. The appellant argues that the trial court's decision is based solely on the issue of first registration. A Customary Trust is an overriding interest in land. Under Section 28 of the now-repealed Registered Land Act, a Customary Trust was recognized. A registered title can be affected by a Customary Trust. The late Konde Malingi Chai held the land in trust for Said Nyambu's family.

19. The respondent argues and submits that it should be noted that the appellant has failed to produce any documentation or proof that the suit property was family land. The question for this appellate court is whether it is correct to assume that a parcel of land is family land solely because another family member owns it. The simple answer is no; the appellant is a cousin of the respondent, and the case would be different if the parties were siblings, which

they are not. The respondent and his family have always occupied the suit property, and in 2020, the appellant invaded and forcibly cultivated it, necessitating the filing of the suit in the trial court.

20. The respondent argues that during the trial, he testified that the suit property belonged to the deceased and that he did not hold the title in trust for the family. A key point noted by the trial court was that the Assistant Commissioner's office had already decided this matter, and the plaintiff even submitted a summons from the ACC as PEX 4. The ACC determined that the land was owned by the deceased and was not family land. The appellants sought to invade and permanently squat on the land forcibly. The respondent also presented the certificate of title issued in the deceased's name on November 3, 2005. During the trial, the appellant did not raise any fraud issues, so the title was accepted as valid. The deceased, Konde Malingi Chai, lived on and cultivated the suit property, registered it in his name, and a title was issued; by law, the deceased is the indefeasible proprietor of the suit property. See Sections 24, 25(1), and 26 of the Land Registration Act.

21. Citing several judicial precedents, the respondent believes that the customary trust has not been proven. I have evaluated the evidence presented before the trial magistrate, along with the parties' materials and submissions.

22. In the case of **Kiebia v M'lintari & another [2018] KESC 22 (KLR)**, the Supreme Court of Kenya outlined five key elements that help qualify a claim for a customary trust. While the court noted that the categories of customary trusts are not closed and each case must be decided on its own merits, these five elements serve as a standard for establishing such a trust:

a) Pre-registration Status of the Land: The land in question must have been family, clan, or group land before its registration.

b) Claimant's Membership: The person making the claim (the claimant) must belong to that specific family, clan, or group.

c) Nature of the Relationship: The claimant's relationship to the family, clan, or group must not be so remote or tenuous that their claim appears "idle or adventurous".

d) Entitlement to Registration: It must be shown that the claimant would have been entitled to be registered as an owner or a beneficiary of the land, if not for certain "intervening circumstances".

e) Target of the Claim: The claim must be directed against a registered proprietor who is also a member of that same family, clan, or group.

23. The Supreme Court clarified that a claimant does not need to physically possess or occupy the land to establish a customary trust. If land is held for the benefit of other family members, a customary trust is presumed regardless of possession. The legal foundation is that Customary trusts are recognized under the proviso to Section 28 of the (now repealed) Registered Land Act and are currently regarded as overriding interests under the Land Registration Act of 2012. The court emphasizes that the key factors are the nature of the landholding and the parties' intent.

24. The **Kiebia Case (supra)** resolved a long-standing "conundrum" in Kenyan land law. Its importance lies in several key areas: It explicitly overturned the "Bennett doctrine" from the 1970s (**Obiero v Opiyo [1972] EA 227** and **Esiroyo v Esiroyo [1973] EA 388**), which had

previously held that land registration extinguished all customary rights. It clarified the uncertainty about whether a claimant must be in physical possession of land to prove a trust, ruling that actual physical possession is not a necessary element. It confirmed that customary trusts are recognized as overriding interests under Section 28 of the Land Registration Act of 2012.

25. Revisiting this appeal with the principles of customary trust in mind, the trial magistrate, after assessing the evidence from both sides, reached the following conclusion regarding customary trust:

“I have had recourse to go back to the evidence as produced. Only the proceedings in Dex2 make reference to the deceased having been registered "to assist his grandfather's family". Dex 1 does not make reference to the land that was being inherited and whether it is the suit land. Many questions remain unanswered. Who were the brothers to the deceased Konde Malingi Chai? Was Saidi Idi the only other family member in the Nyambu family? Save for the family of the deceased Khonde Malingi and now the defendant, where are all the other family members living?”

Where is Saidi Idi, his wife if any and other members of his family buried? Where was the Defendant living prior to his being made a clan representative and starting to till on the suit land in 2020 as according to Dex1 indeed the issues of ownership started thereabout in 2020-2021?

It is not in dispute that the Plaintiff is a cousin to the Defendant. The Plaintiff has produced a Title Deed issued way back in 2005 to the deceased. The letter Dex I was written way back in 1994. Did the authors of this letter follow up on their "inheritance" and was their inheritance the suit property? No evidence has been given on this.

I do find that on a balance of probabilities and guided by the case of Isack Kieba M'Inanga -vs- Isaaya Theuri M'Lintari & Another [2018]JeKLR and the case of James Karano Christopher & another v Christopher Njagi Karano & 4 others [2018] eKLR, the Defendant did not produce any evidence to show that his family was in actual possession of the land as at the time of adjudication and subsequent issuance of the title, whether constructive or actual. There was also no evidence brought out in court to show that the deceased was actually registered to hold the land in

trust for the family or the clan. It was not clear whether there are other members of the clan or Nyambu Family and if they also have been aggrieved or it was only Mr. Japhet Muramba Nyambu. It was also not clear which families Ms. Nyambu claimed to be representing as the clan head. The Defendant has failed to prove the elements of trust whether customary, actual and or constructive in any aspect.

The Plaintiff in his evidence stated that the Defendant has from 2020 started tilling the land to the detriment of the Estate of the deceased Konde Malingi Chai who is the registered owner of the suit property. I am satisfied that the deceased Konde Malingi Chai was the absolute registered owner of the suit property L.R No. Kilifi/Vyambani 122 and his estate is entitled to the said suit property. Any tilling or action by the Defendant on the suit property is intermeddling with a deceased property.”

26. Reevaluating the record and applying the test outlined in the **Kiebia Case** (supra), the appellant failed to meet the necessary requirements for establishing a customary trust in his favor. There was no evidence that, before the land's registration, it belonged to a family, clan, or group. Additionally, there was no proof that he was part of the

alleged clan or any specific family, clan, or group. His connection to the family, clan, or group was not shown or proven, making it impossible to determine whether it was distant, weak, or "idle or adventurous." It was also not demonstrated that he had the right to be registered as an owner or beneficiary, except for certain "intervening circumstances." Moreover, whether his claim was against a registered (the respondent) owner who is also part of the same family, clan, or group as him.

27. Based on the evidence on record, there is a clear break in the lineage between the parties, and the intention of a trust of any kind, as held by the trial magistrate, cannot be deciphered.

28. Consequently, I find no merit in the appeal, which is hereby dismissed with costs.

Dated, signed, and delivered electronically in Nyeri on this 11th day of March, 2026.

E. K. MAKORI

JUDGE

In the presence of:

Dr. Chitembwe for the Appellant

Ms. Amina for the Respondent

Kendi: Court Assistant