

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELC APPEAL NO. E024 OF 2024

HENRY NAMU.....1ST

APPELLANT

**CRISPIN MWANIKI MUGO (As the legal representative
of the estate of the late MUGO MUNYAMBU).....**

.....2ND APPELLANT

VERSUS

JOSEPH MBOGO ISHUMAEL.....

RESPONDENT

(Being an appeal from the Judgment of Hon. R.Njoki Kahara
delivered on 22/05/2024 in Siakago SPM-ELC NO. 3 of 2019)

JUDGMENT

1. The Respondent herein was the Plaintiff before the trial court wherein he had sued the Respondents vide an amended Plaintiff dated 15/11/2019. In the said Plaintiff, the Respondent had sought, inter alia, a declaration that the Appellants deceased father, Mugo Munyambu held land parcels Nthawa/Gitiburi/3065 and 3073 in trust for the Respondent; that the Land Registrar Mbeere District be ordered to cancel the names of Henry Namu and Crispin Mwaniki Mugo registered as proprietors of the said parcels of land and they be registered in the name of the Respondent.

2. It was the Respondent's contention that his late father was a member of Gachugu clan whose chairman was Mugo Munyambo, the Appellants father. He averred that the late Mugo Munyambu was the registered proprietor of the suit lands herein to hold in customary trust for the Respondents late father, Ishmael Ndebe Njau and his family. He averred that the suit lands were clan land and were registered in the name of the late Mugo Munyambu as he was the chairman of the Gachugu clan in accordance with Kimbeere traditions and customs.
3. He stated that prior to his death, his late father had agreed with the late Mugo Munyambu that he would transfer the suit lands to the Respondent and that the late Mugo had applied for the Land Control Board Consent to transfer the suit lands to the Respondent. The Respondent further stated that after the death of Mugo Munyambu, the Appellants who are his sons misled the succession court to grant them the suit lands vide Embu High Court Succession Cause No. 640 of 2014 and that the Appellants have failed to transfer the said parcels of land to the Respondent despite demand and notice of intention to sue. He stated that together with his family they reside, cultivate and have developed the suit lands and they face the danger of being evicted.
4. The Appellants in their statement of defence dated 02/03/2020 averred that as the administrators of the estate of their late father Mugo Munyambu, they have reserved

parcel no. Nthawa/Gitiburi/4793 measuring 1.21 Ha which is a resultant subdivision of parcel no. 3073, for the Respondent, and that they are ready and willing to execute the transfer documents in his favour. They denied that the Respondent has lived and developed land parcel 3065 for over 12 years or that he is entitled to 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 Joseph Mbogo Ishumael adopted his witness statement dated 20/02/2017 and a further statement dated 15/11/2019 as his evidence in chief. In his statement, he stated that the late Mugo Munyambu was the registered owner of Nthawa/Gitiburi/2018 which was over 100 acres, to hold in trust since he was the chairman of their clan. That the said parcel of land was to be subdivided into 4 portions and his late father Ishmael Ndebe Njau was to get 16.86Ha out of the said land. He averred that his late father's portion of land was again sub divided by the late Mugo Munyambu under his father's supervision to be distributed to his sons and one daughter.
7. He averred that all the sons and daughter were transferred their portions of land after the late Mugo Munyambo obtained the respective Land Control Board Consent on 05/05/1993. He averred that the late Mugo Munyambo applied for a consent to transfer parcels No. 3073 and 3065

to him but he died without the consent having been granted. He stated that he has lived and developed the said parcels of land and that the parcel of land the late Mugo Munyambo stated in his defence that he was willing to give him, being Nthawa/Gitiburi/3549 is registered in the name of a third party one David Gichovi Nyaga.

8. He produced in evidence minutes of the meeting of the Land Control Board held on 06/08/2008, 10/08/2011 and on 14/09/2011, a bundle of letters, an application to file a claim in the Land Disputes Tribunal over land parcel 3065, a letter of consent dated 05/05/1993 and a mutation form dated 22/05/2008.
9. PW2 Kimotho Munyambu adopted his witness statement dated 15/09/2019 as his evidence in chief. He stated that he comes from the same clan as the Respondent and that the late Mugo Munyambu was his brother and their clan chairman in charge of clan land. He averred that after land adjudication, his said brother asked him to help in sub division of parcel 2018 which was part of clan land so that the Respondent's father could get his share and distribute it among his children.
10. He stated that the Respondents father died before the late Mugo Munyambu could transfer the respective parcels of land to the Respondent and his siblings. He stated that the Respondent lives in parcel No. 3065 measuring approximately 6 acres and that he is also entitled to land

parcel 3073 measuring approximately 0.05 Ha. He stated that the Appellants should transfer the suit lands to the Respondent since as a clan they gave them their own parcels of land.

11. DW1 Henry Namu adopted his witness statement dated 02/10/2020 as his evidence in chief. He stated that he is the legal representative of the estate of the late Mugo Munyambu and that the 2nd Appellant is his brother. He averred that the late Mugo Munaymbu died on 28/03/2013 and that he belonged to the Gacugu Clan. That the Respondent's father belonged to the Ngithi Clan and therefore their families were therefore not clansmen. He denied that his father held the suit lands in trust. He averred that with his brother, they filed a succession cause and distributed the estate of the deceased to the rightful beneficiaries and that the Respondent was not one of the beneficiaries.

12. He further stated that his late father in his oral will desired to transfer 3 acres out of his land parcel 3065 to the Respondent because he had given the Respondents father to live on that portion of land and that the deceased had also been willing to transfer land parcel 3073 to the Respondent. He maintained that they were willing to transfer land parcel 4793 measuring 1.15Ha where the Respondent lives and which resulted from the subdivision of land parcel 3065, and further transfer the whole of land parcel 3073 to honour the

wishes of their father. He denied that their father had applied for a Land Control Board Consent.

13. He produced in evidence, a grant of letters of administration and certificate of confirmation of grant in Embu Succession Cause No. 640 of 2014, applications for consent of Land Control Board in respect of land parcels 3065 and 3073 and a mutation form in respect of land parcel 3065.

14. DW2 Cyprian Njeru Ndebe adopted his witness statement dated 02/10/2020 as his evidence in chief. He stated that the Respondent was his brother and that their late father belonged to the Ngithi Clan while the Appellants father belonged to the Gacugu Clan. He averred that their father never owned any land in Gacugu Clan or within Nthawa Gitiburi Adjudication Section where they live. He averred that they live on land that was gifted to them by the Appellants father the late Mugo Munyambu who is their distant grandfather and that is where the Respondent lives with his family. He averred that the suit lands belong to the Appellants family.

15. The record shows that on 9/2/2022 the parties through their advocates entered in to a consent that was adopted and recorded by the Court in the following terms:

1. That the defendants do transfer land parcel no. Nthawa/Gitiburi/3073 and Nthawa/Gitiburi/4793 to the plaintiff.

2. That the plaintiff's prayer (bb) in the amended plaint be further amended to read parcel no. Nthawa/Gitiburi/4794 instead of parcel no. Nthawa/Gitiburi/3065.
3. That the plaintiff would remove all the restrictions he had placed on all land parcels relating to the estate of the deceased Mugo Munyambu.
4. That the plaintiff's claim on land parcel no. Nthawa/Gitiburi/4794 do proceed for hearing.
5. That the matter be referred to court annexed mediation.
6. That a prohibitory order be issued and be registered over land parcel No. Ntahwa/Gitiburi/4794 pending the hearing and determination of the contested claim.
7. Upon analysing the suit, the trial Court in its judgment dated 22/05/2024 identified the main issue for determination as whether the Respondent was also entitled to land parcel No. 4794, being the remaining resultant parcel from the original land parcel No. 3065, so as to make his total entitlement six (6) acres. The Court found that the Respondent's evidence was that parcel No. 4794 formed part of the land given to his deceased father, Ishumael Ndebe Njau, by the Gacugu Clan, and that he relied on minutes of three Land Control Board meetings held on 6/8/2008, 10/8/2011 and 14/9/2011 showing that the late Mugo Munyambu had booked the

Board with the intention of transferring parcels Nos. 3065 and 3073 to the Respondent, although the transfers were deferred on the three occasions as the late Mugo Munyambu appeared to have changed his mind.

8. The Court further found that the Respondent's case was that the late Mugo Munyambu had been tasked by the Respondent's deceased father to subdivide and transfer his share of land to all his sons and that, while the late Mugo Munyambu transferred land to the Respondent's other siblings, he did not transfer the Respondent's portion before his death. The Court accepted the evidence of PW2, a brother to the late Mugo Munyambu, that parcel No. 3065 was a share belonging to the Respondent's deceased father and that the Respondent's father had been incorporated into the Gacugu Clan in accordance with customary practices.
9. The Court considered the Appellants' evidence that their late father had orally indicated that the Respondent was only entitled to three (3) acres and that they were therefore willing to transfer parcel No. 4793 to the Respondent, as well as the evidence of DW2, the Respondent's brother, that the land belonged to the late Mugo Munyambu and that the Respondent's father did not own land within the Gacugu Clan. The Court further found that it was not in dispute that the Respondent and his family had occupied and utilized the suit land for many years and that neither the late Mugo Munyambu nor the Appellants had ever sought to evict the

Respondent from the land, including by way of a counterclaim.

10. The Court found PW2, an elderly witness who had participated in the subdivision of clan land, to be credible and to have direct knowledge of the history and origin of the suit land, and held that although the exact discussions between the deceased persons could not be known, the late Mugo Munyambu never asked the Respondent to vacate the land and the Respondent had continuously lived on and utilized the land with his family.
11. On the basis of PW2's evidence, the Court found that the late Mugo Munyambu held land parcel No. 3065 in trust for the Respondent and, since the Appellants had already agreed to transfer parcel No. 4793 to the Respondent, held that the Respondent had proved his case on a balance of probabilities. The Court therefore entered judgment for the Respondent, held that he was also entitled to land parcel No. 4794, ordered the cancellation of the Appellants' names from the register in respect of that parcel and directed that it be registered in the name of the Respondent.
16. The Appellants' were aggrieved with the impugned decision and preferred the present Appeal on the following grounds;
 - a. That the Learned Trial Magistrate erred both in law and fact when she held that the late Mugo Munyambu held and was registered as the proprietor of land parcel No.

- Nthawa/Gitiburi/3065 in trust for the Respondent without any sufficient evidence.
- b. That the Learned Trial Magistrate erred both in law and fact by disregarding the fact that the late Mugo Munyambu had expressed in his oral will that the Respondent's entitlement to land parcel No. Nthawa/Gitiburi/3065 was 3 acres only and not the whole of 6 acres.
 - c. That the Learned Trial Magistrate erred both in law and fact by giving a lot of unnecessary weight to the evidence of Kimotho Munyambu (PW2) upon which the Court wholly relied on to reach its erroneous decision.
 - d. That the Learned Trial Magistrate erred in law when she found that both the late Mugo Munyambo and the Appellants had never tried to evict the Respondent from the suit land or file a counterclaim to evict him, and disregarded the fact that the Respondent was entitled and was occupying and cultivating part of the suit land parcel No. Nthawa/Gitiburi/3065, which the appellants admitted to be 3 acres and not the whole of the said land which measured 6 acres, and which land had not been subdivided.
 - e. The Learned Trial Magistrate erred both in law and fact by finding that the Respondent lived on and occupied and was cultivating the whole of the original land parcel No. Nthawa/Gitiburi/3065 (before subdivision) without

- sufficient evidence and disregarding the overwhelming evidence that the Respondent in fact lived on and cultivated only part of land parcel No. Nthawa/Gitiburi/3065 which upon subdivision was land parcel No. Nthawa/Gitiburi/4793 and which portion the Appellants were willing to transfer to the Respondent.
- f. That the Learned Trial Magistrate erred both in law and fact by making orders to cancel registration of land parcel No. Nthawa/Gitiburi/4794 when in fact the same has never been registered in the name of the Appellants.
 - g. That the Learned Trial Magistrate erred in law by disregarding the written submissions filed on behalf of the Appellants.
 - h. That the Learned Trial Magistrate erred and misdirected herself in law by delivering a judgement that was against the weight of evidence adduced and by giving undue emphasis and weight to the evidence adduced by the Respondent and his witness.
17. The Appellants sought to have the appeal allowed, the Judgement of the trial Court set aside and be substituted with an order dismissing the Respondents suit and that costs of the Appeal and the lower court suit be awarded to the Appellants.
18. When the appeal came up for directions, the parties agreed to canvass the appeal by way of written submissions. The Appellants

filed submissions through the firm of Njeru Ithiga & Company Advocates dated 30/09/2025.

19. They submitted that a customary trust is a question of fact and has to be proved by evidence. They cited the cases of Gichuki versus Gichuki Civil Appeal No. 21 of 1981 and Juletabi African Adventures Ltd & another versus Christopher Michael Lockey (2017) Eklr to support that position. They submitted that the Respondent failed to produce any documentary evidence in support of his claim that a customary trust existed over the suit parcels of land and that the Respondent had failed to prove his claim on a balance of probabilities.
20. The Respondent filed submissions dated 27/10/2025 through the firm of Joe Kathungu and Company Advocates. He submitted that the trial Court's Judgment was sound, well-reasoned, fair and in accordance with the law. He maintained that the Appellants had not proved any of the grounds of his appeal and therefore the appeal ought to be dismissed with costs.
21. Having considered the record of appeal and the respective submissions of the parties, the sole issue for determination is whether the appeal has merit.
22. It is noteworthy that, by the consent recorded on 09/02/2022, the parties narrowed the dispute and expressly agreed that the only issue remaining for determination

before the trial court was whether the Respondent was entitled to land parcel No. Nthawa/Gitiburi/4794. It is common ground that land parcel No. Nthawa/Gitiburi/4794 is one of the resultant subdivisions of the original land parcel No. Nthawa/Gitiburi/3065, the other being land parcel No. Nthawa/Gitiburi/4793, which had already been awarded to the Respondent pursuant to the said consent.

23. During the hearing, the 1st Appellant admitted that the Respondent and his wife occupied the whole of land parcel No. Nthawa/Gitiburi/3065 and were cultivating the entire portion. He further testified that land parcel No. 3065 was sub divided into parcels Nos. 4793 and 4794, each measuring approximately 3 acres, as the Respondent was only entitled to three (3) acres out of land parcel 3065 according to their late father. The 1st Appellant also admitted that the Respondent's father had been assimilated into their Gacugu Clan through the payment of goats. The trial court was satisfied that the Respondent's father had indeed been assimilated into the clan, and this Court finds no reason to interfere with that finding.

24. Further, it was clear that the Appellants claim that their late father intended to allocate the Respondent only three (3) acres out of land parcel 3065 was not supported by any evidence. On the contrary, the Respondent's claim that he was entitled to the whole of land parcel No. Nthawa/Gitiburi/3065 was corroborated by the evidence of

PW2 Kimotho Munyambu, who was the brother to the Appellants' father, who testified that land parcel 4794 constituted part of the share belonging to the Respondent's deceased father. The trial court accepted the testimony of PW2 and expressly found him to be a credible witness, having observed his demeanour. Bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses testify, this Court finds no basis upon which to interfere with that assessment of credibility.

25. It is also noteworthy that the Appellants, by consent, agreed to transfer to the Respondent the other parcels of land which formed part of his claim. In the totality of the evidence, this Court is not persuaded that the trial court misdirected itself in any material respect, and it is satisfied that the Respondent proved his entitlement to land parcel No. Nthawa/Gitiburi/4794 on a balance of probabilities.

26. The Court finds that the appeal lacks merit and it is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT EMBU THIS 16TH APRIL, 2026.

HON. E.C CHERONO
ELC JUDGE, EMBU

In the presence of;

1. Mr. Joe Kathungu for the Respondent

2. M/S Mwinja H/B Mr. Njeru Ithiga for the Appellant
3. Diana Kemboi C/A