



**Matiliku v Kilonzo & another (Environment and Land Appeal
E006 of 2022) [2025] KEELC 5343 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5343 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E006 OF 2022**

EO OBAGA, J

JULY 17, 2025

BETWEEN

JANE MUTHINI MATILIKU APPELLANT

AND

ALEXANDER KILONZO 1ST RESPONDENT

REGINA MAINGI 2ND RESPONDENT

*(Being an appeal from the judgment of Hon. J. N. Mwaniki Chief
Magistrate delivered on 23rd March, 2022 in Makueni CMCC 127 of 2018)*

JUDGMENT

1. The Appellant had filed a suit against the Respondents in which she sought an order of injunction restraining the Respondent from interfering with her property known as Nzai/Nzui/803 (suit property) and their eviction. The Respondents filed a defence to the Appellant's claim and raised a counterclaim in which they sought among other reliefs, a declaration that the suit property was family land and that the Appellant was holding it in trust for the family.
2. After a full hearing, the trial magistrate dismissed the Appellant's claim and held that the suit property was family land and that the title to the suit property in the Appellant's name was to be cancelled and the same registered in the joint names of the Appellant and the 1st Respondent to hold it in trust for the family. This is the judgment which led into the filing of this appeal.
3. The Appellant raised the following grounds in the memorandum of appeal:
 1. The learned trial magistrate erred in law and fact and misdirected himself when he placed excessive weight on the defence testimony which was not plausible at all.



2. The learned trial magistrate erred in law and fact and misdirected himself by failing to appreciate and consider the evidence of the Appellant as well as exhibits tendered and thereby arrived at the wrong decision.
 3. The learned trial magistrate erred in law and fact in failing to attach the due weight to the Appellant's evidence and submissions on the primary suit.
 4. The learned trial magistrate erred in law and fact in relying on unproduced evidence and other extraneous factors thus arriving at the wrong decision.
 5. The learned trial magistrate erred in law and fact in failing to properly analyse the evidence and exhibits tendered by the parties thus arriving at the wrong decision.
4. The parties were directed to file written submissions on 6th February, 2025. The Appellant was granted 21 days to file and serve submissions. The Respondents were given 21 days to file their submissions upon being served. The Appellant filed her submissions dated 8th April, 2025. As at 10th June, 2025 when writing this judgment, the Respondents had not filed their submissions.
 5. The Appellant submitted that this court is called upon to decide whether the suit property belonged to Kinyenze Mukai. The Appellant gave the history of the family of Kinyenze Mukai and the ownership of the suit property as well as parcel No. Nzai/Nziu/386. The Appellant relied on the case of Ngugi & Another (Environment and Land Case 36 of 2020) (2022) KEELC 2261 (KLR) where Justice Gecheru quoted the decision of the Supreme Court in the case of Isaac Kieba M'Inanga –vs- Isaaya Theuri M'Lintari & Another (2018) eKLR where it was held as follows:

“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”.
6. The Appellant submitted that the registration of the late Martin Michael Matiliku and Appellant's husband as owner of the suit property has never been challenged by anyone since registration. She submitted that the registration of the suit property in the name of her husband was known by all his siblings and no one challenged it.
 7. The Appellant also submitted that the Respondents had no locus to bring the counterclaim as they did not have grant of letters of administration to represent the interests of the Estate of the deceased persons



through whom they claim. She further submitted that the Respondents were not the administrators of the Estate of the late Kinyenze Mukai for them to have filed a counterclaim and that therefore the trial magistrate was wrong in granting them the prayer in the counterclaim.

8. The duty of a first appellate court was stated in the case of *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* (1968) EA 123 as follows:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v. Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)”

9. I have carefully considered the evidence which was given before the trial court as well as the grounds of appeal in the memorandum of appeal and the submissions by the Appellant. The only issue for determination in this appeal is whether the trial magistrate properly analysed the evidence adduced before arriving in the conclusion he reached in the judgment.
10. The evidence which emerged during the hearing is that the suit property and LR No. Nzai/Nziu/386 belonged to Kinyenze Mukai who died before the process of demarcation. The late Kinyenze Mukai had four sons; Kilonzo Kinyenze, Muia Kinyenze, Kanoya Kinyenze and Kawai Kinyenze.
11. At the time of demarcation in 1974 or thereabouts, Kanoya Kinyenze and Kawai Kinyenze had died but it would appear they left their families. During demarcation in 1974, Kilonzo Kinyenze and Muia Kinyenze were registered as owners of LR No. Nzai/Nziu/386. On the same date, Martin Michael Matiliku Kilonzo who was the first born son of Kilonzo Kinyenze was registered as owner of the suit property that is Nzai/Nziu/803.
12. Though the suit property and Nzai/Nziu/386 had separate titles, there was no boundary separating the two on the ground as the family of Kinyenze Mukai treated the two parcels as one parcel. The 1st Respondent was born and bred on the suit property. His parents and his two children were buried on the suit property.
13. The Appellant’s attempts to bring surveyors to establish a boundary between the two properties were thwarted by the Respondents and neighbours who knew that the two parcels were family land for the benefit of the family of Kinyenze Mukai. During the hearing, the Appellant admitted in cross examination that the suit property was not a purchase by her late husband. She also admitted that the 1st Respondent has a home on the sit property and that he has been on that property and that her husband never asked him to move out of the land.
14. Japhet Ngungu Muumbi testified as defence witness number 4. In 2012, he was the District Chairman of Eombe Ntoka Katemi Clan Association. On 18th May, 2012, the clan held a meeting to resolve a dispute over the suit property and parcel 386. In that meeting it was resolved that the two parcels belonged to Kinyenze Mukai and ought to have been shared amongst the four sons of Kinyenze Mukai. Early on, the clan committee had deliberated over the dispute regarding the two parcels and found that the two were one and the same and were to be shared among the four sons of Kinyenze Mukai.



15. The green cards for the two parcels were produced in evidence. They show that parcel Nzai/Nziu/803 was first registered in the name of Martin Michael Matiliku Kilonzo on 31st August, 1974. He obtained title deed on 20th November, 1980. Parcel No. Nzai/Nziu/386 was registered in the names of Kilonzo Kinyenze and Muia Kinyenze with each holding ½ share each. The two who are now deceased never went to pick their title deed. The registration was done on 31st August, 1974, the same day the Appellant's husband was registered as owner of the suit property.
16. The suit property was transferred to the Appellant on 19th May, 2005 as the administratrix of the Estate of her husband. She obtained title deed on 10th June, 2005. The Appellant and the Respondents trace their common origin to Kinyenze Mukai. The Appellant is the wife of Martin Michael Matiliku Kilonzo who is son of Kilonzo Kinyenze who was son to Kinyenze Mukai. The 1st Respondent is a brother to the husband of the Appellant and is therefore grandson of Kinyenze Mukai.
17. The Appellant admitted that she was married in 1968 and that it is her father in law Kilonzo Kinyenze who undertook the demarcation process. Kilonzo Kinyenze had himself and one of his brothers registered as owners of parcel 386 in equal shares and caused his first born son to be registered as sole owner of parcel 803 which is the suit property. The registration of the two parcels having taken place on the same date, it is clear that the two were ancestral land and were for the benefit of all the sons of Kinyenze Mukai.
18. The evidence in the case before the lower court met all the requirements set out in the case of Isaack Kieba M'Inanga –vs- Isaaya Theuri M'Lintari & Another which was quoted in the case of Ngugi – vs- Kamau & Another (Supra).
19. The Appellant's complaint in the memorandum of appeal was that the trial magistrate placed excessive weight on the testimony of the defence; that the trial magistrate did not consider the Appellant's evidence and exhibits; that the trial magistrate considered extraneous factors in arriving at his decision and that he did not properly analyse the evidence and exhibits tendered.
20. The Appellant's case was that the Respondents were trespassers on the suit property who needed to be evicted therefrom. The trial magistrate found that they had interest in the suit property and therefore could not be evicted. On the issue of the counterclaim, the trial magistrate considered the evidence and exhibits produced and found that the suit property was family land which belonged to Kinyenze Mukai. He ordered that the title in the name of the Appellant be cancelled and it be registered in the name of both the Appellant and 1st Respondent to hold it in trust for the family of Kinyenze Mukai.
21. The Appellant raised the issue of locus standi of the Respondents to bring the counterclaim on behalf of the estates of the deceased persons. This issue was never raised in the lower court. The law is clear that submissions are not evidence and cannot take the place of evidence. The issue was prove of trust which has been proved by evidence.
22. The trial magistrate properly analysed the evidence before him. There is nothing to show that he considered any extraneous factors in his judgment. I therefore find no merit in this appeal which is dismissed with no orders as to costs as the parties are members of the same family. I will only vary the lower court judgment number 2 and 3 by adding the name of Regina Kavemba Maingi. For avoidance of doubt the varied parts of the judgment should read as follows:
 2. A declaration be and is hereby made that land parcel No. Nzai/Nziu/803 belongs to the family of the late Kinyenze Mukai and the same be registered in the names of the Plaintiff Jane Muthini Matiliku, the first Defendant Alexander Mbithi Kilonzo and the third Defendant Regina Kavemba Maingi to hold in trust for themselves and other beneficiaries.



3. The land Registrar, Makueni to cancel the title deed issued to the Plaintiff and register the land in the joint names of the Plaintiff and the first and second Defendants.

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HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 17TH DAY OF JULY, 2025.

In the presence of:

Ms. Ngumbao for Mr. Mutia for Respondent.

Ms. Kyalo for Appellant.

Court assistant – Steve Musyoki

