

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ELCA NO E016 OF 2024

CHARLES WAMBUGU
NGURE.....APPELLANT

VERSUS

CHRISTOPHER MAHIGO
KIRAGU.....RESPONDENT

JUDGMENT:

*(Being an appeal from the Judgment of Hon Nthuku- SPM
Ol-kalou ELC NO. E011 OF 2023 delivered on 5/9/2025 at
the SPM Court's in Ol-kalou SPM'S Court)*

The Respondent, having taken out letters of Administration *Ad litem* in respect of the Estate of his father, Stephen Kiragu Ngure, filed a suit against the Appellant, Charles Wambugu Ngure, his uncle (a brother to his late father). He avers that his late father is the registered proprietor of the parcel of land L.R No NYANDARUA / KIRIMA/138 measuring approximately 3.0 Hectares where he (the Respondent) resides as a farmer and from where the Appellant started evicting him and his family when his (Respondent's father) died.

The Appellant placed a caution against the suit land on 28/7/2017 which still existed as at the time of filing the suit in the lower

Court. The Appellant in April and June 2023 started destroying the crops planted on the suit land and planted thereon which amounted to trespass. This cause of action arose in Gatondo Location of Nyandarua County. He therefore prayed for the following orders: -

- a. That Plaintiff's (Respondent's) father is the legal owner of all that parcel of land known as L.R No. NYANDARUA/KIRIMA/138 measuring approximately 3.0 Hectares.
- b. That the actions of the Defendant (Appellant) amounts to trespass of L.R No. NYANDARUA/KIRIMA/138.
- c. General damages for trespass.
- d. The Defendant (Appellant) to cause the removal of the caution registered against L.R No. NYANDARUA/KIRIMA/138.
- e. General Damages for destruction of food crops planted by the Plaintiff (Respondent).
- f. Costs of the suit and interest at Court rates.
- g. Any other relief the Court may deem just to grant.

A Motion was filed by the Respondent for an order of temporary injunction restraining the Defendant (the Appellant), his agents and/or persons claiming under his name from entering into, remaining on and/or cultivating the Plaintiff's (Respondent's) parcel of land L.R No NYANDARUA/KIRIMA/138 measuring approximately 3.0 Hectares and of course costs attendant to the Application. The same was brought under Certificate of Urgency. The Application was certified urgent by the

Honourable R. Yator, S.P.M. on 13/7/2023. The same was opposed by the Appellant and then denied with the Court only granting an order of status quo to remain in force until the hearing and determination of the suit. This was on 26/10/2023.

The Court further ordered each party to remain, reside and cultivate the portion of land they were in before the institution of the suit without any of them encroaching onto the other's portion.

The Defendant (Appellant) filed a Statement of Defence on 19/10/2023 and denied the contents of the Plaint where he said that the parcel of land was originally allotted to his late father, Kiragu Ngure alias Ngure Kabui in 1966 and he took immediate possession of the same and that both families occupy different parts of the suit property. He further said that his late father Kiragu Ngure Kabui apportioned the suit property amongst his sons viz. Symon Karitu Ngure, Charles Wambugu Ngure, Stephen Kiragu Ngure and John Monjoria Ngure to cultivate. But after about 2 years, John Monjiria Ngure and Symon Karitu Ngure moved out and gave their portions to Stephen Kinyua Ngure and the Defendant (Appellant) to farm and that their father remained on his portion.

He later gave his portion to Stephen Kiragu Ngure and that his (Respondent's) father continued farming the land and residing thereon till he died in 1989.

He further averred that there existed customary trust over the land which was created even with the land being registered as belonging to the late Stephen Kiragu Ngure. He further held that he had cultivated the land for over 40 years where he enjoyed continued, peaceful, quiet and uninterrupted possession of the same and that the Respondent wanted to disinherit them. He further said Title to the land by the late Kiragu Ngure was now null and void. He finally pleaded that the suit is vexatious, frivolous, lacking in merit, abuse of the Court process and should be dismissed with costs and that it was brought without any Demand Notice.

The Hearing of the case commenced on 4/4/2024 when PW1 Christopher Mahingo, the Respondent herein took to the witness box. He said the case involved a parcel of land NYANDARUA/ KIRIMA/138 belonging to his late father whose death certificate he produced in Court together with a copy of Title Deed for the land and Green Card in respect thereto as well as Demand letter. He said that Charles Wambugu, the Appellant was his uncle. But that the latter has never built on the suit land nor lived on it. He also said he had 2 other uncles who have their own parcels of land.

In 2022 the Appellant started encroaching on the suit land by planting crops thereon yet he has 40 Acres elsewhere. The Respondent said the land had not yet been transferred from their late father's name to them, the Deceased's children. He prayed that the Appellant be restrained from interfering with

the land which matter he had already reported to Gatondo Police Station. He further produced documents as follows: -

- a. Copy of Title Deed for L.R. No. NYANDARUA/KIRIMA/138.
- b. Copy of the Green Card for the same.
- c. Chief's letter dated 20/6/2023.
- d. Demand letter dated 21/6/2023.
- e. Copies of receipt in the name of Stephen Kiragu Ngure dated 5/6/1995 in respect to the land.
- f. Demand Notice for loan arrears dated 20/12/1989.
- g. Receipt for loan repayment of Kshs 6,550/- dated 6/11/1989.
- h. Receipt for loan repayment of Kshs 776 dated 30/12/1991.
- i. Copy of limited Grant *Ad litem* dated 3/7/2023.

On cross-examination by Mr Wahome for the Appellant, the Respondent said that the Title Deed reads No. 138 but physically it was 324 and that his father died in 2020 after the Title Deed was issued to him in 1995. He said his father had 4 brothers. Charles, the Appellant, was his father's younger brother.

His father was the third born and that he had no information that the land had been allocated to his grandfather. His uncles have never lived on the suit land and that when he reported the matter to the police, no action was taken. Also, his uncles have never invited him and his siblings for a discussion over the ownership of the suit land.

On re-examination by his counsel, Mr Mahingo said that the land was a product of a settlement scheme allocated to his father and

not to his grandfather. It was not family land and that the land cannot be part of a succession cause because of the caution placed against it.

This was the close of the Respondent's case opening the door for the Defendant's (Appellant's) case. Upon a successful Application to re-open the case and recall the Plaintiff (Respondent) to produce the Grant of letters of Administration *Ad Litem*, a copy of the Limited grant *Ad Litem* dated 3/7/2023 was produced in Court on 6/6/2024 and the Respondent's case finally closed paving the way for the evidence of DW1 Charles Wambugu, the Appellant. Besides producing the following documents: -

1. Minutes of family meeting of 23/9/2013 drawn at the chief's office.
2. Application for registration of a caution dated 27/7/2017.
3. Letter from the Assistant County commissioner.
4. Letters from the Divisional CID officer Kipipiri dated 10/7/2018, 10/8/2018 and 8/9/2018.
5. Witness Statement of Symon Karitu Ngure recorded at DCI, Kipipiri on 5/8/2020.

the witness described himself as the nephew of the Respondent. In his statement, the Appellant recalled that in 1966, the suit property was allocated to his father, Ngure Kabui for which he (Kabui) paid Kshs 500/- before taking possession of the land where he built his residence and started using the land for farming. He later sub-divided the land and gave portions meant

for farming to his sons Symon Karitu Ngure, Charles Wambugu Ngure, Stephen Kairungu Ngure and John Munjoria Ngure.

After about 2 years later, John Munjoria and Symon Karitu moved away and left their portions to Stephen Kiragu Ngure and the Appellant but their father remained on his portion. His wife then deserted him and unable to cultivate his portion, he took only $\frac{3}{4}$ Acre of the property and left the other portion to Stephen Kiragu Ngure to farm as he had a bigger family. His father, Ngure Kabui continued to cultivate his portion until he died in 1989 leaving Stephen and himself on the land. The former died in 2010. Grace Wambui Kiragu, widow of Stephen Kiragu demanded that the Appellant would be given part of the land only after parting with Kshs. 13,000/- she was owed which the Appellant said that he paid to her later on 30/5/2014. She denied having been paid but later admitted this in the presence of the Divisional CID Officer that the land did not belong to their late husband but she still refused to sub-divide it.

The CID Officers never gave them the Report of his investigations. He finally said that his father Kabui was buried on the suit land.

On cross-examination by Mr. Gathumbi for the Respondent, the witness said that he was born in 1952 and that his father was allocated the land in 1966. He said that although his father paid Kshs. 500/= for the land, he did not have a receipt for the same. He said he started cultivating the land in 1972. He said although the land was divided amongst the 4 sons, he didn't have the

mutation. The land is 7½ Acres and that he and his brother have not built their homes thereon and that his father died in 1989. He also said he stayed on a 28-Acre land in Kirima. He said he has been using 3/4 of an Acre since 1972. He said that the Kshs. 13,000/= he paid to Grace Kiragu was for a plot they jointly owned.

On re-examination, he said that the Title in Nairobi belonged to Ngure Kiragu (who was his father) and Stephen Kiragu Ngure.

DW2 - Mathaga Gathigi Wangui adopted his Statement dated 18/10/2024 as his evidence in chief. In the said Statement, Wangui said that in the 1960's he worked at Salient as a tractor driver in a European farm together with the late Ngure Kabui, the Appellant's father and the Respondent's grandfather.

In 1973, he took the Appellant's father to the land the latter had been allocated where he moved to from the village where he previously lived. He took possession and continued living and cultivating thereon. In 1973 the Appellant and the Respondent's father were given the land by their late father but upon the latter's death it is the Respondent's father who unlawfully obtained Title documents over the said suit property. He said he was aware the Appellant has been farming on his portion of the suit property to date. His land neighbours the suit property and therefore he has been able to personally observe the dealings thereon. He said that he is the one who showed the Appellant's father the land which was No. 324. Ngure had 4 children. He also

said he was a committee member (I believe of the allocation committee) hence the Government told him to show Ngure his land.

On cross-examination by Mr Gathumbi, this witness said that he knew Ngure Kabui who was not so close to him. He saw him for the first time when he went to show him his land and that he was also his neighbor because there is only one parcel of land between his and theirs. He also claimed to have been born and brought up on the land - in the neighbourhood. He said that the Appellant does not live there. It is only the children of Stephen who live there i.e. the Respondent

and his siblings.

On re-examination, he said that it is Kabui and his children who live on the suit property.

The last witness in the case was Symon Karitu Ngure who testified and said that Ngure Kabui was his father. He lived on the disputed land. Before then he was a squatter and it is the squatters who were allocated land.

He said that they used to live in Ol-kalou and therefore he has never lived there. It is Stephen Kiragu who lived there. He used to cultivate it for 2 years but later stopped because the place was too far from their home. He said that their father paid Kshs. 500/- for the land and that when they allowed Stephen's children to live on the land they did not expect them to give them portions. He admitted that they didn't have a grant for Ngure Kabui's Estate.

Although this witness when testifying did not refer to his statement dated 15/10/2023, the same is on record and it is only fair for the Court to refer to its contents which were summarized in his oral evidence in Court. He reiterated in the statement what the Appellant had said in his testimony word for word and I don't need to verbalize the contents of the same.

On cross-examination by Mr. Gathumbi, Karitu said that he lived in Ngeta Scheme and has never built a house on the suit land. He said that Stephen Kiragu was his brother and that in 1966 he was 26 years old. He never moved to the land but only cultivated it for 2 years and then stopped.

The same was never sub-divided. Without saying by who, he said he had been shown where to cultivate and so were his brothers. He said that although he saw the Title Deed in the name of Stephen Kiragu after 2010, they never sued the Estate of Stephen Kiragu for the revocation of the same nor did they file for probate in respect to their father - Ngure Kabui. They also did not sub-divide the land amongst themselves. He equally admitted that the Appellant owed Grace Kshs. 13,000/-.

On re-examination the witness, Symon Karitu Ngure, said that the first receipt was in Ngure Kabui's name and that no succession cause was filed from his father to his brother.

After the case was closed and submissions filed, the trial Magistrate retired to write her Judgment which her Honour

delivered on 5/9/2024. Learned Trial Magistrate crystallized the following 3 issues for determination.

1. Has customary trust been proved?
2. Has the Plaintiff (Respondent) proved his case on a balance of probabilities.
3. Who should bear the costs of the suit.

The first issue was answered in the negative while the 2nd was answered in the affirmative. She further went on to find the Appellant guilty of trespass and ordered him to pay General damages of Kshs. 50,000/- to the Respondent as well as remove the caution he placed against the suit land failure to which the land Registrar would remove the same within 14 days of the Judgment.

This is the Judgment that is the subject of this Appeal wherein this Court is urged to overturn and find: -

- a) THAT the Appeal against the Judgment delivered on the 5th Day of September 2024 be admitted.
- b) THAT this Honourable Court sets aside the Judgement issued in OL KALOU MCELC CASE NO. E011 OF 2023 on the 5th day of September 2024.
- c) THAT the said judgement issued in OL KALOU MCELC CASE NO. E011 OF 2023 and consequential orders thereto be set aside pending the hearing and determination of this Appeal.

d) THAT this Honourable Court finds that the Appellant did establish Customary Trust.

e) THAT this Honourable Court cancels the Title for Parcel Number NYANDARUA/KIRIMA/138 registered in favour of Stephen Kiragu Ngure.

f) THAT this Honourable Court orders that parcel Number NYANDARUA/KIRIMA/138 be registered in favour of Kiragu Ngure for purposes of succession.

g) THAT the costs of this Appeal be awarded to the Appellant.

On the grounds: -

- a. THAT the Learned Magistrate erred in law and fact by finding that customary trust had not been proven on a balance of probabilities.
- b. THAT the Learned Magistrate erred in law and in fact by finding that the actions of tilling the $\frac{3}{4}$ parcel of land amounted to trespass and awarding a sum of Kenya Shillings 50,000/= as Damages.
- c. THAT the Learned Magistrate erred in law and fact by finding that Stephen Kiragu Ngure was the legal owner of the parcel of land L.R. Number NYANDARUA/KIRIMA/138 measuring approximately 3 Hectares.

d. THAT the learned Magistrate erred in law and fact by ordering the Appellant herein to remove the caution registered on the parcel of land.

I will start with Ground (c) of the Memorandum of Appeal. The Respondent produced a copy of Title Deed for NYANDARUA/KIRIMA/138 issued to Stephen Kiragu Ngure of ID No. 1115339/64 on the 5/6/1995. The accompanying Green Card shows that the Title Deed was opened on 16/6/1996 in the name of Settlement Fund Trustees. Then on 5/6/1995 it was transferred to Stephen Kiragu Ngure, father to the Respondent, of ID No. 1115339/64 and a Title Deed issued the same day prior to Charles Wambugu Ngure, the Applicant herein of ID No. 2966442 of P.O Box 95 Olkalou placing a caveat against the land claiming a beneficiary interest on 28/7/2017. The Respondent also produced 2 (two) receipts of monies paid in respect to the land serial No. 235051 for Kshs 475 on 5/6/1995, serial No. 235052 of even date for Kshs 125 for the Discharge of the land.

There is also a Demand Notice for arrears of loan dated 20/12/1989 addressed to Stephen K. Ngure which showed the arrears to be Kshs. 6,550/= paid on 6/11/1989 vide receipt No. 696289 and another one serial No. 626944 dated 30/12/1991 for loan repayment of Kshs. 766/30.

He also produced a copy of Limited Grant of Letters of Administration *Ad Litem* issued by the Senior Principal

Magistrate's Court, Ol kalou No. E009 of 2023 on 3/7/2023 in his favour.

With the above Documents, I am inclined to conclude that the Respondent had the locus to bring the suit in the lower Court. Besides, there is no doubt that the suit land was first registered in the name of Settlement Fund Trustees on 16/6/1996 and the same transferred to the late Stephen Kiragu Ngure, father to the Respondent who later made repayments of loan and for discharge and nowhere in the Documents, including the Demand Notice was it indicated that the land was allocated to the name of Stephen Kiragu Ngure in trust for himself and his brothers. Nor was it even testified that his brothers assisted him in repaying the loan. Consequently, to answer the 3rd Ground of Appeal, the learned trial Magistrate perfectly found Stephen Kiragu Ngure was rightfully registered the legal owner of NYANDARUA/KIRIMA/138 measuring approximately 3.0 Hectares. Nothing shows that he was unlawfully registered as the owner.

Sections 24, 25 and 26 of the Land Registration Act, 2012 are very

instructive on this Ground.

Section 24 of the **Land Registration Act 2012** gives the registered proprietor absolute rights over land, it provides:

Subject to this Act—

(a) The registration of a person as the proprietor of land shall vest in that person the absolute

ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25 of the Act under the sub-heading, **Rights of a proprietor** provides that,

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) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(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.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Further, this Title is protected under Section 26 of the same Act which provides:

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the

person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

As was held in the case of **Esther Ndegi Njiru & Another =vs= Leonard Gatei [2014] eklr:**

“the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which a person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme”.

Section 80 (1) of the **Land Registration Act No. 3 of 2012** provides as follows:

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

No such claims were ever made or proved and the Court cannot therefore invoke this provision.

On Ground No. (a) of the Grounds of Appeal, under Section 28 (b) of the Land registration Act on Overriding interests, 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.

In the Supreme Court of Kenya, Isack Kiiba Minanga -vs- Isaaya Theuri M’linturi & another [2018] eKLR the Court held as follows:

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“.....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 *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and 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 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.....”

Customary trust need not be noted on the Register of the suit land. Registration of a person as a proprietor of land does not preclude him from holding an interest in trust for another. Customary trust is an encumbrance on land. These are non - registrable rights which run with the land. They are overriding. They subsist on the land.

I agree with the learned trial Magistrate that the legal burden of proving the existence of trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person claiming must prove that: -

- the suit property was ancestral clan land;
- during adjudication and consolidation, one member of the family was designated to hold the land on behalf of the family;

- the registered persons were the designated family members who were registered to hold the parcel of land on behalf of the family. In essence, one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.

Customary trust is proved by leading evidence. It is a question of fact

which must be proved by whoever is claiming a right under customary trust. And the Court must be satisfied that the land was family or clan land before registration. It was inherited or passed down from the family lineage and was registered in the name of the

Title holder for the benefit of the family or clan.

To prove a customary trust in the instant case it had to be shown that the first allotment was not to Stephen Kiragu Ngure but his father or somebody else (including Kiragu) not in his own right but as a trustee for the family of his father, Ngure Kabui. This land as also not registered in the name of the first born who should have been the *Muramati* under kikuyu customary law and not the third born (the Respondent's father) as is in Kikuyu customs to which the parties herein belong.

More importantly though, if the Appellant came to Court invoking his father's name, then he ought to have taken out letters of Administration at the very minimum *Ad litem* in respect to his father's Estate. He failed to do so.

The other issue is that of Trespass which was admitted by the Appellant who testified that he has been occupying $\frac{3}{4}$ Acre of the suit land and though the quantum is not questioned, I find Kshs. 50,000 as sufficient General Damages.

The ownership of the suit land having been found to be the Respondent's, he had to enjoy Article 40 of the Constitution on Protection of right to property as follows: -

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property —

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

Consequently, the Court had to order the removal of the Caution against the Respondent's land.

The upshot of the above is that the Appeal dated 20/3/2024 stands dismissed with costs to the Respondent.

Judgment read and delivered at Nyandarua this 14th Day of May 2026.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Samson.

Appellant's Counsel: N/A.

Respondent's Counsel: Ms. Bundi.