



**Mwai v Mwai (Environment and Land Appeal 50 of 2021)
[2025] KEELC 567 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 567 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 50 OF 2021
JO OLOLA, J
FEBRUARY 14, 2025**

BETWEEN

JAMES MIRICHO MWAI APPELLANT

AND

AGNES GATHONI MWAI RESPONDENT

JUDGMENT

Background

1. This is an Appeal arising from the Judgment of the Honorable A. Mwangi, PM delivered on 12th November, 2021 in Karatina PMCC No. 21 of 2018.
2. By her Originating Summons filed before the Trial Court on 26th November, 2014, the Respondent herein – Agnes Gathoni Mwai sought for the determination of the following:
 1. What was the Government land policy in registering land ownership in the year 1959?
 2. Who was the original owner of land parcel No. Kirimukuyu/Mbogoini/46 on 23.4.1959 and 23.6.1978 respectively?
 3. Under what circumstances did the Defendant get registered as the owner of parcel No. Kirimukuyu/Mbogoini/46?
 4. Whether the Defendant should sub-divide and transfer to the Plaintiff the 1.3 acres from land parcel No. Kirimukuyu/Mbogoini/46; and
 5. Who should meet the cost of this suit?
3. The reason the Respondent sought for a determination of the said issues against her brother was her contention that the suit property was their ancestral land. It was the Respondent’s case that their family initially owned both L.R. No. Kirimukuyu/Kiria/9 and L.R. No. Kirimukuyu/Mbogoini/46 (the suit



property). It was the Respondent's position that as at the time of land consolidation and registration in 1959, an individual could not be registered as the owner of two parcels of land. On that account, the Respondent asserted that since their father was already registered as the proprietor of LR. No. Kirimukuyu/Kiria/9, the father caused the Appellant herein to be registered as the proprietor in trust for the family which included the Respondent.

4. In his Replying Affidavit sworn on 4th March, 2015, James Miricho Mwai (the Appellant) refuted those claims. It was the Appellant's case that the suit property was given to himself by his grandfather and not their father as stated by the Respondent. It was the Appellant's case that he had later on permitted his father to live on the land and that he did not hold the same in trust for anyone.
5. Having heard the parties and in her impugned Judgment delivered on 12th November, 2021, the Learned Trial Magistrate (Hon. A. Mwangi, PM) ordered and decreed as follows:-
 1. That the Plaintiff has proved her claims that the (Defendant is) registered (as) proprietor of the suit land in trust for the family as the father at the time could not be registered under more than one parcel of land;
 2. That the Defendant is directed to sub-divide and transfer to the Plaintiff 1.3 acres of the suit land;
 3. That each party to bear their own costs; and
 4. That there be 30 days stay of execution.
6. Aggrieved by the said determination, the Appellant who was the Defendant in the Lower Court moved to this court and lodged a Memorandum of Appeal dated 6th December, 2021 urging this court to set aside the said judgment on four (4) grounds listed as follows:-
 1. That the learned magistrate erred in law and in fact, misapprehended and misunderstood the principles governing customary trusts therefore arriving at a wrong decision.
 2. That the learned trial magistrate erred in law and in fact by taking into account irrelevant considerations and failing to take into account relevant considerations therefore arriving at a wrong decision.
 3. That the learned trial magistrate erred in law and in fact in failing to properly consider the compelling evidence by the Appellant therefore arriving at a wrong decision.
 4. That the learned magistrate erred in law and in fact in failing to properly consider the binding authorities cited by the Appellant.

Analysis and Determination

7. Following directions issued herein, the Appeal was disposed of by way of written submissions. I have accordingly carefully perused and considered both the Record of Appeal as well as the submissions and authorities placed before me by the Learned Advocates representing the parties.
8. As the first Appellate Court, this court is mandated to re-evaluate the evidence presented before the Trial court as well as the decision appealed from and to arrive at its own independent judgment on whether or not to allow the Appeal (See *Selle & Another –vs- Associated Motor Boat Co. Ltd. and Others* (1968) EA 123].
9. The four issues raised by the Respondent in the Originating Summons filed in the Lower Court basically sought to determine one question: Whether or not the registration of the Appellant as



the proprietor of all that parcel of land known as Kirimukuyu/Mbogoini/46 was in trust for the Respondent.

10. The Appellant denied the existence of any such trust. While conceding that the Respondent was his younger sister, the Appellant asserted that his was a first registration as the sole and absolute proprietor of the suit property in the year 1959.
11. In matters regarding customary law, courts have repeatedly held that the same can only be proved by leading evidence on the history (root) of the suit property alongside the relevant customary law on which the trust is founded and to which the parties subscribe to. As has been stated before, a trust can never be implied by the court unless the intention to create a trust in the first place is clear.
12. Indeed, as the Supreme Court of Kenya stated in the famous case of *Isaak Kieba M’Inanga –vs- Isaya Theuri M’Lintari & Another* (2018) eKLR

“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 –vs- Kinuthia*, that what is essential is the nature of the holding of the land and the 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.”

13. From a perusal of the Judgment delivered by the Learned Trial Magistrate it was evident that the court was alive to the above decision by the Supreme Court. Having analysed the said decision, the Court concluded as follows at Page 7 and 8 of the decision rendered on 12th November, 2021:

“Upon subjecting the undisputed facts of this case to the elements set out in the above case, I conclude that the Plaintiff has established her case.

The Plaintiff stated the land was family land belonging to their father. The Defendant though claiming otherwise stated “their family had land. The land was not demarcated when he was born. Later our family was allocated land belonging to Gikonyo Githogori (their grandfather), I and father were given land.” It is clear from the evidence that the Plaintiff belongs to the family of Gikonyo Githogori for she is sister to the Defendant hence her relationship to the family is not remote or tenuous. Although the Plaintiff did not expressly state that she could have been entitled to be registered as an owner but was not due to some intervening circumstances, the Defendant’s evidence proves that the Plaintiff could not have been registered due to age. He stated in cross examination that the Plaintiff was born in 1959



hence it is clear that there is no way she could be registered due to her young age and for the obvious reason that the registration was done in 1958.

Finally, the Plaintiff's claim is against the registered proprietor of the suit land who happens to be her brother. Further evidence, in favour of the Plaintiff's case is the fact that both her parents are buried on the suit land and lived on his land till their death. Also the Defendant admitted in the re-examination that during demarcation, one could only be registered for one parcel of land. This clearly shows that he was registered to hold the land for the family as argued by the Plaintiff..."

14. Taking the above analysis into consideration, I was unable to find fault with the conclusion reached by the Learned Trial Magistrate. The parties herein are siblings and the Appellant was the eldest son of Mwai Gikonyo. Mwai Gikonyo's father was one Gikonyo Githongori.
15. In his own testimony before the trial court, the Appellant told the court that his said grandfather Gikonyo Githongori had many parcels of land in Kiriaini and Mbogoini areas. It was his testimony that those parcels of land were consolidated and registered as Kirimukuyu/Kiria/9 and Kirimukuyu/Mbogoini/46. It was the Appellant's further testimony that at the point of registration his father was registered as the proprietor of LR. No. Kirimukuyu/Kiria/9 while the Appellant was registered as the proprietor of the suit property (Kirimukuyu/ Mbogoini/46).
16. Clearly from his own testimony, the Appellant conceded that the suit property was their ancestral land, the same having previously belonged to his grandfather. While he insists that he was registered as the absolute proprietor of the suit property, he does not explain how his father who was registered as the proprietor of a separate parcel of land came to live on the suit property with his entire family until the time of his death.
17. Testifying in support of her case, the Respondent told the court that she was born and raised on the suit land which was their family home. The fact that the entire family resided on the suit property was actually corroborated by the Appellant's own witness and brother Christopher Karu (DW2) who told the court that they all grew up on the suit land.
18. According to the Respondent, the two parcels of land belonged to their father but since the policy did not allow one to be registered as the proprietor of more than one parcel of land, their father caused the Appellant as his eldest son to be registered as the proprietor of the suit property. It was telling that while he denied holding the property in trust, the Appellant conceded during the trial that during the period of land adjudication, one was only allowed to be registered as the proprietor of one parcel of land.
19. Looking at the totality of the circumstances herein, I was left in no doubt that the Appellant was registered as the proprietor of the suit property in trust for the other family members. That explains the fact that while he moved away in 1968 to Meru where he established his home, he left the rest of the family including his father and mother in occupation of the suit property. That also explains the reason why when the Respondent returned home in the year 1987 after divorcing her husband, the Appellant acting on the instructions of their father gave the Respondent a portion of the land on which she established her home and on which she resides to-date. The Appellant executed the requisite documents and consents which enabled the Respondent to build her house and to install electricity thereon.
20. In the premises I am persuaded that the suit property was before registration, land that belonged to the Respondent's grandfather – Gikonyo Githongori. But for the fact that the Respondent was younger and that she was born a woman and not a man, the Respondent just like the Appellant could have been



entitled to be registered as the proprietor or other beneficiary of the land as the Appellant did not do anything special to have the same registered in his name.

21. Accordingly, it is my considered view that this Appeal has no merit. It is hereby dismissed.

22. As the parties are members of a family, I make no order as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 14TH DAY OF FEBRUARY, 2025

J.O. OLOLA

JUDGE

In the presence of:

Firdaus the Court Assistant.

Ms Murimi Advocate for the Appellant

Mrs Wahome Advocate for the Respondents

