

**IN THE COURT OF
APPEAL AT NYERI**

(CORAM: M'INOTI, KANTAI & ALI-ARONI,

JJ.A.) CIVIL APPEAL NO. E053 OF 2024

BETWEEN

**JOHN KINYUA KABUII1ST APPELLANT
FRANCIS MURIITHI KABUII.....2ND APPELLANT**

AND

PETER MUGERA KABUII.....RESPONDENT

(Being an appeal against the Judgment of the Environment and Land Court at Kerugoya (Cherono, J.) delivered on 12th July, 2019

in

E.L.C. No. 799 of 2013.)

JUDGMENT OF THE COURT

This is a first appeal arising from the judgment by the Environment and Land Court (ELC), Kerugoya, which held that the suit properties known as **Mutira/Kaguya/608** and **Mutira/Kaguya/609** (“the suit lands”) are held by the appellants in trust for themselves and their family members named in the suit. The court also held that the suit lands be subdivided into equal portions in favour of all the said family members. The appellants are dissatisfied with those findings, hence this appeal.

Our mandate in a first appeal as donated by **rule 31** of the **Court of Appeal Rules, 2022** is to re-appraise the evidence, to draw inferences of fact and to retry the case. We shall therefore

set

out the background to the case to satisfy ourselves whether the ELC rightly considered the evidence and came to a proper conclusion in its judgment.

The appellants herein were sued as defendants by their mother, Benina Wairimu Kabui, also known as Penina Wairimu Kabui, in Kerugoya ELC No. 799 of 2013 where she sought a declaration that the suit lands were registered to the appellants to hold in trust for all family members. She also sought an order to compel the appellants to subdivide the suit lands equally in favour of herself and other family members. Her case was that the appellants were registered as proprietors of the suit lands in November 1959 and that the suit lands were clan land. She stated that her husband, the late Kabui Kabiru, left behind 7 dependents entitled to the suit lands. She stated that she occupied part of parcel number 608 while the 1st appellant occupied the balance of the land and that the 2nd appellant was said to be in occupation of parcel number 609.

The appellants defended the suit and took the position that the suit was *res judicata* in light of SRM Kerugoya LDT cases No.6/2006 and No. 29/2000 as well as Baricho Court LDT No. 2/2000 and Embu HC Misc. No. 29/2007. They also stated that their father Kabui Kabiru died before adjudication and demarcation of the suit lands and that some of the 7 dependants listed like the current respondent Peter Mugeru Kabui were not yet born. They denied the averment that the suit lands were held in trust and

stated that the LDT awarded their mother life interest on parcel

609, which they had not interfered with, and that the life interest was confirmed by the High Court in Embu. They stated that a family meeting held on 6th May, 1992 resolved to subdivide LR. Kiine/Kiangai/285 to be given to family members who had no land. They also stated that the court had no jurisdiction to transfer the suit lands as they were first registrations. They accused their mother of greed.

In a judgment delivered on 12th July, 2019, the court held in favour of the appellants' mother. The court stated that the late Peninah had proved the registrations were done in trust for the appellants, for herself and for the appellant's younger siblings. The court held that the division of another property did not relieve the appellants of their trustee duties on the suit lands. Their mother was held to have proved her case to the required standard. The court ordered that the suit lands be equally divided among to all the family members named in the plaint.

The appellants' mother passed away on 3rd May, 2022 and Peter Mugeru Kabui obtained letters of administration *ad litem* to her estate and was substituted into the matter on 25th May, 2023, and is the current respondent.

The appellants, dissatisfied with the findings of the ELC filed this present appeal through a Memorandum of Appeal asking this Court to set aside the judgment of the ELC and substitute it with an order dismissing the suit. They ask the court to declare the appellants as the rightful owners of the suit lands. The

appellants'

grounds of appeal are that the ELC erred in finding that the suit lands were held in trust and yet the claim for customary trust had already been determined by a competent court. The appellants also state that the court ought to have upheld the decision of the Baricho LDT case No.2 of 2002 and should have acknowledged that the family had allocated other parcels of land to other family members. They also state that the court ignored their evidence, maintained a suit which was *res judicata* and erred in compelling the appellants to subdivide the suit lands equally among all family members.

The appellant filed submissions dated 22nd September, 2025 in support of the appeal.

The respondent has filed submissions dated 5th August, 2025. The respondent states that the judgment of the court was well reasoned, that the court appreciated the existence of a customary trust and that the appeal does not raise any question of law to defeat the existence of a customary trust. The court is urged to dismiss the appeal in its entirety.

This appeal was heard on 21st October, 2025 on the Court's virtual platform. Learned counsel **Mr. Ombachi** appeared for the appellants while learned counsel **Mr. Otieno** appeared for **Miss Ndahi** for the respondent. Both counsel opted to fully rely on their written submissions.

We have considered the record of appeal, the submissions by the parties and the relevant law.

The record of appeal reflects that land parcel No. Mutira/Kaguyu/608 was initially registered to Karigu Kabui on 21st November, 1959 and thereafter registered to John Kinyua Kabui on 7th May, 1981. According to the appellants' defence at the trial, these two names refer to one and the same person, namely John Kinyua Kabui. The green card for land parcel number Mutira/Kaguyu/609 shows that it was registered to Muriithi Kabui on 21st November, 1959. According to the defence filed at the ELC, the name Muriithi Kabui refers to the second appellant, Francis Muriithi Kabui. At the time of these registrations, Kabui Kabiru, husband to Peninah Kabui, was already deceased.

We note that in LDT Case No. 32 of 2006, a finding was made regarding only parcel No. 609 where the Tribunal, on 28th February 2007, directed that Peninah Wairimu Kabui have a life interest over the land. This award was adopted as an order of the court on 18th March, 2007 in Kerugoya SRM 6 of 2007. The appellants filed Embu HC Judicial Review ("JR") Application No. 29 of 2007 seeking to quash the Tribunal award. The judicial review was dismissed on 30th November, 2009. In dismissing the judicial review application, the court held that the tribunal rightly gave orders on occupation of land only and not on ownership as the tribunal had no jurisdiction to resolve a trust dispute.

The record also reflects that there was another case at the Baricho LDT No. 43 of 1996. This award was adopted as a judgment of the court on 18th February, 2002 in Baricho District Magistrates

Court LDT case No. 2 of 2002. That decree reflects that Nos. 608 and 609 belong to the 1st and 2nd appellants respectively.

Our first port of call is to consider whether the case at the ELC was *res judicata* in light of the proceedings before the two Land Tribunals and equally in light of the Judicial Review application. We are of the considered view that the High Court in Judicial Review No. 29 of 2007 rightly determined that the tribunal proceedings in case No. 32 of 2006 were lawful and proper and did not warrant interference. That is because the tribunal sat to determine the occupation of parcel No. 609 and did not make any determination as to ownership of either of the suit properties. Additionally, the decision of the JR court was never appealed and remains valid.

With regard to Baricho LDT case No. 2 of 2002, the tribunal went ahead to determine the ownership of the properties, by confirming them as belonging to the appellants. This decision of the tribunal was ultra-vires and void ab initio and the lower court acted in error when it adopted the award. We say so while relying on the decision by this Court in **Wachira Wambugu & 2 Others vs. District Land Dispute Tribunal Othaya & 3 Others** [2013] KECA 46 (KLR), where the Court held:

“Section 3 (1) of the Land Disputes Tribunal Act (now repealed) limits the tribunal’s jurisdiction to:

“(a) The division of or the determination of boundaries to land including land held in common;

(b) A claim to occupy or work land; or

(c) Trespass to land.”

Equally, such a Tribunal did not have jurisdiction to determine claims based on alleged trust or determine whether land ownership had been procured fraudulently. Such claims could only have been referred to the High Court.”

We therefore find that the suit at the ELC was the proper forum for the determination of the question on trust and ownership of the property; and the matter was not *res judicata*.

We now turn to the issue as to whether the suit lands were subject to a customary trust. We note that the appellants were minors when the lands were registered in their names, thus they cannot advance an argument that they rightly obtained the same by their own volition or effort. There was evidence placed before ELC by the appellants and their mother that they belonged to the Waitherandu clan. That clan allocated the suit lands to the appellants in 1959 when they were minors and the lands were registered in their names when they attained the age of majority much later. Their mother proved on a balance of probabilities that such allocation of clan land to the appellants was to hold in trust for their mother and their younger siblings. It is more likely than not that the property was registered to them because their father had passed away.

We are of the view that the learned Judge was well guided by the decision of the Supreme Court in the case of **Isack M’Inanga Kiebia vs. M’Lintari & Another (Civil Case 10 of 2015) [2018] KESC 22 (KLR)** which stated:

“Some of the elements that would qualify a claimant as a trustee are:

- 1. The land in question was before registration, family, clan or group land**
- 2. The claimant belongs to such family, clan, or group**
- 3. 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.**
- 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.**
- 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”**

The Supreme Court in the above case of **Kiebia vs. M’Lintari**

(supra) also went ahead to say:

“...we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are

therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. Each

case has to be determined on its own merits and quality of evidence.”

In light of our findings, we agree with the ELC Judge that the late Peninah Wairimu Kabui (as plaintiff) did in fact prove the existence of a customary trust and confirm the findings of the ELC that the suit lands were registered to the appellants in trust for themselves and their family. Having so found, we cannot fault the Judge for ordering that the suit lands be shared equally among the family members.

This appeal is unmerited and is dismissed with no order as to costs considering that the dispute involved close family members.

Dated and delivered in Nyeri this 25th day of March, 2026.

K. M'INOTI

.....
JUDGE OF APPEAL

S. ole KANTAI

.....
JUDGE OF APPEAL

ALI - ARONI

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JUDGE OF APPEAL

*I certify that this is
a true copy of the
original*

Signed

DEPUTY REGISTRAR