



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kinyanjui & another v Nyambura & 2 others (Environment and Land Appeal 7 of 2024) [2025] KEELC 5415 (KLR) (21 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5415 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND APPEAL 7 OF 2024**

**MN GICHERU, J  
JULY 21, 2025**

**BETWEEN**

**FRANCIS D. KINYANJUI ..... 1<sup>ST</sup> APPELLANT**

**JOSEPH WAIRACHU KINYANJUI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**AGNES NYAMBURA ..... 1<sup>ST</sup> RESPONDENT**

**MAINA KINYANJUI ..... 2<sup>ND</sup> RESPONDENT**

**MUCHINA KAMAU ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Appellants seek the following orders in this appeal.
  1. That the appeal be allowed.
  2. That the judgment and decree of the trial court dated and delivered on 23-3-2022 in Kandara Magistrate’s Civil No. 22 of 2018 be set aside and substituted with a judgment in favour of the Appellants as had been prayed for by the Appellants in the plaint dated 3-1-2018.
  3. That the costs of this appeal and those in the trial court be paid by the Respondents to the Appellants.
  4. Any other relief as this court may deem fit in the interest of justice.This is as per the memorandum of appeal dated 2-10-2023.
2. The Appellants have listed six(6) grounds of appeal. They are as follows. The learned trial magistrate erred in law and in fact –



- i. in finding that L.R. Loc. Gakarara/401 and plot 52 Kandara market were held in trust for one Fredrick Kinyanjui Kimani by one Chalet Kanyi alias Charity Kanyi whereas no such trust existed,
  - ii. ordering that the title certificates of parcels Nos. Loc.4/Gakarara 401 and plot 52 Kandara market revert to one Fredrick Kinyanjui Kimani yet there was no evidence to show that he was either the initial registered owner or possessed any beneficial interest to the said premises,
  - iii. in failing to harmonise her proceedings with the judgment and misconstrued and disregarded the Appellants' evidence,
  - iv. by issuing injunctive orders against the Appellants thereby restraining them from disposing and/or distributing the estate of Francis Kimani(sic) yet the deceased person was never mentioned in the matter,
  - v. in wrongly applying the principles of the law of trusts thereby arriving at a wrong decision and
  - vi. in dismissing the Appellants' suit.
3. In the suit before the lower court, the Appellants who were the Plaintiffs had sought an order of permanent injunction restraining the Respondents who were the Defendants from cutting trees and/or causing any other destruction on land parcel Nos. Loc.3/Githumu/568, Loc.4/Gakarara/401 and Loc.4/Kaguthi/532.
  4. The facts of the case according to the Appellants were as follows. The estate of the deceased Chalet Kanyi alias Charity Kanyi who was their mother comprised the suit parcels. The 1<sup>st</sup> Defendant who was the Appellants' step mother together with the other Defendants had on 23-1-2018 trespassed on L.R. Loc.3/Githumu/568 and felled trees on the said land without justification whatsoever leading to a huge loss. In addition to the above, the Defendants had threatened to invade the suit parcels. The Respondents claim that the Appellant's mother held the suit land in trust for them was not true and in Nairobi Succession Cause No. 1278 of 1992, which awarded the suit parcels to the Appellants, the Respondents attempt to have the grant revoked had been dismissed as they were unable to prove that they were beneficiaries of the estate of the Appellants' mother Chalet Kanyi alias Charity Kanyi.
  5. The Respondents filed a defence and a counterclaim against the Appellants. In the counterclaim, they sought the following orders.
    - a. A declaration that land parcels Nos.Loc.3/Githumu/568, Loc.4/Gakarara/401 and Loc.4/Kaguthi/532 and plot No. 52 Kandara market were held in trust of the deceased Fredrick Kinyanjui Kimani by Chalet Kanyi alias Charity Kanyi.
    - b. Revocation and/or annulment of the title deeds to land parcels Nos. Loc.3/Githumu/568, Loc.4/Gakarara/401 and Loc.4/Kaguthi/532 and plot No. 52 in respect thereof and an order directed at the Murang'a District Land Registrar to execute a reversion to Fredrick Kinyanjui Kimani.
    - c. A permanent injunction restraining the Defendants by themselves, their employees, servants, and/or agents from disposing alienating, subdividing or in any manner whatsoever interfering with the four suit parcels until the deceased's estate is distributed to all the beneficiaries.
    - d. Costs of this suit and of the counterclaim together with interest thereon until payment in full.
  6. The facts of the case according to the Respondents were as follows. In the years 1962 and 1963, Fredrick Kinyanjui Kimani decided to transfer the four suit parcels to his first wife Charity Kanyi alias Chalet



Kanyi. She is the mother to the Appellants. He did this to avoid a debt advanced to him by some Asians. He had taken the loan to build Kiguoya Primary School. After building the school, the school was not able to pay him because there arose a dispute. He was left to pay the Asian's debt alone. To avoid his property being auctioned, Frederick Kinyanjui transferred the four suit parcels to his wife. The wife did not transfer the property back to her husband as expected. Instead she mistreated him with a view to retaining the property in her name. This prompted Fredrick to file Civil case No. 3165/1982 at the Magistrate's Court at Sheria House. In the case, an order dated 9-5-1983 was issued referring the dispute to the District Officer, Kandara who was to convene a panel of elders to determine the dispute. Eventually the dispute was resolved in favour of Fredrick Kinyanjui. The records of the Court and those by the District Officer were lost. The decree in his favour could not be implemented. The deceased started ailing. Eventually the deceased died without getting his land back from his wife. The Appellants who are the children of that wife have frustrated the Respondents by promising to transfer the land but they have never done so. The 1<sup>st</sup> Respondent died before she could get the land that she and her children are entitled to. The Appellants are happy with the status quo because they collect rent from the plot at Kandara whereas the Respondents are living a life of abject poverty and dejection. They pray that they get what is rightfully theirs.

7. In her judgment dated 23-3-2022, the learned trial magistrate only partially allowed the Respondents' counterclaim. She found that Loc.4/Gakarara/401 and Plot No. 52 Kandara market are registered in the name of Chalet Kanyi alias Charity Kanyi in trust for the Respondents and ordered that title deeds thereto be revoked and to revert to Fredrick Kinyanjui Kimani.

The learned trial magistrate did not make any such declaration in respect to parcels numbers Loc.3/Githumu/568 and Loc.4/Kaguthi/532. The reasons given by the learned magistrate for not finding that there was a trust for Loc.3/Githumu/568 are that the green card shows that on 1-4-1963, the transfer of L.R. No. 568 was in exchange with plot No. 292 whose ownership was not disclosed. There was also an element of gift in that transfer. As for L.R. No. Kaguthi/532, the court said that since married Kikuyu women could not own property, the registration of Charity Kanyi as the owner of the parcel No. 532 needed to be explained fully. Since the Respondents could not explain, she decline to declare a trust for those two parcels.

8. Counsel for the parties filed written submissions dated 28-3-2025 and 12-5-2025 respectively. The Appellants' counsel identified the following issues for determination.
  - i. Whether the issues addressed by the trial magistrate had been dealt with in Succession Cause No. 1278 of 1992.
  - ii. Whether the trial magistrate had jurisdiction to declare a trust.
  - iii. Whether a claim for trust can succeed in the absence of actual physical possession and occupation.
  - iv. Whether land that is not registered can be presumed to be trust land.

The Respondent's counsel has responded to the Appellants' submissions except on the issue of res judicata.

9. I have carefully considered the appeal in its entirety including the record, the grounds, the written submissions and the law cited in the submissions. I find that the four issues as identified could determine the dispute but I wish to add a fifth one which arises from the reasoning of the trial magistrate.



**(v) Is it correct to say that married Kikuyu Women could not own property in the early sixties?**

10. I will start with the last issue. This issue did not arise in the pleadings or at the trial. I have perused the record and I do not see it anywhere. It has not been addressed in the submissions filed by the parties in March and May 2025. Yet it was used by the Court to deny the Respondents two of the suit parcels.

In his book titled “Restatement of African Law 2, Kenya II Law Succession at page 14, “Eugene Cotran has briefly written about the estate of a married woman as well as an unmarried woman. The book covers the Kikuyu, Embu, Mbeere, Gichugu and Ndia at pages 8-18. About a married Kikuyu Woman he states as follows.

“Any property which a married woman holds, whether given by her husband or not, is inherited by the husband on her death. This applies to any land which the married woman’s father may have given her on marriage(ithaga). However, this piece of land may be redeemed by the Woman’s father or his sons at any time, either during her lifetime or after her death, by payment of its value in livestock.”

This book by Cotran is the leading authority on inheritance in African Customary Law. It recognizes that married Kikuyu women could indeed own land contrary to the finding by the learned magistrate. Secondly, the fact that the green cards for parcels Nos. Loc. 3/Githumu/568, Loc.4/Kaguthi/532 and Gakarara/401 were registered in the name of Charity Kanyi, a woman, on 1-4-1963, 26-5-1965 and 2-1-1964 respectively, is good evidence that married women could own property in those years.

11. On the issue of whether the suit is res judicata because of Nairobi Succession Cause No. 1278 of 1992, I find that it is not res judicata. At paragraph 66 of the judgment, the learned Judge stated as follows.

“It is clear from the pleadings and testimony of all witnesses that there is a suit pending before Kandara Court where the issue of ownership dispute is pending. In that case, the Respondents have an injunction against the Applicants restraining them from interfering with the four portions of land. There is also a counterclaim by the Applicants claiming a right of ownership. With these proceedings in place pending determination, this court cannot encroach by making a determination on trust issues. To do so will be tantamount to encroaching to another court’s mandate hence prejudicing the outcome in that other suit.”

Paragraph 67,

“In any event, where a party is claiming ownership on account of trust touching on land already registered on the deceased’s name, it is prudent for the claimant to file a substantive suit before the Environment and Land Court to exhaustively determine the land ownership dispute. In this case, I do not think this probate court is properly seized of this matter...”

Those two paragraphs suffice to demonstrate that the probate court did not deal with the issues that were dealt with in the Kandara suit.

12. Regarding jurisdiction, I find that the issue should have been raised at the earliest possible opportunity at the trial court. The record shows that after the Appellants were served with the amended defence and counterclaim, they filed a reply to defence and counterclaim dated 20-2-2019 through their counsel, Mbiyu Kamau and Company Advocates. That particular pleading has three(3) paragraphs and none of them has said anything about jurisdiction. Order 2 rule 4 of the Civil Procedure Rules provides as follows.



- 4(1) “A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality-
- a. which he alleges makes any claim or defence of the opposite party not maintainable;
  - b. which, if not specifically pleaded, might take the opposite party by surprises; or
  - c. which raises issues of fact not arising out of the preceding pleading.”

The Appellants cannot be heard to raise the issue of jurisdiction on appeal more than six years after they forfeited that right after they filed their reply to defence and counterclaim. Had they raised the issue of jurisdiction at the right time, then a valuation of the suit property would have been carried out or the suit would have been transferred to the court with jurisdiction. The Appellants are estopped from raising the issue of the pecuniary jurisdiction more than six years since they filed the reply to defence and counterclaim.

13. To answer the third issue raised by the Appellants, it is my finding that trust especially a customary trust can succeed in the absence of actual physical possession and occupation. This was the holding of the Supreme Court of Kenya in the case of *Isaack M’Inanga Kiebia vs Isaya Theuri M’Lintari* and another [2018] eKLR. At paragraph 54 of the judgment, the court stated.

54. “In the foregoing premises, it follows that we agree with the Court of Appeal’s assertion that to prove a trust in land, one need not be in actual physical possession and occupant of the land”. A customary trust falls within the ambit of the proviso to Section 28 of Registered *Land Act*, while the rights of a person in possession or actual occupation ...are overriding interests and fall within the ambit of Section 30(g) of the Registered *Land Act*,”

The proviso to Section 28 of the Registered *Land Act* (Cap 300), now repealed, provides as follows.

“Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

Section 30(g) of the same Act provides as follows.

“The rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.”

Paragraph 54 of the judgment of the Supreme Court in the case of *Isacck M’Inanga* (supra) is the interpretation of the provisions of the repealed Registered *Land Act* (Cap 300).

Under Sections 28 (b) and (h) of the *Land Registration Act* both customary trusts and the rights acquired or in the process or being acquired by virtue of any written law relating to the limitation of actions or by prescription are recognized as overriding interests.

Since the rights of the Respondents arose during the regime of the Registered *Land Act*, they fell under the proviso to Section 28 of the Act. To reiterate the Supreme Court’s decision, possession is not a requirement to prove a customary trust. The submission by the Counsel for the Appellants seems to be in agreement with this finding if page 4 of his submissions is anything to go by.

14. Coming now to the final issue, it is my finding that all the four parcels of land in question belonged to Fredrick Kinyanjui Kimani who is the father to the Appellants and husband to the 1<sup>st</sup> Respondent. There is overwhelming credible evidence to prove this. Firstly, there is the detailed evidence filed by



the Respondents. The pleadings and the evidence by the Respondents covers 17 pages. It explains in great detail how and why the land which belonged to Fredrick Kinyanjui Kimani was transferred to his wife Charity Kanyi. This seemingly philanthropic and good man built a public school with funds borrowed from some Asian Merchants. For some reason a dispute arose and he could not be paid for the project that he had undertaken at the school. To escape from his creditors, he transferred all his land to his wife Charity Kanyi. He thought he could trust her. She turned out to be untrustworthy and she is the reason for this case that has been pending in court since 1982, a period of 43 years.

The evidence and the pleadings by the Petitioners cover six pages. They are shallow and unconvincing. They lack detail and content. In the end I believe the evidence adduced by the Respondents over that adduced by the Appellants.

Secondly, the evidence by the Respondents is corroborated by the Chief's letter dated 10-8-1993 which recognizes the four plots and two more as the property of the deceased. Thirdly, the order issued on 30-5-1983 in Sheria House Civil case No. 3165 of 1982 was in respect of the following plots, 401/Gakarara scheme, No 532/Kaguthi scheme, No 292/Githumu Scheme and Kandara market plot No. B.1. This is sufficient proof that the deceased Fredrick Kinyanjui Kimani sued his wife Charity Kanyi for all the four plots. There was therefore no good reason for the trial magistrate to declare a trust in respect of only two plots, leaving out the other two.

Finally, since I have found that all the four parcels belonged to the husband of Charity Kanyi and that he only intended to temporarily transfer them to her, the proper thing is to order that they all get registered in his name as he had intended.

15. In conclusion and for the reasons already given, I dismiss the Appellants' appeal. Secondly, I enter Judgment for the Respondents as per prayers (a) (b) and (c) of the counterclaim dated 12-3-2018.

I award costs in this court and in the lower court to the Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 21<sup>ST</sup> DAY OF JULY, 2025.**

**M.N. GICHERU JUDGE.**

Delivered online in the presence of; -

Court Assistant – Mwangi Njonjo

Applicants' Counsel – Miss Wairimu h/b

Respondent's Counsel – Miss Macharia

