

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELC APPEAL NO. E007 OF 2020

ROBERT MURIITHI NYAGA.....1ST

APPELLANT

MARGARET WANJA NYAGA.....2ND

APPELLANT

DOROTHY KARIMI NJURA.....3RD

APPELLANT

JANE NJERI NYAGA.....4TH

APPELLANT

NANCY KARIMI NYAGA.....5TH

APPELLANT

SARAH RUGURU NYAGA.....6TH

APPELLANT

LYDIA MUTHONI NYAGA.....7TH

APPELLANT

CHRISTOPHER NDWIGA NYAGA.....8TH

APPELLANT

VERSUS

CATHERINE MUTHONI NJERU.....

RESPONDENT

*(Being an appeal from the Judgment of Hon. T.K
Kwambai SRM delivered on 18th November, 2020 in*

Embu ELC Case NO. 28 of 2019)

JUDGMENT

1. The Appellants herein were the Plaintiffs before the trial court wherein they had sued the Respondent vide a Plaint dated 26/04/2019. In the said Plaint, the Appellants had sought, inter alia, a declaration that land parcel No. Kagaari/Kanja/8619 is family and or clan land and that the Respondent is registered as the owner in customary trust for the Appellants. They sought an order relinquishing the trust, cancellation of the Respondents name from the register and the re-registration of the said land in the joint names of the Appellants.
2. It was the Appellant's contention that land parcel 8619 is a subdivision of the larger land parcel Kagaari/Kanja/512 which was always reserved for the Appellants family/clan use. They averred that the Respondent is the administrator of the estate of one Sammy Njeru Nyaga and the current registered owner of land parcel 8619, the suit land, by way of transmission. They averred that the suit land was previously registered in the joint names of one Njagi M' Mbario aka Njaga M'Mbario, who is their father, and the late Sammy Njeru Nyaga, who is their brother in trust for the family members and that they all belong to the same clan and or family.
3. They contended that they had all mutually agreed that the registration of the two parties as proprietors of the suit land was to be in trust for the family, however, upon the death of

Sammy Njeru Nyaga, the Respondent filed a succession cause and wholly inherited the suit land in trust for herself and her two children which is illegal. They averred that they have been in possession and actual occupation of the suit land prior and subsequent to the subdivision and registration of the land.

4. The Respondent in her statement of defence dated 07/05/2019 denied that the suit land was ever jointly owned since its demarcation, adjudication and registration and averred that the land was registered to her husband only. She maintained that the movement of the land from the first registered owner to Njagi M' Mbario then to the late Sammy Njeru Nyaga and now to her is shown in the green card of the land.
5. When the former suit came up for directions, the parties agreed to proceed with the hearing by way of viva voce evidence.
6. PW1 Lydia Muthoni Nyaga adopted her witness statement dated 26/04/2019 as her evidence in chief. In her statement, she stated that the 1st, 2nd, 4th, 5th, 6th and 8th Appellants were her brothers and sisters and that the 3rd Appellant was the wife to her brother. She stated that the Respondent was her sister in law married to their late brother Sammy Njeru Nyaga and the administrator to his estate. She averred that land parcel 8619 was a subdivision of Land Parcel Kagaari/Kanja/512 which was registered in the name of their grandfather Timotheo Njeru Kangicu, who had inherited the land from the Rwamba clan. She averred that all the Appellants are members of the

Rwamba clan and that the Respondent did not belong to the said clan.

7. She averred that land parcel 512 was subdivided in the year 2012 and that during registration of the resultant parcels and in particular land parcel 8619, their late father, Mzee Geoffrey Nyaga M'Mbario summoned the entire family including their uncle Mzee Njagi M'Mbario and informed them that the suit land was to remain as the family land for purposes of farming, burial, family meetings and other traditional rites of the Rwamba clan and the M'Mbario family. That therefore, their late father instructed that the suit land was to be registered and held in trust for them by their uncle Mzee Njagi M'Mbario and their elder brother Sammy Nyaga Njeru. That this was done on 12/4/2012 and a joint title issued in the names of these two individuals.
8. She stated that in the year 2013, their brother Sammy Njeru died and that during his lifetime, all the Appellants were free to occupy, use, work and/or possess the land as per the family agreement and at no time did their brother raise an objection. On cross examination, she stated that their uncle later handed over the suit land to the Appellants' late husband. She stated that the other subdivisions of the original parcel of land were given to their late uncle and one Njagi M'mbario who was still alive.
9. PW2 Njagi M'mbario adopted his witness statement dated 15/09/2019 as his evidence in chief. He stated that land parcel

512 was inherited from his father one Timotheo Njeru Kangicu who had inherited the land from the clan known as Rwamba Clan. He explained that the land was therefore held by his father as family and clan land for the benefit of his children. He averred that when the land was subdivided, the children of Timotheo Njeru Kangicu agreed that he would be registered as the owner of land parcel 8619 in trust for the family. He stated that after registration, the whole land continued to belong to the whole family and that all his siblings and their children continued in occupation, possession and use of the land.

10. He stated that specifically, the Appellants mother, the late Rebecca Wandia extensively developed the land and that after her demise, the Appellants continued to use and occupy the land. He stated that on the date of registration of the suit land on 12/04/2012, his name and that of the late Sammy Njeru Nyaga, being the first born of his family, were entered in the register of the suit land as proprietors to hold it in trust for the Appellants and the two wives of the late Sammy Njeru. He averred that they were both registered as proprietors to the land because he was the one to distribute it and that he gave it to the late Sammy Njeru on behalf of his late brother so that he could distribute it to his siblings. He expressed his disbelief that the Respondent had caused herself to inherit the whole land with her children instead of giving the Appellants their rightful share.

11. PW3 Margaret Wanja Nyaga adopted her written statement dated 26/04/2019 as her evidence in chief which supported the evidence of PW1.
12. DW1 Catherine Muthoni Njeru adopted her written statement dated 07/05/2019 as her evidence in chief. She testified that the land in question was the subject of Succession Cause No. 172 of 2015 in which the 3rd Appellant was a party, and that she acquired the land pursuant to the said proceedings. She further stated that the 3rd Appellant was granted thirty days within which to appeal against the decision but did not lodge any appeal. She further stated that the 3rd Appellant never raised the issue of the suit land being trust land in the Succession Cause. She stated that the suit land belonged to her late husband who had an absolute title. She denied that the Succession Cause was done in secret as alleged by the Appellants.
13. She stated on cross examination that the 3rd Appellant was her house help who had sired together with her late husband and that the said 3rd Appellant had been provided for in the distribution of the estate of her late husband. She stated that her late husband was given the suit parcel of land as he was the one who took care of his grandfather's medical bills. She stated that no one was using the said parcel of land and that her husband was not buried on the land.
14. She produced in evidence, a copy of a grant and certificate of confirmed grant, a copy of a marriage certificate, Green

Cards for land parcels 512 and 8619 and a mutation form for the original land parcel 512.

15. Upon analyzing the suit, the trial Court in its judgment found that the suit land was the resultant sub division of land parcel No. 512 which was registered in the name of the parties' grandfather one M'mbario Kangicho. That upon the demise of the said M'mbaro Kangicho, the Respondent filed a succession cause being succession cause No. 134 of 2011, the basis of which land parcel 512 was divided into 3 portions one of which is the subject parcel of land.
16. The trial Court further found that what would have demonstrated that there existed such a trust as alleged ought to have been through a certificate of confirmed grant issued in Runyenjes Succession Cause No. 134 of 2011. The Court expressed that no such document was produced to prove that indeed PW2 or the Respondents husband was holding the land in trust for the Appellants. The Court found that the Appellants failed to prove their case on a balance of probabilities and dismissed their suit. The Court further directed that a restriction placed on the suit land be lifted.
17. The Appellants' were aggrieved with the impugned decision and preferred the present Appeal on the following grounds;
 1. That the learned Trial Magistrate erred in law and fact when he failed to consider the following evidence which was on record:
 - a. That Land Parcel Number Kagaari/Kanja/512, was family land which was originally owned by one M'Mbario Kangicho who

was the father of the Appellants. The said Appellants had attached a Green Card which clearly established this fact.

b. That the Appellants had also attached Green Cards for Land Parcels No. Kagaari/Kanja 8617, registered in the name of Njagi M'Mbario (son of M'Mbario Kangicho), Kagaari/Kanja/8619, registered in the name of Njagi M'Mbario (which was transferred to Sammy Njeru Nyaga, a son to the father of the Appellants since their father was Deceased) and later transferred to the Respondent Catherine Muthoni Njeru as the trustee for the family.

2. That the Learned Trial Magistrate erred in law and fact when he failed to consider the evidence by way of Witness Statements of Njagi M'Mbario, Lydia Muthoni Nyaga and Margaret Wanja Nyaga which clearly established that Land Parcel Number Kagaari/Kanja/8619, was transferred to the Respondent as a Trustee of the family of the Appellants.

18. The Appellants sought to have the Judgment of the trial Court set aside and the suit land be re-transferred to them.

19. When the appeal came up for directions, the parties agreed to canvass the appeal by way of written submissions. The 7th Appellant filed submissions dated 01/12/2025 on behalf of the other Appellants. They submitted that a trust is an overriding interest registrable against the title of land in line with section 28(b) of the Land Registration Act. They averred that a

customary trust was well discussed by the Supreme Court in the case of Isack M'inanga Kiebia versus Isaaya Theuri M'lintari and Another (2018) Eklr where it was held that each case has to be determined on its own merits and quality of evidence and that the Court proceeded to set out the elements that would qualify a claimant as a trustee.

20. They submitted that their claim in the suit land is based on customary trust as original land parcel 512 which was subdivided to give rise to the suit land originated from Rwamba Clan and after the demise of M'mbario Kangichu, the land and its resultant subdivisions were given to the family members. They added that the late M'mbario Kangichu and his late wife Tabitha Kairo are buried on the suit land and that they are all their descendants and have been occupying and utilizing the suit land since it was registered in the name of M'mbario Kangichu.
21. They averred that their late brother was registered as proprietor of the suit land by virtue of being the eldest son to hold it in trust for the rest of the family. They contended that section 80 of the Land Registration Act empowers the Court to order for the rectification of the land register and urged that the Court finds that the registration of the suit land in the name of the Respondent was done fraudulently.
22. The Respondent on her part filed submissions dated 12/01/2026. She submitted that there was no evidence produced to show that the original land parcel 512 was trust

land before it was subdivided into land parcels 8617, 8618 and 8619. She expressed that it was clear when the original owner of land parcel 512 subdivided the land, he transferred the three portions to his sons voluntarily and no one complained. She pointed out that it was curious that the Appellants were only after her land parcel 8619 and not the rest of the subdivisions and expressed that it was clear that after her husband died, they simply wanted to chase her away and inherit their brother's property.

23. She maintained that the suit land was matrimonial land where they lived until the demise of her husband. She averred that the Appellants did not bring any elder or anyone to prove that the suit land was clan, ancestral or group land and therefore the elements of customary trust had not been proved as was required in the case of Peter Nyaga Kairu versus Esther Wanjiku Njau and Others (2017) Eklr. She urged that some of the Appellants are married men and women who have their properties and are greedily after a small piece of land which was left by the deceased to his family. She urged that the appeal be dismissed with costs.

24. Having considered the record of appeal and the respective submissions by the parties, the sole issue for determination is whether the Appellants proved, on a balance of probabilities, that land parcel No. Kagaari/Kanja/8619 is held by the Respondent under a customary trust.

25. The Supreme Court in *Kiebia v M'lintari & another* (Petition No. 10 of 2015) [2018] KESC 22 (KLR) set out the principles to be considered in a claim founded on customary trust, namely that:

- i. The land in question was before registration, family, clan or group land.
- ii. The claimant belongs to such family, clan, or group
- iii. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
- iv. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
- v. The claim is directed against the registered proprietor who is a member of the family, clan or group.

26. The Appellants' case was that the suit land originated from Land Parcel No. Kagaari/Kanja/512, which belonged to the Rwamba clan and was given to their grandfather, Timotheo Njeru Kangicu. PW2 stated that the land was inherited by the children of the late Timotheo Njeru Kangicu, subdivided, and that he was registered as proprietor of the suit land together with the late Sammy Njeru Nyaga, who held it in trust for the family. The Respondent, however, denied that the land was held in trust by her late husband and claimed it belonged to him.

27. The Green Card for land parcel No. Kagaari/Kanja/512 shows that entry No. 1 was made on 03/02/1961, registering M'Mbario Kangicho as proprietor, and a title deed was issued on 25/10/1977. On 09/11/2011, the land was registered in favor of Njagi M'Mbario pursuant to Succession Cause No. 134 of 2011 at Runyenjes. The title was subsequently closed on 12/04/2012 upon subdivision, giving rise to land parcels 8617, 8618, and 8619. The trial court misapprehended the evidence when it found that land parcel 512 was subdivided pursuant to a succession cause filed by the Respondent.
28. The Green Card for land parcel No. Kagaari/Kanja/8619 shows that it was first registered on 12/04/2012 in the names of Njagi M'Mbario (PW2) and the late Sammy Njeru Nyaga. The Respondent later acquired the land through Embu Chief Magistrate's Succession Cause No. 124 of 2017, formerly Embu High Court Succession Cause No. 172 of 2015, by way of transmission.
29. The trial court opined that, had the original land parcel 512 been held in trust by PW2, a confirmation of grant in the succession cause would have been produced. This Court, however, differs. The evidence of PW1 and PW3, corroborated by PW2, demonstrates that the land was indeed family land held in trust. PW2, who transferred the suit land to the late Sammy Njeru Nyaga, provided consistent testimony regarding the origin, subdivision, and movement of the land. His account remained unchallenged, and no evidence was presented by

the Respondent to undermine his credibility. On the other hand, the Respondent's assertion that her late husband received the land because he cared for his grandfather is unsupported by any documentary or independent evidence.

30. Applying the principles from *Kiebia v M'lintari supra*, the Court finds that the Appellants demonstrated that land parcel No. Kagaari/Kanja/512, from which the suit land was derived, was family and clan land originating from the Rwamba clan. They further showed that they are members of the family and clan, and that the land was intended for their use and benefit. The Court further finds that the registration of PW2 and the late Sammy Njeru Nyaga was intended to hold the land in trust for the Appellants. The relationship of the Appellants to the family was neither disputed nor tenuous.

31. The Appellants further established that, but for the decision to register the land in the names of PW2 and the late Sammy Njeru Nyaga, they would have been entitled to be beneficiaries of the land. Their claim is directed against the Respondent, who derives her title from the late Sammy Njeru Nyaga, a member of the same family.

32. In the circumstances, and upon evaluation of the evidence on record, this Court is satisfied that the Appellants proved, on a balance of probabilities, the existence of a customary trust over land parcel No. Kagaari/Kanja/8619.

33. The appeal therefore succeeds and the Judgement of the trial Court dated 18/11/2020 is hereby set aside.

34. Each party shall bear their own costs of the appeal.

DATED, SIGNED AND DELIVERED AT EMBU THIS 05th day of
March, 2026.

HON. E.C CHERONO
ELC JUDGE

In the presence of;

1. 1st Appellant-present
- 2 2nd Appellant-absent
- 3 3rd Appellant-absent
- 4 4th Appellant-present
- 5 5th Appellant-absent
- 6 6th Appellant-absent
- 7 7th Appellant-present
- 8 8th Appellant-present
9. Respondent-present
10. Mohammed Koja-C/A