REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELCA NO. E002 of 2024

NANCY MICERE JOHN CIIRA ..... 1ST APPELLANT

CYRUS CHOMBA ..... 2ND APPELLANT

ROBINSON MWANIKI CIIRA ..... 3RD APPELLANT

PAUL GITONGA NGONDI ..... 4TH APPELLANT

VERSUS

GLADWELL WAMIRU NATHAN B. MWANIKI (Sued as administratrix of
the Estate of Nathan Mbithi Mwaniki) **..... RESPONDENT**

JUDGMENT

(Being an appeal from the judgment of Hon. L.W. Kabaria, PM, in Gichugu MCELC 22 OF 2020 delivered on 11th December 2020)

1. This appeal is against the Judgment delivered by **Hon. L.W. Kabaria P.M**, delivered on **11th December 2023,** in **Gichugu MCELC 22 of 2020.** In that judgement, the learned trial magistrate dismissed both the Plaintiff's suit

and the Defendant's counterclaim and directed that each party bear their own costs.

2. The Appellants, who were the Plaintiffs before the trial court, were dissatisfied with the decision of the learned trial magistrate and have lodged this appeal, through the memorandum of appeal dated 11th January 2024, raising four (4) grounds, namely:

    1) That the decision and findings of the Learned Principal Magistrate on the existence of the Appellants' trust in respect of **Land Parcel Baragwe/Kariru/214** were based on a misapprehension of the evidence adduced and were against the weight of that evidence.

    2) That the Learned Principal Magistrate erred in law and misdirected herself by citing, applying, and relying upon the repealed **Registered Land Act (Cap 300),** particularly **Sections 27 and 28** thereof, and consequently delivered an erroneous judgment adverse to the Appellants.

    3) That the Learned Principal Magistrate failed to appreciate that the matter was a defended suit in which issues had been framed, thereby imposing upon the court a legal duty to render a judgment containing a concise statement of the case, the

points for determination, the decision thereon, and the reasons for each finding.

4) That the Learned Principal Magistrate violated the principles of natural justice, the adversarial system of litigation, and jurisprudential fairness by ignoring, abandoning, and rejecting the Appellants' written submissions and the authorities cited in support of their case on customary trust and adverse possession.

The Appellants therefore prays that this appeal be allowed; the judgment and decree of the lower court be set aside; and that this Honourable Court be pleased to recall the entire case before the lower court unto itself and rehear the same by way of retrial, on the pleadings, evidence and case law and other material placed before the lower court; or in the alternative, remit the case to another competent court for rehearing; and they be awarded costs of both the appeal and the suit in the lower court.

3. The dispute traces its origin to **Gichugu MCELC No. 22 of 2020**, where the Appellants (then Plaintiffs) filed suit against the Respondent by way of an Amended Plaint dated 18th February 2022, seeking for various declaratory and consequential reliefs in respect of **Land Parcel No.**

Baragwe/Kariru/214. They prayed for a declaration that the Respondent holds the said parcel of land in trust for them in the following proportions: 1.5 acres each for the 1st, 2nd, and 3rd Appellants, and 1.1 acres for the 4th Appellant.

They further sought that the trust be dissolved and that the suit property be subdivided into three portions measuring 2 acres, 1.5 acres, and 1.1 acres, respectively, with the Appellants and the Respondent each being registered under separate titles.

4. In the alternative, the Appellants prayed for declarations that the 1st, 2nd, and 3rd Appellants had acquired title to portions measuring 1.5 acres each of the suit property by adverse possession, and that the 4th Appellant had similarly acquired title to 1.1 acres of the same parcel. They accordingly sought orders for the cancellation of the Respondent's name from the register in respect of the said portions and for their respective names to be registered in her place.

   They also sought a declaration that the Respondent's title over those portions had been extinguished, together with the costs of the suit.

   The Appellants' case, as pleaded in the amended plaint, was that during the land adjudication and consolidation

exercise in the **Baragwi/Kariru area** of the then **Kirinyaga District**, one Jeremiah Mwaniki (deceased) held several fragments and parcels of land. During the adjudication process, he consolidated these parcels into a single parcel known as **Baragwe/Kariru/214**, which he caused to be registered in the name of Nathan Mbithi Mwaniki, allegedly in trust for himself and his brothers in the following proportions:

1) Nathan Mbithi Mwaniki – 2 acres
2) John Ciira – 1.5 acres
3) Simon Ngondi – 1.1 acres

5. The Appellants contended that all three original beneficiaries have since passed away, and their respective heirs are the parties now before the court. They averred that following the death of Nathan Mbithi, the Respondent (his widow) sought to evict the Appellants from the suit land, prompting the dispute to be referred to the **Gichugu Land Disputes Tribunal**.

   The Tribunal, after hearing the parties, awarded the land in the same proportions—namely, 2 acres to the Respondent, 1.5 acres to John Ciira, and 1.1 acres to Paul Gitonga, Njeru Simon, and Tabitha Wanjiru. The Appellants maintained that although there existed avenues of appeal against the Tribunal's decision, the Respondent did not appeal but instead filed **Succession Cause No. 15 of 2006.**

They further averred that they and their families have occupied, possessed, and developed their respective portions of the suit land for over sixty-two (62) years, and that their occupation has been open, continuous, and uninterrupted, thereby giving rise to both a customary trust and rights by adverse possession.

6. The Respondent opposed the suit through an Amended Defence and Counterclaim dated 26th October 2021. She denied the Appellants' claim in its entirety, maintaining that she is the rightful beneficiary of her late husband's estate and that the Appellants, or any other persons purporting to claim an interest therein, are strangers to the estate. She averred that no trust ever existed in respect of **Land Parcel Baragwe/Kariru/214**, and further denied that any eviction had ever taken place. While acknowledging that a dispute had indeed been referred to the Gichugu Land Disputes Tribunal, the Respondent contended that no valid order or award emanated from the said proceedings, as the same were allegedly halted to allow the institution of succession proceedings in respect of the estate of the late Nathan Mbithi Mwaniki. She further asserted that the purported Tribunal award was never adopted as a judgment of the court, and was therefore of no legal effect. The Respondent maintained that she is the duly registered proprietor of the suit property, having acquired title by

way of transmission following the death of her husband in **Succession Cause No. 15 of 2006,** and that the Appellants' plea for a declaration of trust was misconceived and legally untenable.

7. In her counterclaim, the Respondent averred that her late husband, Nathan Mbithi Mwaniki, was not the firstborn son of his father, the late Jeremiah Mwaniki, and that Jeremiah was alive at the time of land adjudication and consolidation. She contended that the late Nathan Mbithi lawfully acquired the suit land and became its absolute owner, holding it for his sole benefit and not in trust for any other person. Upon his death, she duly succeeded him as the registered owner of the property through succession.

   The Respondent further averred that the Appellants were mere licensees on the land during her husband's lifetime, and that such licence has since been withdrawn. She therefore prayed for judgment on the counterclaim seeking the following orders:

   1) *A declaration that she is the absolute owner of land parcel Baragwe/Kariru/214, or that her late husband was its absolute owner.*

2) *An order that the Appellants and anyone acting on their behalf do vacate the suit land forthwith, and in default, be evicted therefrom.*

3) *A permanent injunction restraining the Appellants, their agents, relatives, or any persons claiming through them from entering, cultivating, remaining on, or in any other manner interfering with the suit land.*

4) *An order for the removal of any restrictions, cautions, or prohibitory entries registered against the title of Baragwe/Kariru/214.*

5) *Costs of the counterclaim, with interest.*

8. The appellants' case was heard on 6th June, 2023, with the 1st Appellant testifying on her own behalf as **PW1**. She adopted her witness statement and list of documents as part of her evidence. She told the court that the 2nd, 3rd, and 4th Plaintiffs were her children, while the Respondent was her sister-in-law. Her prayer to the court was that each of them be granted their rightful portion of the suit property.

   In cross-examination, **PW1** testified that the firstborn son in her husband's family was Simon Ngondi. She stated

that she got married to John Ciira in 1968, by which time land adjudication had already been completed. She explained that Cyrus Chomba and the late Robinson Mwaniki were her sons, while Paul Gitonga was the son of Simon Ngondi, the eldest son of Jeremiah Mwaniki.

9. She further testified that Simon Ngondi died and was buried on his own land at Difathas. She confirmed that her father-in-law, Jeremiah Mwaniki, was alive in 1958 during land adjudication. When she got married, she found him residing on the suit land, and it was he and his wife who allocated her a portion of 1.5 acres, where she has since resided and developed and where her husband was eventually buried. She also referred to an earlier case in which it was allegedly decided that the suit property had been given to Jeremiah by the clan. **PW1** stated that the family had made efforts to resolve the dispute amicably with the Respondent, but the latter declined, forcing them to resort to litigation. She maintained that the land could not have been registered in Jeremiah's absence, since he was the patriarch and head of the family.

10. The 2nd Appellant testified as **PW2**. He confirmed that the 1st Appellant was his mother and that the 3rd Appellant was his late brother. His testimony was that he supported his mother’s claim and desired that she be allocated her rightful share of the suit land. He stated that the Respondent’s late husband, Nathan Mbithi, was older

than his own father, and reiterated that his mother deserved her portion of the land.

In cross-examination, **PW2** stated that land adjudication occurred before he was born and confirmed that Nathan Mbithi was not the firstborn son of his grandfather, Jeremiah Mwaniki. He maintained that his mother should receive her share because the suit land was clan land, which had been entrusted to Nathan to hold in trust for the family. According to him, Nathan had been given the land because he was educated, and the clan believed he would hold it on behalf of the rest.

11. He testified that the family had earlier testified before the Gichugu Land Disputes Tribunal, but that the witnesses who participated in those proceedings had since passed away. **PW2** also stated that he was unaware that Jeremiah was residing in Ukambani or that he had declined to come and collect the land from the clan. He maintained that the Appellants had lived peacefully on the suit land for many years and reiterated his desire that his mother be allocated 1.5 acres. He conceded, however, that he did not have a survey report or any formal document to demonstrate the exact portion they occupied, and that the land had not been formally subdivided. He further confirmed that his father had once filed an application for review against the Respondent, which he later took over

after his father's death, but the application was ultimately dismissed.

12. The 3rd witness, **Paul Gitonga Ngondi**, testified as **PW3**. He stated that he was claiming 1.1 acres of the suit land, which he claimed through his father, Simon Ngondi Mwaniki.

In cross-examination, he admitted that he had not taken out letters of administration to sue or be sued on behalf of his father's estate. In re-examination, he clarified that the elders whose decision was presented before the Tribunal had recommended that he be given 1.1 acres, and it was on that basis that he was before the court.

13. The defence hearing took place on 1st August 2023. The Respondent testified as **DW1** and adopted her witness statement and list of documents as her evidence in chief. In cross-examination, she stated that the suit land originally belonged to her late husband and that the same was transmitted to her in 2007. She confirmed that the appellants were still residing on the land. She testified that her husband passed away in 1986, and that during his lifetime, he never demanded that the appellants vacate the suit property.

She further confirmed that she had not taken any steps to remove them from the land. She denied the appellants'

assertion that the suit land had been given to different people, maintaining instead that it solely belonged to her late husband. However, she conceded that it was true the appellants had lived on the land for many years. In re-examination, she stated that John Ciira, the 1st Appellant's late husband, never approached her husband to ask for any portion of the land during his lifetime.

14. Upon considering the pleadings, the evidence, and the written submissions by both parties, the Learned trial magistrate framed four issues for determinations:

    1) *Whether the Plaintiffs had established their claim of customary trust in respect of land parcel Baragwi/Kariru/214, and if so, whether the trust should be dissolved;*
    2) *Whether the Plaintiffs had established a claim to title by way of adverse possession;*
    3) *Whether there was merit in the Defendant's counterclaim; and*
    4) *Who should bear the costs of the suit.*

15. In regard to the first issue, the learned trial magistrate found that the Appellants had not proved the existence of a customary trust as against the Respondent. In her reasoning, she observed that the suit land had moved from the late Nathan Mbithi Mwaniki to his wife, the Respondent, through transmission, and unless that

registration was specifically challenged, no customary trust could be inferred. The court stated:

> *"The suit land moved from Nathan Mwaniki to a beneficiary, his wife, so that unless her registration is challenged, there is no way to infer a customary trust. The customary trust, if any existed, would have been extinguished by her registration by way of transmission."*

16. The learned trial magistrate further observed that the appropriate time and manner to raise such a claim would have been against Nathan Mbithi during his lifetime or even after his demise, either within the succession cause or in a separate suit before distribution of the estate. She added that since the land had already transmitted to the Respondent who in her view, was not related to the Appellants in a manner to hold land in trust for them, the claim of trust could not stand.

The trial court also noted that the Respondent had acquired the land by way of life interest under succession law and held that:

> *"I see nothing in the Act that suggests that there can be an overriding interest over a life interest. Indeed, that would be a contradiction of terms."*

Consequently, the court concluded that the claim of customary trust was misplaced as against the Respondent, whether in her personal capacity or as administratrix of the estate of the late Nathan Mbithi Mwaniki.

17. On the second issue, concerning adverse possession, the trial court found that the Appellants had admitted being on the land with the full knowledge of the Respondent, and that no attempt had been made to evict them. The court held that such occupation, being permissive, could not be said to be adverse to the Respondent's title.

Turning to the counterclaim, the learned trial magistrate noted that the nature and extent of the Respondent's ownership had already been determined in the succession proceedings, where she was found to hold the property only to the extent of a life interest. Accordingly, the Respondent's claim of absolute ownership was found to be baseless.

The court further observed that the counterclaim had been filed in the Respondent's name, yet she sought orders in respect of her deceased husband's estate. The trial court found that she lacked the requisite locus standi to raise such claims on behalf of the estate in her personal capacity.

18. Regarding the prayer for eviction, the court held that the Respondent had not complied with the procedural requirements under **Section 152E of the Land Act**, which sets out the steps to be followed prior to eviction. Consequently, that prayer was denied.

    The court also noted that the Respondent's prayer (d) in the counterclaim was omnibus, as she had not demonstrated the existence of any caution, restriction, or order registered against the title that required removal.

    In conclusion, the Learned Trial Magistrate dismissed both the Plaintiffs' suit and the Defendant's counterclaim, and directed each party to bear their own costs.

19. Pursuant to the court's directions that the appeal be canvassed through written submissions, the learned counsel for the appellants and respondent filed their submissions dated 5th February 2025 and 15th May 2025 respectively, which the court has considered.

20. The learned counsel for the Appellants, through their written submissions dated 5th February 2025, identified four issues for determinations, and submitted inter alia that **Section 28(b) of the Land Registration Act, 2012**, recognises trusts as overriding interests in land, enforceable even against a registered proprietor. Reliance was placed on the **Court of Appeal** decision in the case

of ***Kanyi versus Muthiora*** **[1984] KLR 712**, in which it was held that registration of title under the repealed **Registered Land Act** does not relieve a proprietor of his duties or obligations as a trustee. Counsel contended that the evidence adduced before the trial court sufficiently established the existence of a customary trust.

It was submitted that the Respondent's late husband, Nathan Mbithi Mwaniki, was a brother to the 1st Appellant's late husband, John Ciira Mwaniki, and to the 4th Appellant's father, Simon Ngondi Mwaniki. The 1st Appellant, having been married into the family, had lived on the land since 1968; her children, the 2nd and 3rd Appellants, were born and raised there, and they had both residential and commercial developments on the property. The 4th Appellant equally resided on the suit land from birth until around 1980.

21. The learned Counsel further submitted that the burial of the 1st Appellant's husband on the suit property without objection from the Respondent or her late husband was a strong cultural and legal indication of beneficial ownership. In light of this evidence, it was urged that the Respondent's predecessor held **Land Parcel Baragwi/Kariru/21**4 in trust for the wider Mwaniki family, including the Appellants.

On the issue of adverse possession, Counsel submitted that the 1st, 2nd, and 3rd Appellants had acquired 1.5 acres, while the 4th Appellant had acquired 1.1 acres, through continuous and uninterrupted occupation of the suit land. He noted that the 1st Appellant had occupied the land since 1968, raised her children there, and even buried her husband on the property. Over the years, the family had constructed permanent homes and undertaken commercial activities on the land.

Counsel argued that by the year 2020, the Appellants had been in occupation for over 52 years, thereby meeting the statutory threshold for acquisition by adverse possession. It was contended that the Learned Magistrate erred in law and in fact in denying the Appellants' claim for a declaration of ownership by adverse possession.

22. Counsel submitted that equitable principles and protection of rights requires regards something that ought to have been done as done. He argued that, given the Appellants' longstanding occupation, familial connection to the Respondent's husband, and development of the land, the court ought to have protected their beneficial interests and ensured substantive justice rather than technical defeat. In conclusion, Counsel urged this Court to allow the appeal with costs, set aside the judgment of the lower court, and issue:

1) A declaration that the 1st, 2nd, and 3rd Appellants have acquired title to 1.5 acres each;

2) A declaration that the 4th Appellant has acquired title to 1.1 acres;

3) An order directing that the Respondent's name be cancelled from the register to the extent of those portions, and replaced with the respective Appellants; and

4) An award of costs in both the lower court and this appeal.

23. The learned counsel for the Respondent filed written submissions dated 15th May 2025, inter alia challenging the competence of the appeal, noting that one of the named Appellants, Robinson Mwaniki Ciira, was deceased prior to the institution of the suit and therefore lacked capacity to give instructions or be a party.

On adverse possession, counsel submitted that the evidence on record demonstrated that the Appellants' entry and occupation of the suit land was with the permission of the registered proprietor, the late Nathan Mbithi Mwaniki. Consequently, their possession was not adverse but permissive, and they could not find a claim under that doctrine.

Counsel further argued that even if adverse possession had been proved, the trial magistrate lacked jurisdiction to determine such a claim, jurisdiction over adverse possession being exclusively vested in the Environment and Land Court. In support, he relied on the Court of Appeal decision in ***Paulina Chemuge Sugawara versus Nairuko Ene Mutarakwa Kiruti & 3 others, Civil Appeal No. E141 of 2022***.

24. Regarding the claim based on trust, counsel contended that the 2nd, 3rd, and 4th Appellants lacked locus standi, as no letters of administration had been taken out to enable them to litigate on behalf of their deceased predecessors. It was noted that the 2nd Appellant himself admitted that the suit land had been registered in the name of Nathan Mbithi to hold in trust for his brothers. Still, he had not taken out letters to represent his late father, John Ciira Mwaniki. The same applied to the 4th Appellant.

As to the 1st Appellant, counsel submitted that no trust had been proved, since there was no explanation as to why, during the first registration, the late Jeremiah Mwaniki was not registered as proprietor though alive at the time, or why Nathan Mbithi, who was not the eldest son, was registered instead. Further, neither Jeremiah nor his sons had ever, during their lifetimes, raised any claim for subdivision or sharing of the land. Counsel therefore

urged the Court to find that the appeal lacked merit and to dismiss it with costs.

25. From the grounds on the memorandum of appeal, record and submissions filed, the following four (4) issues arise for the court's determination:
    a. *Whether the learned trial magistrate erred in finding that the Appellants failed to establish a claim of customary trust over the suit property.*
    b. *Whether the learned magistrate erred in finding that the Appellants had not proved their case on adverse possession.*
    c. *Whether the learned magistrate erred in law or fact in her overall evaluation of the evidence and application of the law so as to warrant interference by this Court.*
    d. *What orders should issue, including on costs.*

26. I have carefully considered the grounds on the memorandum of appeal, record of appeal, submissions by the parties' learned counsel, superior court decisions cited, and come to the following findings:

    a. 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."***

b. Before addressing the substantive questions, the Court has considered several preliminary matters raised by the Respondent. Firstly, it is not disputed that one of the persons named as appellants, Robinson Mwaniki Ciira, the 3rd appellant, had died prior to the filing of the suit in the lower court.

   In law, a deceased person lacks the capacity to sue or be sued, and his inclusion in the suit and appeal, rendered that part of the pleadings and reliefs relating to him, a nullity ab initio. The Court will accordingly disregards his name for all purposes of this appeal.

Secondly, on the question of *locus standi,* the remaining Appellants did not purport to sue in a representative capacity but in their own right as members of the wider family asserting a beneficial interest under customary trust. They therefore possessed sufficient standing to litigate their claim.

Thirdly, while the trial court considered and dismissed the claim for adverse possession, it is now settled law, following the Court of Appeal decision in ***Paulina Chemuge Sugawara versus Nairuko Ene Mutarakwa Kiruti (sued as the administratrix of the Estate of Mutarakwa Kiruti Lepeso) & 3 others*, Civil Appeal No. E002 of 2020**, that subordinate courts lack jurisdiction to entertain or determine claims founded on adverse possession. To that extent, the finding of the learned magistrate on that issue, though dismissive, was made without jurisdiction and is of no legal consequence.

c. On whether the learned trial magistrate erred in finding that the Appellants failed to establish a claim of customary trust over the suit property, the starting point is **Section 25(2) of the Land Registration Act, 2012** which provides that:

> ***"Nothing in this section shall be taken to relieve a proprietor from any duty or***

obligation to which the person is subject as a trustee."

Further, ***Section 28(b)*** **of the Land Registration Act, 2012**, recognizes *trusts, including customary trusts*, as overriding interests in land that bind even registered proprietors without the need for registration. The section provides that:

> ***"Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register— (a) spousal rights over matrimonial property; (b) trusts including customary trusts; (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act; (d) natural rights of light, air, water and support."***

d. The law is now settled, that registration of land in the name of one person does not necessarily extinguish unregistered rights of others under a customary trust.

The **Court of Appeal** in the case of ***Kanyi versus Muthiora* (1984) KLR 712** held that:

> ***"The registration of the suit land in the name of Kanyi under the Registered Land Act did not extinguish Nyokabi's rights under the Kikuyu customary law, Kanyi was not relieved from her duty or obligation to which she was as a trustee to Muthiora's land: See proviso to section 28, of the Act and Gatimu Kinguru v Muya Gathangi [1976] KLR 253."***

Similarly, in ***Isack M'Inanga Kiebia v Isaya Theuri M'Lintari & Another [2018] eKLR***, the **Supreme Court** clarified the nature of customary trusts and the evidentiary thresholds. The Court stated:

> ***"[58]…It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register."***

And at **paragraph [52],** the Court outlined the indicators of a customary trust as follows:

"Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in <u>Kiarie versus. Kinuthia</u> that what is essential is the nature of the holding of the land and the intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. 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 a 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.***

e. Applying the above principles, the evidence adduced in the instant case demonstrates that the **Suit Land, Mwerua/Gitaku/1853**, originated as clan land. Testimony before both the lower court and the earlier Gichugu Land Disputes Tribunal established that the land was allocated to Nathan Mbithi by the Ugaciku clan, allegedly to hold for the benefit of his family.

From the tribunal proceedings dated 30th November 2004, it emerged that John Ciira, the brother of Nathan, asserted that the land was given to Nathan by the clan to hold in trust for the family of their father, Jeremiah Mwaniki, who lived and cultivated on the land. He stated that his father, Jeremiah, was the one who showed him where to build and cultivate when he came onto the land in 1959. That evidence was corroborated by the fact that Jeremiah lived and farmed there and was later buried on the same land. Both families, those of Nathan Mbithi and of his

brother John Ciira, lived and cultivated there peacefully for decades.

According to **DW2's** evidence, Nathan was given the land by the clan while Jeremiah was away, but he too conceded that both families coexisted on it harmoniously and that the land should ultimately have been shared among Jeremiah's sons.

f. The respondent's witnesses before the tribunal confirmed similar facts, though maintaining that the land had been registered in Nathan's name. One even stated that the land was clan land but had been transferred to Nathan because he had livestock to give to the clan, and that disputes only arose when the respondent later sought to subdivide it among her own children to the exclusion of her husband's brothers. After hearing both sides, the tribunal concluded that the land was indeed *trust land* and recommended subdivision among the families of Nathan, John, and Simon Ngondi.

   While the award was never adopted as a court order and the tribunal lacked jurisdiction to determine ownership of registered land, the proceedings are nonetheless a valuable piece of evidence shedding light on the historical nature of the land and the familial arrangement surrounding it.

g. On the totality of the evidence, it is clear that the land was originally clan land, that it was given to Nathan Mbithi to hold on behalf of his wider family, that Jeremiah lived, cultivated, and was buried there, and that the appellants and their families have been in continuous occupation since 1959. Those facts satisfy all the elements set out in the *Isack* ***M'inanga Kiebia*** test and demonstrate that a customary trust subsisted in favour of the appellants. The respondent, as the widow and successor of the registered proprietor, cannot claim immunity from that equitable obligation; she holds the land subject to the same trust obligations as her late husband. Accordingly, the learned trial magistrate fell into error in finding that the appellants failed to prove the existence of a customary trust. The evidence, both oral and documentary, points unmistakably to the existence of such a trust over the suit land.

h. On whether the learned magistrate erred in finding that the Appellants had not proved their case on adverse possession, the court has observed at paragraph (b) above that in view of the that the trial court lacked jurisdiction to hear and determine the claim for adverse possession. The claim was anchored under **Section 38 of the Limitation of Actions Act**, which expressly provides that an application for registration of land by virtue of

adverse possession shall be made to the High Court, now the Environment and Land Court, and not to a subordinate court.

The Court of Appeal in the case of ***Pauline Chemuga Sugawara versus Nairuko Ene Mutarakwa Kiruti (Sued as the Administratrix of the Estate of Mutarakwa Kiruti Lepeso) & 3 others*** **[2023] KECA 79 (KLR**) has reaffirmed this position.

Accordingly, the findings of the learned magistrate on adverse possession were made *per incuriam* and are void for want of jurisdiction.

i. Equally, this Court, sitting as an appellate court, though clothed with appellate powers under ***Section 78*** **of the Civil Procedure Act, Chapter 21 of Laws of Kenya**, cannot assume original jurisdiction to determine a question that the trial court was incompetent to entertain. The proper procedure would have been for the appellants to institute an independent originating summons before this Court under **Order 37 Rule 7 of the Civil Procedure Rules.** Consequently, while noting the appellants' long and undisputed occupation of the suit land, this Court lacks jurisdiction to make a first instance pronouncement on the merits of adverse possession within the confines of this appeal.

j. Having carefully reviewed the record of the lower court, the evidence of the parties, and their written submissions, this Court finds that the appeal is merited. The evidence on record demonstrates that the suit property, **Land Parcel No. Baragwi/Kariru/214**, was held by the respondent's late husband, Nathan Mbithi Mwaniki, in customary trust for the wider family of the late Jeremiah Mwaniki, including the appellants. The findings of the Gichugu Land Disputes Tribunal, though of no legal force, provide a credible reflection of the family's shared understanding of that trust and the long-standing occupation by the appellants' households.

   Accordingly, this Court finds that the learned magistrate misapprehended the nature and scope of the evidence before her and erred in holding that no trust had been proved.

k. In the result, the appeal succeeds to the extent that this Court hereby sets aside the judgment and decree of the lower court and substitutes it with a declaration in terms of prayer (a) of the amended plaint that the respondent holds **Land Parcel No. Baragwi/Kariru/214** in customary trust for the benefit of the 1st, 2nd, and 4th appellants, with their respective beneficial interests as prayed in their

amended plaint. The claim and relief sought in the name of Robinson Mwaniki Ciira, the 3rd appellant, who has been confirmed to have died before the filing of the suit, is void ab initio, and for avoidance of doubt, is struck out.

l. ***Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya*** provides that costs shall ordinarily follow the event unless the court, for good reason, orders otherwise. The court in the case of ***re Estate of Monica Wanjiru Macharia*** **(Deceased) (Family Appeal15 of 2023) [2024] KEHC 14780 (KLR)** held that:

> ***"Section 27 of the Act is clear that it lies in the discretion of the court to award costs in a suit. This discretion must be exercised judiciously."***

While the Court is perturbed by the respondent's conduct in denying her late husband's kin what is evidently ancestral family land, this dispute remains a matter between relatives, and the Court deems it proper to order that each party bears their own costs in this appeal so as to encourage, foster and preserve familial harmony.

27. In view of the conclusions detailed herein above, the court finds and orders as follows:

a. ***That the appeal has merit and is hereby allowed.***

b. ***That the learned trial magistrate's judgement delivered on 11th December 2020 in Gichugu MELC No. 22 of 2020 is hereby set aside, and substituted with a declaratory order in terms of prayer (a) of the amended plaint that the respondent holds Land Parcel No. Baragwi/Kariru/214 in customary trust for the benefit of the 1st, 2nd, and 4th appellants, with their respective beneficial interests as indicated thereof.***

c. ***That the claim and relief sought in the name of Robinson Mwaniki Ciira, the 3rd appellant, who has been confirmed to have died before the filing of the suit, is void ab initio, and for avoidance of doubt, is hereby struck out.***

d. ***That each party to bear their own costs in the appeal.***

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 22ND DAY OF APRIL 2026.

S. M.

Kibunja

ELC

JUDGE

In the presence of:

Appellants – M/s Muturi for Kamweti

Respondent – Mr. Myaga for Maina Kagio

Kinyua - Court Assistant.

S. M.

Kibunja

ELC

JUDGE