

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**  
**ELCLC NO. E013 OF 2025**

**JOHN KAVILU MUTISO .....1<sup>ST</sup> PLAINTIFF**  
**MUTISYA MUTISO .....2<sup>ND</sup>**  
**PLAINTIFF**  
**JANE MBEKE MUTISO .....3<sup>RD</sup> PLAINTIFF**

**-VERSUS-**

**JOSHUA MATIVO MUTISO .....1<sup>ST</sup>**  
**DEFENDANT**  
**MICHAEL ODUOR ABOOK .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiffs filed the present suit vide the plaint dated 10<sup>th</sup> March, 2025 seeking the following orders against the Defendants: -
  - a) **An order cancelling and/or revoking title deeds of land Parcels No. MAKUENI/KIKUMINI/1592 – 1610.**
  - b) **An order directing the Land Registrar – Makueni to close the registers of land Parcels No. MAKUENI/KIKUMINI/1592 – 1610 and in return open the register of land Parcel MAKUENI/KIKUMINI/542 in the names of MUTISO KYENZE.**
  - c) **An order directing the 1<sup>st</sup> Defendant to share equally land Parcel No. MAKUENI/KIKUMINI/542.**
  - d) **Costs and interest of the suit.**
  - e) **Any other relief that this Honourable Court deems fit to grant.**
2. Subsequent to the filing of the suit, the Defendants filed a Statement of Defence and Counterclaim dated 29<sup>th</sup> July, 2025 and a notice of preliminary objection of even date. The preliminary objection is based on the following grounds: -

- a) **THAT the Plaintiffs lack locus standi to institute the suit since they are not the legal representatives of the estate of the late Mutiso Kyenze.**
- b) **THAT the prayers sought in the plaint can only be pursued by beneficiaries who have been appointed as legal representatives by the court.**
- c) **THAT the suit herein is therefore a clear abuse of the court process and ought to be struck out with costs.**
3. The preliminary objection was canvassed by way of written submissions.
4. In the Defendants' submissions dated 21<sup>st</sup> November 2025, Counsel identified the sole issue for determination as whether the Plaintiffs have the requisite capacity to institute this suit.
5. Counsel argued that the Plaintiffs' contention is that they have a legal claim over land Parcel No. MAKUENI/KIKUMINI/542 on the basis that the land belonged to their deceased father, Mutiso Kyenze. It was further contended that prayer (b) of the Plaint seeking cancellation of the resultant titles from the subdivision of land Parcel No. MAKUENI/KIKUMINI/542 could only be pursued by the legally appointed administrator of the estate of the late Mutiso Kyenze.
6. Counsel submitted that without evidence to prove that the Plaintiffs are the legal representatives of the estate of the late Mutiso Kyenze, the suit herein is incompetent and hence it should be struck out with costs. Reliance was placed on the case of **Sisilia Nyakoe & another v Attorney General & 4 others [2021] eKLR** to buttress the Defendants' submissions.
7. The Plaintiffs filed their submissions dated 21<sup>st</sup> November, 2025. On their behalf, Counsel identified two issues for determination as follows: -

*a) Whether the Plaintiffs have instituted this suit under representative capacity on behalf of the estate of Mutiso Kyenze; and*

*b) Whether the Plaintiffs have locus standi to institute this suit.*

8. Submitting on the first issue, Counsel contended that the Plaintiffs had brought the suit on their own behalf in pursuit of their own interests as beneficiaries of the suit property held in trust for them by the 1<sup>st</sup> Defendant. Counsel submitted that the Defendants' preliminary objection is improperly raised on the assumption that the Plaintiffs had filed the suit on behalf of the estate of the late Mutiso Kyenze. Counsel maintained that the Plaintiffs had not filed the suit in a representative capacity.
9. Counsel further contended that the title deed of the suit property has never been in the name of the late Mutiso Kyenze but in the name of the 1<sup>st</sup> Defendant. Counsel submitted that the 1<sup>st</sup> Defendant breached his position as a trustee by subdividing family land and selling some portions leaving the Plaintiffs with no other recourse than to sue.
10. Submitting on the second issue, Counsel contended that the Plaintiffs have a direct interest in the suit property which originally belonged to their late father Mutiso Kyenze. It was further contended that the 1<sup>st</sup> Defendant was registered as proprietor of the suit property to hold the same in trust for the beneficiaries of the family of the late Mutiso Kyenze. In view of the foregoing, Counsel submitted that the Plaintiffs have locus standi to institute the suit against the Defendants. Counsel urged the court to dismiss the preliminary objection with costs.
11. The sole issue for determination is whether the Plaintiffs have locus standi to bring the suit herein against the Defendants.
12. The Defendants have sought that the suit herein be struck out on the basis that the Plaintiffs' claim to the suit property is grounded on the fact that they are

beneficiaries of the estate of the late Mutiso Kyenze, who was the legal owner of the land before it was registered in the 1<sup>st</sup> Defendant's name. The Defendants contend that without obtaining a grant of probate on behalf of the Deceased's estate, the Plaintiffs have no locus standi to bring the suit against the Defendants.

13. *Locus standi* is defined in Black's Law Dictionary 9<sup>th</sup> Edn at pg 1026 as follows:-

***“The right to bring an action or to be heard in a given forum.”***

14. In the case **Daykio Plantations Limited v National Bank of Kenya Limited & 2 others [2019] eKLR**, the Court considered the issue of locus standi and ably delivered the following rendition: -

***“It is therefore evident that locus standi is the right to appear and be heard in Court or other proceedings and literally, it means ‘a place of standing’. Therefore if a party is found to have no locus standi, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this Court was to find that the Applicant has no locus standi, then the Applicant cannot be heard and that point alone may dispose of the suit. In the case of Quick Enterprises Ltd ...Vs... Kenya Railways Corporation, Kisumu High Court Civil Case No.22 of 1999, the Court held that:-***

***“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone”.***

***Having now considered the objections raised by the 1<sup>st</sup> Respondent, the Court finds that lack of locus standi can dispose of the matter preliminarily without having to resort to ascertaining of facts.***

*The Preliminary Objection raised by the Defendants fits the description of Preliminary Objection as stated in the Mukisa Biscuit case ( Supra).”*

15. At paragraphs 6 and 7 of the Complaint, the Plaintiffs aver that the suit property land Parcel No. MAKUENI/KIKUMINI/542 is ancestral land having initially belonged to the late Mutiso Kyenze who was the father of the 1<sup>st</sup> Defendant and the Plaintiffs. The Plaintiffs averred that the land was registered in the name of the 1<sup>st</sup> Defendant since their father was deceased and their mother, Wausi Mutiso (Deceased), did not have a national identity card. It is thus their claim that the suit property is ancestral land and the 1<sup>st</sup> Defendant holds the same in trust for the family of the late Mutiso Kyenze.

16. A customary trust is a valid claim to land as noted under Section 28 of the Land Registration Act, 2012 and being an overriding interest, it affects the rights of a registered proprietor of land under Section 25 (1) (b) thereof. Section 25 (1) (b) provides as follows: -

**(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—**

**(a) .....**

**(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.**

17. Section 28 (b) of the Land Registration Act, 2012 outlines as follows:-

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) ... ..

(b) trusts including customary trusts;

18. The burden of proving a customary trust falls on the party alleging it. This position was reaffirmed in the case of Mbui Mukangu v Gerald Mutwiri Mbui [2004] eKLR where the Court of Appeal also weighed in on what entails a customary trust in the following terms:-

*“It was unregistered land held under custom but the tenure changed during the land consolidation process and subsequent registration under the Registered Land Act. It is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations.” [emphasis added]*

19. The Court of Appeal also observed that a claim to land based on a trust must be supported with compelling evidence as stated in the case of Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] KECA 118 (KLR) as follows:-

*“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-*

*“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”*

*See Gichuki vs. Gichuki [1982] KLR 285 and Mbothu & 8 Others vs. Waitimu & 11 Others [1986] KLR 171.”*

20. The question as to whether the Plaintiffs are entitled to shares in the suit property on the basis of a customary trust will depend solely on the nature and quality of evidence they will adduce at the hearing of their case. It is therefore evident from the Plaint and particularly in paragraph 16 that the Plaintiffs are pleading to court to award them their respective shares in the land on the basis of a trust.

21. Section 107 (1) of the Evidence Act outlines as follows: -

**‘Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.’**

22. The upshot of the foregoing is that this court finds that the Plaintiffs have the requisite locus standi to bring this suit on the basis of a subsisting customary trust. In the Plaint, there is nothing to indicate that their claim is tied to the estate of their late father Mutiso Kyenze.

23. Accordingly, the preliminary objection is devoid of merit and the same is hereby dismissed. Costs shall be in the cause.

It is so ordered.

.....  
**HON. E. O. OBAGA**  
**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS  
THIS 16<sup>TH</sup> DAY OF APRIL, 2026.**

**IN THE PRESENCE OF:**

In the absence of parties who were aware of the date of delivery of the same.

Court assistant - Deodata