



**Ita & 2 others v Njeru (Environment and Land Appeal E026 of 2023)
[2026] KEELC 2611 (KLR) (30 April 2026) (Judgment)**

Neutral citation: [2026] KEELC 2611 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E026 OF 2023
EC CHERONO, J
APRIL 30, 2026**

BETWEEN

AUGUSTINE KINYUA ITA 1ST APPELLANT

SELINA MUTHONI 2ND APPELLANT

ITA NGURU 3RD APPELLANT

AND

ELIUD NJERU RESPONDENT

(Being an appeal from the Judgement of Hon. J.A Otieno (SRM) delivered on 16/11/2023 in Embu MCCC Case No. 42 of 2023 Eliud Njeru versus Augustine Kinyua Ita and 2 others)

JUDGMENT

1. The Respondent herein was the Plaintiff before the trial court wherein he had sued the Appellants vide a Plaint dated 18/02/2013. In the said Plaint, he claimed that he was the registered owner of land parcel Mbeere/Kirima/2999 since 2008 in absolute and that the title was not subject of any overriding interests. He averred that the Appellants had without justification encroached on the said land, built structures and purported to dwell thereon without his authority. He sought to have them evicted from the suit land and to be awarded damages for trespass.
2. The Appellants filed an amended defence and counterclaim and averred that the Respondent was the registered proprietor of the suit land but that he held the land subject to a customary trust. In the Counterclaim, the Appellants averred that the suit land was part of a block of land known as Block 2244 which Block belonged to seventeen clans of the Mbeere tribe and which clan included the Ngithi clan that they were members of. They averred that they moved and settled on part of the Block in 1987 by virtue of being members of the Ngithi clan and that sometime in 2008, the said Block 2244 was converted into private land without following the lawful procedure. They averred that the suit land was excised from the said Block and registered in favour of the Respondent as proprietor on 16/07/2008



- and that at the time of registration, the Respondent was aware of their occupation and possession of the said land.
3. They sought inter alia, a declaration that they were in lawful occupation of the suit land; annulment of the registration of the suit land and an order that the Respondent transfers the suit land to them within 30 days failure to which the transfer be executed by the Court Administrator.
 4. The Respondent filed a reply to the defence and counterclaim and denied the Appellants claim that they moved to the suit land in 1987. He averred that they trespassed into the land sometime in the year 2010. He averred that he was a member of the Irumu Clan of Mbeere tribe and that the Appellants belonged to the Ngithi Clan of the Mbeere tribe. He stated that land parcel 2999 was a subdivision of land parcel 2962 which was also a sub division of Block 2244. That, Block 2244 comprised of 7,000 Acres of land which had been leased to the Meka sisal Development Company and by the demarcation process, the said 7,000 Acres were designated as Mbeere/Kirima/2244 which was registered to the 17 clans of the Mbeere tribe.
 5. He averred that each clan was to file an appeal before the Minister for lands claiming their particular parcel of land and that the chairman of the Irumu Clan lodged appeal No. 148 of 1996 whereas the chairman of the Ngithi clan one Munyi Mbiti lodged Appeal No. 149 of 1996. He averred that his clan the Irumu Clan was awarded land parcel 2962 while the Ngithi Clan that the Appellants belong to were awarded land parcel 3368. He contended that upon subdivision of land parcel 2962, he was given land parcel 2999 as a member of the Irumu Clan. He maintained that the Appellants as members of the Ngithi Clan have interest and claim in the land parcel 3368 which was awarded to their clan and not the suit land which belongs to him. He urged that the Appellants had no cause of action against him and urged that the Counterclaim be dismissed.
 6. When the former suit came up for directions, the parties agreed to proceed with the hearing by way of viva voce evidence.
 7. PW1 Eliud Njeru adopted his witness statement dated 08/02/2021 as his evidence in chief. He stated that the suit land was excised from Mbeere/Kirima/2962 which was excised from Block 2244 that was owned by the seventeen clans. He maintained that the Appellants trespassed the suit land in 2010. On cross examination he stated that he did not have any evidence that the Appellants trespassed into the suit land in 2010 and stated that the chief's letter that the Appellants moved to the land in 1987 was false. He stated that he purchased the suit land from the Irumu Clan and he was issued with a title deed on 03/10/2008.
 8. He produced in evidence, a copy of a demand letter dated 30/01/2012, a certified copy of the register for land parcel 2244, a copy of the title for land parcel 2999, a certified copy of the green card for land parcel 2962, proceedings in Objection no. 172/83, 372/83 and 1130/83 over land parcel 2244, letters dated 27/01/1983 and 21/07/1972, County Council of Embu Minutes for the meeting held on 12/10/1992, copy of the High Court Judgement in Judicial Review Case No. 5 of 2009, and a copy of a ruling in Civil Application No. 310 of 2010.
 9. PW2, James Njeru Muriithi the former chairman of the Irumu Clan adopted his written statement dated 08/02/2021. He confirmed that land parcel 2999 was allocated to the Respondent by the Irumu Clan. He averred that the Appellants who were in occupation of the land allocated to him being land parcel 2998, quickly moved to the Respondents land after he ordered them to vacate.
 10. DW1, Augustine Kinyua Ita adopted his written statement as his evidence in chief. He stated that the Respondent was not a member of the Mbeere Tribe. He further stated that he was not consulted on the subdivision of Mbeere Block 2244 which was community land or on the subsequent subdivision.



- He stated that the Respondent had never utilized the suit land whereas they had been in possession of the land since 1987. On cross examination, he stated that he had not exhibited any developments on the suit land. DW2 Selina Muthoni and DW3 Ita Nguru mainly corroborated DW1'S testimony.
11. DW1 produced in evidence a letter by the Chief Mavuria location dated 11/03/2013, the green card for land parcel 2244, 2962 and a memorandum to the DC Mbeere District.
 12. Upon analyzing the suit, the trial Court in its judgment found that the Respondent had on a balance of probabilities, reasonably established that he acquired the suit land procedurally and legally. The Court also found that there was no sufficient evidence to prove that the Respondent held the suit land under a customary trust. The Court dismissed the Appellants counterclaim and allowed the Respondents suit and ordered that the Appellants vacate the suit land within 90 days from the date of the judgement or be evicted from the land. The Court did not grant any orders as to general damages. Costs were awarded to the Respondent.
 13. The Appellant was aggrieved with the impugned decision and preferred the present Appeal on the following grounds;
 1. That the Learned Magistrate erred in law and fact by finding that the Respondent acquired land parcel No. Mbeere/Kirima/2999 procedurally and legally.
 2. That the Learned Magistrate erred in law and fact by finding that the Appellants possessory rights did not override the Respondent's proprietary rights and interests.
 3. That the Learned Magistrate erred in law and fact by abrogating and failing to give effect to Article 10(2), 21(3), 43 and 63 of *the Constitution* of Kenya 2010; section 37 of the *Land Act* 2012, Section 8 of the *Land Registration Act* 2012, and the *Community Land Act* 2016 and thereby promoted destitution and landlessness contrary to public policy.
 4. That the Learned Magistrate erred in law and fact by dismissing the Appellant's Counterclaim.
 5. That, in the circumstances of this case, the judgment resulted in a manifest miscarriage of justice.
 14. The Appellants sought to have the decree of the trial Court set aside, the appeal and counterclaim be allowed and the Respondents suit be dismissed with costs to the Appellants.
 15. When the appeal came up for directions, the parties agreed to canvass the appeal by way of written submissions. The Appellants filed submissions dated 19/11/2024 and supplementary submissions dated 17/02/2026 through the firm of Mwaniki Gachuba Advocates.
 16. The Appellants submit that the Respondent's acquisition of Mbeere/Kirima/2999 was unlawful, as the land originated from Mbeere/Kirima/2244, which was community (trust) land belonging to different clans of the Mbeere tribe. They argued that under the repealed Constitution, Trust *Land Act*, and *Land Adjudication Act*, registration of individual titles required approval by the County Council of Embu and incorporation of group representatives, which was not demonstrated by the Respondent. They emphasized that no evidence was tendered by the Respondent to demonstrate that the purported registration of the suit land followed the procedure that was set out under section 115 and 116 of *the Constitution* of Kenya (repealed), section 23(2)(5)(c) of the *Land Adjudication Act* and the Land (Group Representatives) Act cap 287 (repealed) or section 6(1)(2) of the *Land Control Act* or payment of stamp duty rendering the title defeasible under Article 40(6) of *the Constitution* of Kenya, 2010.
 17. The Appellants further contended that their possessory rights override the Respondent's proprietary rights. They maintained that they have been in occupation of the suit land since 1987 as members of



- the Ngithi Clan, which was corroborated by the local chief's letter. They argued that their occupation was lawful under the Trust Land Act and amounts to overriding interests under Section 30(g) of the Registered Land Act (repealed) and Section 28(b) of the Land Registration Act, 2012. They argued that the trial Court fell into error by failing to find and declare that they are entitled to the suit land as of right.
18. The Appellants, in their supplementary submissions, relied on Section 28 and 30(g) of the repealed Registered Land Act and Sections 25 and 28(b)(j) of the Land Registration Act, which recognize overriding interests in land and argued that the Respondent was not an absolute and indefeasible owner of the suit land as there exists a customary trust over the land by dint of the Appellant's actual possession or occupation of the land which override the Respondents proprietary interest in the land. They maintained that they were not trespassers on the land, as their occupation predates the first registration of the land and that their rights are protected under Section 69 of the repealed Trust Land Act and Section 115(2) of the repealed Constitution. They urged that the appeal be allowed.
 19. The Respondent filed submissions dated 27/02/2025 through the firm of Duncan Muyodi and Company Advocates. He submitted that he is the absolute and indefeasible proprietor of land parcel Mbeere/Kirima/2999, having acquired it lawfully through the land adjudication and demarcation process from the larger Mbeere/Kirima/2244, which was subdivided among the 17 clans of the Mbeere tribe. He argued that the Appellants only trespassed onto the land in 2010, long after his registration in 2008, and therefore could not claim overriding interests. He relied on Article 40 of the Constitution and Sections 24, 25, and 26 of the Land Registration Act, which vest absolute ownership in a registered proprietor, subject only to fraud, misrepresentation, or illegality, none of which the Appellants allegedly proved.
 20. The Respondent further submitted that the Appellants' claim of customary trust was unsubstantiated, as they belong to the Ngithi Clan, which was allocated a different parcel (Mbeere/Kirima/3368), and not the Irumu Clan's land parcel Mbeere/Kirima/2962 from which Mbeere/Kirima/2999 was derived. He emphasized that the Appellants failed to demonstrate any entitlement to his parcel and that their occupation could not amount to overriding interests. He maintained that the Appellants were trespassers who interfered with his proprietorship, failed to prove their counterclaim, and should be evicted.
 21. Having considered the record of appeal and the submissions by the parties, the issues for determination are:
 1. Whether the Respondent acquired Mbeere/Kirima/2999 procedurally and legally.
 2. Whether the Appellants established a valid customary trust.
 22. It is not in dispute that the original land parcel Mbeere/Kirima/2244, measuring approximately 7,000 acres, was land that belonged to seventeen clans of the Mbeere tribe. The land was declared to belong to the seventeen clans through objection proceedings which the Respondent produced in evidence. Through the objection proceedings, the Respondent demonstrated that the land had initially been surrendered by the seventeen clans to an Asian company for the cultivation of sisal and tobacco through the Embu County Council, which was registered as trustee. It was further shown that the land was later reverted back to the Embu County Council following a directive by the then President, the late Daniel arap Moi, requiring the Asian company to surrender the land back.
 23. The area in which the land was situated was subsequently subjected to adjudication, and the dispute as to whether the land belonged to the clans or to the County Council was determined through the objection proceedings where it was ultimately declared to belong to the seventeen clans. The



Respondent produced evidence in form of the green card for the said land parcel 2244 which showed that it was later subdivided into Mbeere/Kirima/2855, 2958 and 2962. Land parcel 2962 was registered in favour of James M. Mubothi (representing the Irumbe Clan) on 07/04/2008 and was on 16/07/2008 subdivided to give rise to land parcels 2979-3023, out of which the Respondent was registered as the proprietor of land parcel Mbeere/Kirima/2999. The Respondent was therefore able to prove how he came to be registered as the proprietor of the suit land.

24. The Appellants on the other hand, did not adduce any evidence to show that they had any claim to the land. The letter they produced by the Chief merely confirmed that they were residents of his area of Mavuria Location since 1987, but did not state that they were in occupation of the suit land. Their claim that they had an interest in the suit land by possession and occupation since 1987 was therefore not proved through any documentary evidence. The trial court therefore rightly concluded that the acquisition of the suit land by the Respondent was both procedural and lawful.
25. Concerning the issue of customary trust, although customary trusts are acknowledged under Section 28(b) of the *Land Registration Act*, the Appellants did not satisfy the evidentiary threshold set out in *Kiebia v M'lintari & another* (Petition No. 10 of 2015) [2018] KESC 22 (KLR) which established the guiding principles for proving a claim founded on customary trust, namely that:
 - i. The land in question was before registration, family, clan or group land.
 - ii. The claimant belongs to such family, clan, or group
 - iii. 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.
 - iv. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
 - v. The claim is directed against the registered proprietor who is a member of the family, clan or group.
26. In the present case, the Appellants confirmed before the Court that they belong to the Ngithi Clan, whereas the suit land was allocated to the Irumbe Clan. They therefore failed to demonstrate any nexus between their clan and the land in question to sustain a claim founded on customary trust.
27. The appeal therefore lacks merit and it is hereby dismissed in its entirety. The judgment of the trial Court dated 16/11/2023 is upheld.
28. Costs of the appeal are awarded to the Respondent.

DATED, SIGNED AND DELIVERED AT EMBU THIS 30TH DAY OF APRIL, 2026.

HON. E. C. CHERONO

JUDGE

In the presence of;

Mr. Muikamba H/B for Mr. Gachuba for the Appellant

Mr. Okwaro for the Respondent

Diana Kemboi C/A

