

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELCL APPEAL NO. E020 OF 2025

WILLY GITONGA PETER.....
.....APPELLANT

VERSUS

PAUL MURITHI NJUE.....
.....RESPONDENT

(Being an appeal from the Judgement of Hon. Vincent Masivo (SRM) delivered on 18/03/2025 in Runyenjes ELC Case No. E025 of 2023 Paul Muriithi Njue v Willy Gitonga Peter)

JUDGMENT

1. The Respondent herein was the Plaintiff before the trial court wherein he had sued the Appellant vide a Plaint dated 29/11/2023 seeking interalia: A declaration that Peter Kithinji Kanyakire was registered as trustee of land parcels no. Kyeni/Mufu/4876, 4877 and Magumoni/Thuita/1007 on his behalf and in trust for all his children including the parties herein; A declaration that Peter Kithinji Kanyakire did not pass good title to the Defendant as he was a mere trustee of the said parcels of land on behalf of his children; That the Land Registrar Embu do revoke the registration of the said parcels

of land and revert them back to Peter Kithinji Kanyakire as well as costs of the suit.

2. The Plaintiffs case was that he and Defendant are step-brothers, both sons of Peter Kithinji Kanyakire. He averred that the Defendant is the current registered proprietor of land parcels Kyeni/Mufu/4876 and Magumoni/Thuita/1007, and a joint proprietor of Kyeni/Mufu/4877, which the Plaintiff contended originally belonged to their father, who is now elderly and senile. The Plaintiff averred that his father had married three wives who bore him eight children who currently don't own any land as the same is currently registered in the Defendants name.
3. He averred that land parcels No. 4876 and 4877 were given to their father by the Marigu Clan whereas land parcel No. 1007 was bought by their father and his first wife Agatha Maitha who is the Plaintiffs mother. He alleged that land parcels No. 4876 and 4877 were customary land held by their father in trust for himself and his children. It is further alleged that the Defendant unlawfully caused the transfer and registration of all the suit properties into his sole and joint name, to the exclusion of the rest of the family.
4. The Defendant filed a Defence and averred that his father Peter Kithinji Kanyakire who is still alive had married only one wife, Esther Njura Kithinji who died in February 2019 and that the two ha four children inclusive of the Defendant. He denied that his father married any additional wives, or that he sired any children with them, and further denied that the alleged persons are his step-brothers and step-sisters. He alleged that

he had made an inquiry and found that the Plaintiff's mother Agatha Maitha is formally married to Tito Njue Mbiyu who is also said to be the Plaintiff's father and that the Plaintiff lives on his 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, Paul Muriithi adopted his written statement as his evidence in chief. He testified that he is a step brother to the defendant sharing a father. The defendant is the registered owner of parcel Nos Kyeni/Mufu/4876 and Mugomo/Thuita/1007 which belonged to their father Peter Kithinji Kanyakire now old and senile, and a jointly registered owner of Kyeni/Mufu/4877. He stated that in 2023, he went home to his father to be allocated land when he met the defendant who told him that his father had no land and the suit lands solely belong to him.
7. He stated that his father had three wives, Agatha Maitha, Maria Kithinji and Njura and that they bore him 8 children. Parcel Nos. Kyeni/Mufu/4786 and 4787 were given to their father by Marigu clan, while parcel No. Magumoni/Thuita/1007 was bought by their father and his mother Agatha Maitha Njue before their separation. He averred that Parcel Nos. Kyeni/Mufu/4876 and 4877 were customary land hence held by their father in trust for himself and his children. His father is now senile and unable to explain the circumstances in which the Defendant was registered as the owner of the suit lands.

8. On cross examination he stated that he shares a father with the defendant namely Peter Kithinji. That he had no document to confirm that he is a son to Peter Kithinji. He stated that her husband is Mithambo Njue and that the name on his identity card is Paul Murithi Njue. He stated that Peter Kithinji transferred parcel Nos. 4877, 4876 and 1007 to the defendant without the family's knowledge. He stated that his father was not sued due to mental illness and that at the moment, he has no wife. He stated that he lived on the suit lands as he was born there and that his mother cultivated tea on these lands.
9. On re-examination he stated that he was given the name Njue from his second family. He stated that Peter Kithinji did not cater for his school fees because he chased his mother away.
10. He produced in evidence the green cards for land parcels 4876, 4877 and 1007.
11. PW2 was Alvan Nyaga. He testified that he knew the father to the parties herein from their childhood. He stated that they are step brothers being the sons to Peter Kithinji. He averred that the Plaintiff is the eldest son and that Peter Kithinji sent away his first and second wives due to a disagreement. That they left behind their children with him. He stated that Peter Kithinji then married the 3rd wife who came with three children including the defendant who is Peter's biological child. He averred that the first and second wives got wind of the mistreatment of their children and picked them.
12. He stated that Peter Kithinji was the registered owner of land parcel No. 193 which was given to him by Marigu clan to hold in trust for himself and his family. This land was later

subdivided to Kveni/Mufu/4876 and 4877. He stated that Peter and his 1st wife, Agatha Maitha who is the Plaintiff's mother started cultivating coffee, tea and macadamia on the land. He averred that the Plaintiff's father and mother later purchased land parcel 1007. He averred that the Plaintiff later returned to his father to get a share of land and found him old and senile. That the Defendant turned hostile intimating that the parcels of land belonged to him. He confirmed that the lands were registered in the name of the defendant.

13. PW3 Sospeter Njiru, testified that the Plaintiff is the son to Peter Kithinji Kanyakire who is his uncle. That he married Agatha Maitha who is the Plaintiff's mother. They were his neighbours. He stated that they were blessed with two children and resided on parcel No. Kyeni/ Mufu/193. That Peter Kithinji was given this land by Marigu clan. He also had a second wife namely Maria. He stated that at one point, he chased his two wives. Agatha Maitha left behind the Plaintiff at his father's home together with the 2nd wife's daughter. Peter Kithinji later married Njura who mistreated these two children forcing their mothers to pick them up.

14. He averred that the 3rd wife came into the marriage with four children including the Defendant. On cross-examination, he stated that he is unaware of the Plaintiff's other father Njue and that Agatha left Peter in 1971. He stated that Parcel No.4877 and 4876 were clan land.

15. PW4 Agatha Maitha testified that the Plaintiff is her son with Peter Kithinji Kanyakire. That she was the first wife to Peter Kithinji. She stated that they were blessed with the Plaintiff

and Jane Muthoni. That they used to cultivate parcel of land namely Kyeni/Mufu/193 which is now subdivided. She used proceeds from crops on this land to purchase land parcel No. Magumoni/Thuita/1007, which was jointly registered with Peter Kithinji. Peter Kithinji then married Maria Kithinji where they were blessed with Sasida Kithinji and Wanja Kithinji. They were later chased away to their parents' home with her co-wife.

16. She averred that they left their children in the custody of Peter Kithinji. Peter Kithinji then married Njura who came with four children. They were forced to pick their children from Peter Kithinji due to neglect and mistreatment. She stated that the Plaintiff returned to his father to get a share of land when the Defendant referred to him as a stranger and intimated that there was nothing for him. On cross-examination, she stated that she is the wife to Njue Mithamo. That they left the Plaintiff's birth notification with the hospital which has now shut down. She paid the plaintiff's school fees. She cannot recall when she jointly bought land with Peter Kithinji. She had no medical evidence to confirm mental illness by Peter Kithinji. She stated that she does not have children with her husband Mithamo.

17. DW1 Willy Gitonga, testified that the Plaintiff is a stranger and that his parents are Peter Kithinji and Esther Njura. He stated that he has no brothers. His father is alive and old, his mother died in February 2019. He has three sisters and that Agatha Maitha and Maria Kithinji are not his step-mothers. He stated that Peter Kithinji transferred his land parcel No. Magumoni/Thuita/1007 to him in 1997 voluntarily. He had

bought this land from one Dionisio in 1971. In 1998, his father subdivided his land parcel No. Kveni/Kigumo/193 into three, parcel No. 4875 which he transferred to the Church of God Gatumbi, 4876 which he transferred to the Defendant, and 4877 which remained in his father's name and later the Defendant was added as a joint proprietor both holding it in trust for the Defendant's sisters and the children of his other deceased sister.

18. He stated that the Plaintiff is the son to Tito Njue of Kararitiri and that he lives with his parents. He stated that parcels No. 4877 and 4876 were not given to Peter Kithinji by the Marigu clan to hold in trust and that land parcel No. 1007 was not jointly bought by his father and Agatha. On cross-examination he stated that at the chief's office, the chief advised that he share land with the Plaintiff. He stated that his father is healthy but is unable to speak due to aging. He stated that he could not tell if his father had other wives prior to his mother.

19. He produced in evidence an application for LCB Consent to transfer land parcel No. 4876, the consent to transfer, the title deed for land parcel 4876, green card for land parcel 4876, title deed for land parcel 4877, green card for land parcel 4877, title deed for land parcel 1007 and the green card for land parcel 1007.

20. DW2 Virginia Kanyua testified that the Defendant is the son to Peter Kithinji and that Peter Kithinji is a cousin to her late husband Julius Njeru Philip. She stated that the Plaintiff is a stranger. She stated that she got married in 1966 and that she

knows Peter Kithinji as having one wife namely Esther Njura who was married after her. She died in 2019. They were blessed with four children namely Margaret Marigu, Betha Muthoni, Lucy Kanini(deceased) and the Defendant. That in the 57 years, that she had been married in their family, she has never known any other wife or children to Peter Kithinji.

21. On cross-examination she testified that she was married in this family in 1966. That she could not explain the happenings prior to her marriage or the sharing of land in the family or the genesis of the suit land.

22. DW3 Isiah Njiru testified that he is a brother in law to Peter Kithinji. He was married to his sister Esther Njura who died in 2019. He married his sister in 1970. That Peter Kithinji has never had any other wife. They were blessed with three children namely Margaret Marigu, Betha Muthoni, Lucy Kanini (deceased) and the Defendant. He stated that the Plaintiff is a stranger. On cross-examination, he stated that his house to Peter Kithinji's is over 10 kms apart. That he did not know Peter Kithinji prior to marrying his sister Esther Njura or that he had other wives prior to their marriage. He stated that he did not know the genesis of the suit lands.

23. DW4 Margaret Marigu, testified that she is the daughter to Lucy Kanini, who is the daughter to Peter Kithinji. Her mother is deceased. She stated that the Defendant is her uncle. That she knew her late grandmother Esther Njura as the only wife to her grandfather, Peter Kithinji. She stated that Peter Kithinji transferred the suit land to the Plaintiff when he was in good health and that he gave a portion of the land to the church of

God. She stated that the Plaintiff is a stranger. On cross-examination she stated that she was born in 1990.

24. Upon analyzing the suit, the trial Court identified two key issues for determination: whether the Plaintiff had proved the existence of a customary trust over land parcels Kyeni/Mufu/4876 and 4877, and whether parcel Magumoni/Thuita/1007 constituted matrimonial property.

25. On the first issue, the Court found that the Plaintiff successfully proved, on a balance of probabilities, that parcels Kyeni/Mufu/4876 and 4877 were clan land originally belonging to the Marigu clan and were given to Peter Kithinji Kanyakire to hold in trust for himself and his children, including both the Plaintiff and the Defendant. The Court held that Peter Githinji did not pass good title to the Defendant in respect to land parcels No. 4876 and 4877. Accordingly, the Court declared that the said parcels were held in trust and ordered that they revert to the name of the father to be held in trust for all his children.

26. In relation to parcel Magumoni/Thuita/1007, the Court found that it was not proved to be matrimonial property. The evidence did not establish contribution by the Plaintiff's mother, Agatha Maitha or joint acquisition with the father. The Court therefore declined the claim over that parcel, finding it to be the father's personal property, which he was entitled to transfer to the Defendant. The Court directed each party to bear their own costs.

27. The Defendant were aggrieved with the impugned decision and preferred the present Appeal on the following grounds;

1. That the learned trial magistrate erred and misdirected himself both in law and fact when he held and made a declaration that Peter Kithinji Kanyakire was registered as a trustee of land parcels Nos. 4876 and 4877 on his own behalf and in trust of all his children the Plaintiff included when in fact the said land parcels were resultant parcels among others from the subdivision of land parcel No. Kyeni/Mufu/193 which was not subject of the suit under trial.
2. That the learned trial magistrate erred and misdirected himself both in law and fact when he held and declared that Peter Kithinji Kanyakire did not pass good title to the Defendant in respect to land parcels Nos. 4876 and 4877 when the said Peter Kithinji Kanyakire was the absolute proprietor of the said land parcels and could deal with his properties in the manner he wished, including transferring the said properties to his son the Defendant.
3. That the learned trial magistrate erred and misdirected himself both in law and fact when he held and ordered that land parcels Nos. 4876 and 4877 do revert back to Peter Kithinji Kanyakire to hold in trust for his children, and in directing the Land Registrar to revoke the registration of the said land parcels and revert them back to Peter Kithinji Kanyakire, which orders the magistrate made without sufficient evidence.
4. That the learned trial magistrate erred and misdirected both in law and fact when he made orders in respect of land parcel No. 4877 which orders affected Peter Kithinji

Kanyakire when the said Peter Kithinji Kanyakire was not a party to the suit thus condemning him unheard.

5. That the learned trial magistrate erred and misdirected himself both in law and fact when he held and declared that the Plaintiff was a son/child of Peter Kithinji Kanyakire and therefore a beneficiary of his properties when there was no evidence at all to prove that the Plaintiff was the son to Peter Kithinji Kanyakire.
6. That the learned trial magistrate erred and misdirected himself both in law and fact when he disregarded the fact that failure by the Plaintiff to sue or join Peter Kithinji Kanyakire as the original owner of land parcels Nos. 4876 and 4877 was fatal to the Plaintiff's case.
7. That the learned trial magistrate erred and misdirected himself both in law and fact when held that one Agatha Maitha (PW3) was the first wife of Peter Kithinji Kanyakire without sufficient evidence when in fact she is the wife of Njue Mitambo.
8. That the learned trial magistrate erred and misdirected himself both in law and fact when he held that Peter Kithinji Kanyakire acquired land parcels Nos. 4876 and 4577 from Marigu clan before he gifted them to his son, the Defendant, without such evidence from the said clan and that they disregarded the fact that the two land parcels were sub divisions of land parcel No. Kyeni/Mufu/193.
9. That the learned trial magistrate erred and misdirected himself both in law and fact by delivering a judgement full of contradictory findings.

10. That the learned trial magistrate erred and misdirected himself both in law and fact by unnecessary giving a lot of weight to the Plaintiffs evidence and submissions and disregarding the Defendant's evidence and submissions and arrived at an erroneous judgement.
28. The Defendant sought to have the appeal allowed, the trial Courts judgement set aside and substituted with an order dismissing the Plaintiff's suit and that the costs of the appeal and the lower court case be awarded to the Appellant.
29. When the appeal came up for directions, the parties agreed to canvass the appeal by way of written submissions. The Defendant filed submissions dated 13/11/2025 through the firm of Njeru Ithiga & Company Advocates. They submitted that the trial Magistrate erred in law and fact by finding that land parcels Kyeni/Mufu/4876 and 4877 were held in customary trust by Peter Kithinji Kanyakire for himself and his children. It is argued that customary trust must be strictly proved by evidence, and that the Plaintiff failed to discharge this burden.
30. The Defendant contended that the existence of trust was presumed without cogent evidence. He submitted that the Plaintiff failed to prove with cogent evidence that he was a son of the said Peter Kithinji Kanyakire, and therefore the trial court erred in relying on hearsay evidence in finding him to be so. It was also submitted that the trial court erred by making orders affecting land registered in the name of a person who was not joined as a party to the suit, thereby condemning him unheard. The Defendant maintained that the trial court

improperly interfered with the rights of the registered proprietor without sufficient evidence.

31. The Plaintiff filed submissions dated 13/02/2026 through the firm of Muthoni Ndeke & Company Advocates. They supported the trial court's finding that land parcels Kyeni/Mufu/4876 and 4877 were held under a customary trust by Peter Kithinji Kanyakire for the benefit of all his children. It was argued that the evidence, including oral testimony from family members, established that the land originated from the Marigu clan and was intended for the entire family.

32. The Plaintiff further submitted that the Defendant failed to rebut the existence of the trust and that registration of the land in the Defendant's name did not extinguish the beneficial interests of other family members. It was contended that the trial court properly evaluated the evidence, correctly applied the burden of proof, and made a justified finding that the land was held in trust. The Plaintiff urged that the appeal lacks merit and should be dismissed with costs.

33. The issue for determination is whether a customary trust existed over land parcels Kyeni/Mufu/4876 and 4877 and whether the trial court erred in interfering with the Defendant's title to the said parcels.

34. It is not in dispute that parcels 4876 and 4877 are resultant subdivisions of land parcel Kyeni/Mufu/193, which the Plaintiff alleges was clan land given to the now late Peter Kithinji Kanyakire by the Marigu clan to hold in trust for his family. The Plaintiff's claim is anchored on his assertion that he is a son of Peter Kithinji Kanyakire and therefore entitled to benefit from

the suit lands. However, upon re-evaluation of the evidence, this Court is of the view that the Plaintiff failed to prove this relationship, having produced no documentary evidence such as a birth certificate to establish that he is the late Peter Kithinji's son. He admitted in cross-examination that his identity card bears the name Paul Muriithi Njue and that he had no proof linking him to Peter Kithinji.

35. In the Supreme Court case of *Kiebia v M'lintari & another* (Petition No. 10 of 2015) [2018] KESC 22 (KLR), the Court set out the principles to be considered in 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.

36. Applying the above principles to the present case, the Court finds that there was no credible evidence to demonstrate that land parcel Kyeni/Mufu/193 was clan land prior to registration in the name of Peter Kithinji Kanyakire. The green card of the land parcel No. 193 would have been useful in this case to show the history of the land but it was not produced by either

of the parties in this case nor was any independent witness from the Marigu clan called to corroborate the allegation that the land was allocated to the late Peter Kithinji to hold in trust for his family. Even assuming that the land may have originated from the clan, that fact alone would not establish that it was held in trust by the late Peter Kithinji for the family, as it could equally have been allocated to him absolutely.

37. The Defendant, on the other hand, produced documentary evidence including the Land Control Board consent and title documents demonstrating that the suit lands were lawfully transferred to him. There was also no evidence to support the allegation that Peter Kithinji Kanyakire was senile at the time he transferred the suit lands to the Defendant in 1998 particularly in view of the fact that he obtained the Land Control Board consent, which presupposes his participation and understanding of the transaction.

38. In the result, this Court finds that the Plaintiff failed to establish, on a balance of probabilities, the existence of a customary trust over land parcels Kyeni/Mufu/4876 and 4877, and that the trial court erred in law and fact in interfering with the Defendant's title to the said parcels.

39. Accordingly, the appeal is hereby allowed.

40. The judgment and decree of the trial court are hereby set aside and substituted with an order dismissing the Plaintiff's suit in its entirety.

41. Each party shall bear their own costs of the appeal.

DATED, DELIVERED AND SIGNED AT EMBU THIS 14TH DAY OF MAY, 2026.

HON. E.C CHERONO
ELC JUDGE, EMBU

In the presence of;

1. Mr. Njeru Ithiga for the Appellant
2. M/S Kamochu H/B for Muthoni Ndege for the Respondent
3. M/S Ruth C/A