



REPUBLIC OF KENYA



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Maina (Sued on behalf of Maina Kihu - Deceased) v Kihu & 4 others (Civil Appeal 287 of 2019) [2025] KECA 1075 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KECA 1075 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 287 OF 2019
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
JUNE 5, 2025**

BETWEEN

MARY WANGUI MAINA (SUED ON BEHALF OF MAINA KIHU - DECEASED) APPELLANT

AND

**LAWRENCE GACHAU KIHU 1ST RESPONDENT
ESTHER WAIRIMU KAGIRI 2ND RESPONDENT
HANNAH NJERI KIHU 3RD RESPONDENT
EUNICE MWIHAKI KAMAU 4TH RESPONDENT
ROSEMARY WAIGWE WAMWEA 5TH RESPONDENT**

(Being an appeal against the Judgment of the Environment and Land Court at Muranga (Kemei, J.) delivered on 15th November, 2018 in E.L.C. No. 468 of 2017)

JUDGMENT

1. This is a first appeal from the judgment by the Environment and Land Court (hereinafter “ELC”) in Murang’a ELC No.468 of 2017 where the Court made various orders in respect of distribution of an asset of the estate of a deceased person. Our duty as an appellate court on first appeal was as stated by this Court in the case of *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR:

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that 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 allowances in this respect.”

2. The crux of the matter before the ELC was a land parcel known as LR Loc. 2/Kanderendu/63 measuring 13.7 acres. The respondents herein were the plaintiffs at the ELC while the appellant was the defendant. The respondents’ case was that their late father, Kihu Nyanjui, was a brother to the late Maina Kihu. They stated that during land consolidation, the properties of their father were registered under their eldest brother, Nyanjui Kihu, as a trustee for the family in terms of Kikuyu customs. Their father died in the 1950s. In 1965, Maina Kihu and another brother, Clement Kiarie, requested Nyanjui Kihu to use the property as collateral for a loan to expand their business and the elder brother acquiesced. That loan was fully paid off and there would be subsequent loans taken against the property. The court was told that these arrangements were not revealed to the larger family especially the respondents who were young when those events were taking place.
3. The respondents further told the court that in 1972 there was a loan in place when Clement Kiarie died in a road accident. Due to default on the loan, the property was advertised for auction and Maina Kihu managed to salvage the situation and redeemed it. The respondents stated that Maina Kihu thereafter refused efforts by the respondents to compensate him to ensure the beneficiaries (respondents) receive their shares of the property as per entitlement in inheritance. The respondents approached the ELC seeking a declaration that Maina Kihu, Nyanjui Kihu and Clement Kihu intermeddled with the estate of Kihu Nyanjui which was held in trust for all 9 beneficiaries. They also sought a declaration that they were all entitled to consideration as beneficiaries in Nakuru Succession Cause No. 255 of 2015 with regard to the suit property. They also stated that Maina Kihu was to get 2 acres as compensation for the loan he had repaid.
4. The appellant herein is the widow of the late Maina Kihu. She did not dispute that the property was originally registered to her husband’s brother, Nyanjui Kihu. She also agreed with the respondents to the extent that following a loan which was defaulted upon after the death of one of his brothers, her late husband bought the land during a private treaty auction. The appellant’s point of departure from the respondents was and is that her late husband acquired the property completely for his own benefit, not for the benefit of the respondents. She stated that none of the brothers assisted in the re-payment of the loan and he did not buy it on their behalf, taking the position that the land was acquired as a commodity on sale and it would have been sold to any other party by the bank.
5. The ELC gave judgment on 15th November 2018 where it held that the suit land was subject to a customary trust for all the children of Kihu Nyanjui and that Maina Kihu was simply a beneficiary all along. The court considered that the deceased Maina Kihu redeemed the property and held that each beneficiary of Kihu Nyanjui should receive 1 acre of land while the estate of Maina Kihu should receive the balance of 5.7 acres having redeemed the property when it was on the verge of being sold at the public auction.
6. Being dissatisfied with the judgment the appellant has filed a Memorandum of Appeal dated 30th October 2019 seeking to have the judgment by the ELC set aside. The appellant faults the trial court for failing to find that the late Maina Kihu was a bona fide purchaser of the property and not a trustee. She states that the suit land was not trust land, that the *Limitation of Actions Act* was wrongly applied, that the court disregarded the sanctity of title registered to the deceased Maina Kihu and that the judgment was not in line with the evidence on record. The appellant filed submissions dated 28th August 2023 in support of the appeal.
7. The respondent filed submissions dated 10th October 2023. They submit that the deceased Maina Kihu took over the land unprocedurally in a private treaty without involving his siblings and refused



to cooperate with them when they offered to compensate him for his efforts in saving the land. They ask this court to confirm the parcel of land to be trust land and dismiss the appeal so that the land can be subjected to administration. They also submit that the appellant had a favourable outcome in the ELC judgment and there was no justification to appeal.

8. This appeal came up for hearing before us on 25th February 2025 on the virtual platform. Learned counsel Mr. Karanja appeared for the appellant while learned counsel Mr. Onyancha appeared for the respondents.
9. Mr. Karanja for the appellant in a highlight of written submissions submitted that Maina Kihu bought the land and has used it without interference since 1977 when it was registered to him. He submitted that no trust was transferred from Nyanjui Kihu to Maina Kihu upon sale of the property. The appellant also submitted that there must be an intention to create a trust and there was none in this case as no contribution or communication was made to that effect between the brothers. Mr. Karanja asked the court to find that the trust terminated due to change of circumstances.
10. Mr. Onyancha for the respondents submitted that the property has always been trust land but the appellant's late husband abused the privilege, and is now in court with unclean hands.
11. We have considered the record of appeal, the submissions by the parties and the relevant law. In our view, the main issue for determination is whether the late Maina Kihu was registered as proprietor of LR Loc 2/Kanderendu/63 in trust for his brothers after he redeemed the property following a loan where there was default and where the parcel of land was on the verge of being sold by public auction and was redeemed by Maina Kihu.
12. According to the Black's Law Dictionary, 11th Edition a trust is defined as:

“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”
13. This Court in *Juletabi African Adventure Limited & Another vs. Christopher Michael Lockley* [2017] eKLR stated that trusts are always express, and not implied. The court held:

“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”
14. We take note that the parties herein do not dispute the fact that the late Maina Kihu paid for the property, after it had been advertised for sale by public auction. A look at the record does not indicate any evidence that the brothers communicated or requested him to do so as a trustee or that they contributed towards the purchase of the suit property. The respondents pleaded that Maina Kihu refused to be compensated but they did not demonstrate the payments they had made to him since 1977 to refund him the cost of redemption of the property which had been on the verge of sale after the loan had not been repaid.



15. The above notwithstanding, we have considered the finding of the Supreme Court of Kenya in *Kiebia vs. M'lintari & Another (Civil Case 10 of 2015)* [2018] KESC 22 (KLR) where the court stated:

“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.”

16. In the said *Kiebia* case (*supra*), the Court went on to say:

Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered *Land Act*. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. 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.”

17. In the circumstances of the present appeal, we find that the nature of the holding of the suit property was trust land *ab initio*, which fact is undisputed by the parties herein. Accordingly, that trust was the interest passed on to Maina Kihu, who was also a member of the family. We are of the considered view that it would be in error to presume that Maina Kihu owned the suit property exclusively, for the sole reason that he could exercise greater financial muscle as compared to the rest of the family; this would be an injustice in itself.

18. The ELC in its judgment dated 15th November 2018, opted to give the appellant a larger portion of the property due to Maina Kihu's redemption of the land in a time of trouble, and we find no fault in that holding by the Judge. All the parties herein were provided for in the judgment and none was unfairly prejudiced. We are of the view that the ELC properly applied its mind to the issues in this matter and reached the correct decision.

19. Accordingly, this appeal is dismissed and each party directed to bear its own costs, they being family members.



DATED AND DELIVERED AT NYERI THIS 5TH DAY OF JUNE, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI – ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

