

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ELCA NO. E051 OF 2024

JAMES NJOGU GITUMBO

APPELLANT

VERSUS

CHARLES NGATIA GITUMBO

RESPONDENT

JUDGMENT

[Being an appeal from the judgment of the Hon. Claire Wanyama, PM, delivered on 29th August 2024 in the Kerugoya MELC No. 63 of 2018]

1. This appeal arises from the judgment of the **Hon. Claire Wanyama** delivered on **29th August 2024** in the **Kerugoya MELC No. 63 of 2018**.

In that judgment, the learned trial magistrate found that **Land Parcel Kiine/Kiangai/611**, hereinafter as the suit land, though registered in the name of the Appellant, constituted trust land, and issued a declaration that the Appellant holds the suit land in trust for himself and the Respondent.

Flowing from that finding, the trial court ordered the termination of the trust. It directed that the suit land be

subdivided, with two separate titles to be issued to the Appellant and the Respondent in equal shares.

The court further ordered that each party bear his own costs of the suit.

2. Aggrieved and dissatisfied with the decision of the learned trial court, the Appellant lodged the present appeal by way of a Memorandum of Appeal dated 10th September 2024, raising five (5) grounds inter alia, that the learned trial magistrate erred in law and in fact in finding that **Land Parcel Kiine/Kiangai/611** was held by the Appellant in trust for the Respondent; that the learned trial magistrate failed to properly and fully analyse the evidence tendered by the Appellant and his witness, thereby arriving at an erroneous conclusion; that the trial court misapplied the principles governing customary trust, notwithstanding that the Respondent had not proved the existence of such a trust to the requisite standard; that the learned magistrate placed undue reliance on the evidence adduced by the Respondent, which evidence fell short of proving the Respondent's case on a balance of probabilities; that the trial court's erred in relying on judicial authorities whose factual circumstances were materially distinguishable from those obtaining in the present dispute, thereby leading to an erroneous determination.

On the basis of the foregoing grounds, the Appellant prays that the appeal be allowed; the judgment and decree of the trial court be set aside; and that the costs of the appeal and of the proceedings in the lower court be awarded to him.

3. The dispute giving rise to this appeal was initiated by the Respondent in the lower court by way of a plaint dated 5th June 2018, seeking for firstly, a declaration that **Land Parcel Kiine/Kiangai/611** is registered in the name of the Defendant but is held by him in trust for himself and the Plaintiff.

Secondly, the Respondent sought an order for the determination and termination of the alleged trust and for the issuance of two separate titles in equal shares to the Plaintiff and the Defendant in respect of the said parcel of land. He also prayed for costs of the suit and such other or further relief as the court might deem just.

The Respondent's claim was premised on the assertion that both he and the Appellant are sons of the late Samson Gitumbo Kinyua. He contended that during the period of land consolidation and demarcation in or about the year 1959, their late father was allocated three **Parcels of Land**, namely **Iriani/Kaguyu/305, Kiine/Kiangai/611, and Kiine/Kiangai/712.**

According to the Respondent, their late father had the parcels registered in the names of his eldest sons to hold the same in trust for the benefit of the other siblings. He asserted that, in particular, the suit land was registered in the name of the Appellant to hold in trust for him.

The Respondent further alleged that their late father had expressed a wish that the Respondent be given one acre out of the suit land, but that the Appellant had refused to effect the transfer. It was his case that the Appellant had continued to occupy and enjoy the entire parcel to the exclusion of the Respondent, thereby denying him his rightful share contrary to their late father's intentions.

4. The Appellant opposed the suit through a statement of defence dated 2nd July 2018. While the Appellant admitted that **Land Parcel Iriani/Kaguyu/305** was allocated to their late father, he denied that **Kiine/Kiangai/611 and Kiine/Kiangai/712** were ever allocated to the deceased. He maintained that the Respondent was not entitled to the reliefs sought.

Specifically, the Appellant asserted that he was the original registered proprietor of **Land Parcel Kiine/Kiangai/611**, having been allocated the land in 1959 and registered in the name Njogu Gitumbo, and that the land was not held in trust for the Respondent. He further contended that **Land Parcel**

Iriani/Kaguyu/305 had been subdivided by the deceased, with one portion sold and the remaining portion transferred to Jesse Rurira.

According to the Appellant, it was that portion which the deceased had distributed on the ground among family members as follows: one acre to Charles Ngaita Gitumbo, one acre to Mwai Gitumbo, two acres to James Kinyua Gitumbo, and one acre to Jesse Rurira.

The Appellant further averred that **Land Parcel Kiine/Kiangai/712**, measuring approximately three acres, belonged to their grandfather and was later subdivided by the clan and shared out, with one acre allocated to James Kinyua Gitumbo and another to Gitumbo Kinyua, the latter portion eventually being transferred to the late Ann Gathigia Gitumbo following the demise of Gitumbo Kinyua.

Finally, the Appellant maintained that he has lived on and fully developed the **Land Parcel Kiine/Kiangai/611** together with his family and denied the existence of any trust in favour of the Respondent.

5. The court issued directions on the 19th March 2025 that the appeal be canvassed through written submissions. The learned counsel for the Appellant and respondent

filed their submissions dated 14th June 2025 and 15th May 2025 respectively, which the court has considered.

6. In their submissions, the counsel for the appellant submitted inter alia that the suit land was registered in the Appellant's name on 4th December 1959 and maintained that, at no point, was the land allocated to their late father. It was contended that the Respondent failed, both at trial and on appeal, to adduce evidence demonstrating the existence of a customary trust over the suit land.

In particular, counsel argued that no clan member or other independent witness was called to support the Respondent's claim that the land was family land held in trust.

Counsel further submitted that the Respondent neither lived on nor had ever occupied the suit land, and that his claim was therefore unsupported by evidence of possession or long use, which are often relevant considerations in claims founded on customary trust.

The counsel for the Appellant faulted the trial court's reliance on the decision in the case of **Henry Mwangi versus Charles Mwangi, Civil Appeal No. 245 of 2004**, submitting that the factual circumstances of that case were distinguishable from those in the present

dispute. Counsel argued that the deceased owned other parcels of land which were allocated to his other sons contemporaneously with the registration of the suit land in the Appellant's name, yet those parcels were not subjected to similar scrutiny or claims of trust.

It was submitted that this undermined the Respondent's assertion that the suit land was uniquely held in trust. In conclusion, counsel submitted that the burden of proving the existence of a trust lay with the Respondent, and that this burden was not discharged to the required standard.

On costs, it was argued that the Appellant had successfully demonstrated that the trial court erred, and that he ought therefore to be awarded the costs of the appeal.

7. The counsel for the Respondent submitted inter alia that it was not in dispute that the **Suit Land, Kiine/Kiangai/611**, was clan land and was registered in the name of the Appellant during the period of land consolidation and demarcation.

Counsel submitted that, as the Appellant and the Respondent are brothers belonging to the same clan, the registration of the suit land in the Appellant's name did

not negate the existence of a trust in favour of the Respondent.

Counsel further submitted that evidence was adduced at trial to the effect that, during the land consolidation and demarcation period, one person could not be registered as proprietor of more than one parcel of land. It was therefore argued that the Appellant's late father caused his additional parcels of land to be registered in the names of his sons, not as absolute gifts, but to hold the same in trust for the family.

It was the Respondent's case that the intention of the family of the late Gitumbo Kinyua was clear and could be discerned from the evidence on record, namely that each son and the unmarried daughter, Anna, was to receive one acre of land. Counsel submitted that, with respect to **Land Parcels Kiine/Kiangai/712** and **Iriani/Kaguyu/527**, there was no dispute between the parties as to how those parcels were allocated. Counsel further submitted that the Respondent's case was supported by the testimony of the parties' brother and by Mary Wandia Jessie, the widow of the parties' late brother, whose evidence was consistent with the Respondent's claim.

It was also submitted that Joshua Mbote, a clan member, corroborated the Respondent's account regarding the

family arrangements and the holding of land in trust. In conclusion, counsel submitted that the Respondent had discharged the legal burden of proof on a balance of probabilities and had established that the Appellant held the suit land in trust for himself and the Respondent.

8. The issues that arise in this appeal for the court's determinations are as follows:

- a. *Whether the learned trial magistrate erred in law and fact in finding that, the Appellant held **Land Parcel Kiine/Kiangai/611** in customary trust for the Respondent.*
- b. *Whether the consequential orders made by the trial court, including the termination of the trust, subdivision of the suit land, and the order on costs, were legally sustainable.*
- c. *Who pays the costs?*

9. I have carefully considered the grounds on the memorandum of appeal, record of appeal, the submissions by the learned counsel for both parties, superior court decisions cited thereon, and come to the following conclusions:

- 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.”

The Court’s jurisdiction on appeal is therefore not limited to matters of law alone, but extends to matters of fact, subject only to the caveat that due allowance must be made for the trial court’s opportunity to observe the demeanour of witnesses.

- b.** On whether the learned trial magistrate erred in law and fact in finding that the Appellant held **Land Parcel Kiine/Kiangai/611** in customary trust for the Respondent, it is important to start by setting out the legal position on customary trust. It is trite that customary trust is now a well-settled doctrine in Kenyan Land Law.

Although registration confers legal title, it does not extinguish overriding interests rooted in customary law. **Section 28(b) of the Land Registration Act** expressly recognises customary trusts as overriding interests that bind registered proprietors notwithstanding the absence of any notation on the register.

- c. The Supreme Court authoritatively restated the governing principles on customary trusts in the case of **Isack M'Inanga Kiebia versus Isaaya Theuri M'Lintari & another [2018] eKLR**, where it held that the existence of a customary trust is a question of fact to be proved by evidence, and identified the following guiding elements:
- i. *that the land was family, clan or group land before registration;*
 - ii. *that the claimant belongs to the family, clan or group;*
 - iii. *that the relationship is not remote;*
 - iv. *that the claimant would have been entitled to the land but for the registration; and*
 - v. *that the registered proprietor holds the land in circumstances that, viewed through customary practice, give rise to a trust.*

Crucially, in the above case, the **Supreme Court** emphasised that customary trust is not proved by formal documentation alone, but may be inferred from the history of the land, the circumstances of registration, family arrangements, and the conduct of the parties. Registration during land adjudication, therefore, is not conclusive of absolute ownership and must be interrogated in its proper social and customary context.

Applying the facts in the instant case to the above principles or elements or settled legal framework, this Court finds no basis for disturbing the trial court's conclusion that the appellant held title to the suit land in a customary trust, for reasons that are here below.

- d.** Firstly, there was no dispute that the Appellant and the Respondent are brothers and sons of the late Gitumbo Kinyua. The family relationship is close and direct, falling squarely within the category contemplated in the case of ***Isack Kiebia* [supra]**. Equally uncontested was the fact that the suit land was registered in the Appellant's name on 4th December 1959, during the period of land consolidation and demarcation. The circumstances of that registration are particularly instructive.

The Appellant's own evidence was that at the time of registration, he was still in college. Viewed through the lens of customary practice prevailing during adjudication, this fact undermines, rather than supports, the assertion of exclusive ownership. It was common during that period for land to be registered in the names of elder or responsible sons, not as a conferment of absolute personal ownership, but as a means of securing family land for the benefit of the wider household. Registration in the name of a young, unmarried son still in school is therefore more consistent with custodianship than with an intention to exclude siblings.

- e. Secondly, the timing and pattern of allocation strongly support the inference of a family arrangement. The suit land was registered in the Appellant's name on the same date that another parcel was registered in the name of his brother, James Kinyua. This simultaneity was not explained as coincidental, nor was any evidence led to show that the two brothers were being settled differently in principle.

To the contrary, the evidence revealed a consistent pattern in which older sons were registered as proprietors of parcels that later served broader family purposes. That pattern is most clearly demonstrated

by the use of the land registered in the name of James Kinyua, that though registered in his name, that land has accommodated other siblings, including Joseph Were, who testified that he resides there.

Notably, this occupation has occurred without formal transfer or subdivision, yet it has been accepted within the family as legitimate. James Kinyua's conduct in allowing siblings to live on and benefit from land registered in his name provides a compelling comparator. It illustrates the family's customary understanding that registration in the name of an elder son did not signify exclusive ownership but rather a holding for the benefit of others.

- f.** In that context, the Appellant's assertion that the suit land was allocated to him absolutely stands isolated. He did not tender evidence to demonstrate why, unlike his brother James Kinyua, he alone was intended to benefit exclusively from land registered during the same adjudication exercise and on the same date. The absence of such evidence is significant, particularly given that the Respondent had previously placed before the court a coherent narrative of family allocation and shared entitlement.

Further corroboration is provided by evidence relating to burial sites. The deceased father was

buried on land associated with one son, while the mother was buried on land associated with another. These burial patterns are not random; under customary law, they often reflect land regarded as belonging to the family lineage rather than to an individual proprietor. While burial evidence is not decisive on its own, when considered alongside the history of registration and the use of the land, it reinforces the conclusion that these parcels were understood to be family land.

- g.** Taken holistically, the Respondent established that the suit land originated from a family allocation process during adjudication, that he belonged to the family entitled to benefit from it, and that the Appellant's registration occurred in circumstances consistent with a customary trust. Once that evidentiary threshold was crossed, the Appellant bore an evidentiary burden to demonstrate that the land was intended for his exclusive benefit. His bare assertion of absolute ownership, unsupported by evidence of a distinct or exceptional allocation, was insufficient to rebut the inference of trust.

In light of the foregoing, the Court is satisfied that the learned trial magistrate correctly directed herself on the law and properly evaluated the evidence before her. The finding that the Appellant held **Land**

Parcel Kiine/Kiangai/611 in customary trust for himself and the Respondent was firmly grounded, in both the applicable legal principles and the factual matrix presented.

This Court therefore finds no error of law or fact warranting appellate interference with that conclusion.

h. Having upheld the trial court's finding that the Appellant held **Land Parcel Kiine/Kiangai/611** in customary trust for himself and the Respondent, the Court now turns to consider whether the reliefs granted flowed lawfully from that finding. Under Kenyan law, once a customary trust is established, the court is empowered to fashion appropriate remedies to give effect to the beneficial interests established.

Section 80 of the Land Registration Act authorises the court to order rectification of the register where registration has been affected by a trust. At the same time, equitable principles permit the termination of a trust through subdivision or transfer where the beneficiaries' shares are ascertainable and no purpose is served by its continuation. In the present case, the evidence before the trial court disclosed a clear and limited

trust arrangement between two brothers, arising from a family allocation during adjudication.

- i.** The Respondent sought, and the trial court granted, subdivision of the suit land into equal shares. No evidence was placed before the court to suggest that unequal entitlement existed, nor was any competing family claim advanced that would render subdivision impractical or unjust. In those circumstances, an order terminating the trust through equal subdivision was not only lawful, but appropriate and pragmatic.

The Appellant did not demonstrate that the remedy ordered occasioned prejudice beyond the loss of exclusivity, which, as already determined, he was never entitled to assert. Nor did he propose any alternative mode of giving effect to the trust.

This Court therefore finds no basis upon which to fault the trial court's exercise of discretion in ordering subdivision and issuance of separate titles.

- j.** On the question of costs, it is trite that costs follow the event, but this principle is subject to the discretion of the court and the peculiar circumstances of each case. This dispute involved close family members and ancestral land, and the

trial court exercised its discretion to order each party to bear his own costs. Such an order accords with the long-standing judicial approach to family land disputes, in which courts often seek to avoid deepening intra-family discord through punitive cost orders.

No misdirection or improper exercise of discretion has been demonstrated to warrant appellate interference. Accordingly, the Court finds that the orders made by the trial court terminating the customary trust; directing subdivision of **Land Parcel Kiine/Kiangai/611** into equal shares and requiring each party to bear his own costs were sound in law and a proper exercise of judicial discretion.

- k.** Having carefully re-evaluated the evidence on record and considered the submissions of the parties, this Court finds that the appeal is devoid of merit. The learned trial magistrate correctly appreciated the applicable law on customary trust and properly applied it to the facts before her. The finding that the Appellant held **Land Parcel Kiine/Kiangai/611** in customary trust for himself and the Respondent was supported by the evidence and accords with settled jurisprudence.

- I. The consequential orders directing termination of the trust through subdivision into equal shares, as well as the order that each party bears his own costs, were lawful and represented a sound exercise of judicial discretion.
10. Accordingly, and in view of the conclusions on both matters of facts and law set out above, the court finds and orders as follows:
- a. That the appeal is without merit and is hereby dismissed in its entirety.**
 - b. That given the nature of the dispute and the familial relationship between the parties, each party shall bear his own costs in the appeal.**

Orders accordingly.

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

Kibunja

JUDGE

S. M.

ELC

In the presence of:

Appellant – Mrs Makworo

Respondent –Mr. Nyaga for Maina Kagio

Kinyua - Court Assistant

Kibunja

JUDGE

S. M.

ELC

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