



Kinguru v Mburi (Sued as the administrator of the Estate of Mbuuri Kinguru - Deceased) (Environment & Land Case 11 of 2021) [2024] KEELC 7569 (KLR) (14 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7569 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 11 OF 2021
JM MUTUNGI, J
NOVEMBER 14, 2024**

BETWEEN

CHARLES MUTHIKE KINGURU PLAINTIFF

AND

**CHARITY WAKARII MBURI DEFENDANT
SUED AS THE ADMINISTRATOR OF THE ESTATE OF MBUURI KINGURU -
DECEASED**

JUDGMENT

1. The Plaintiff instituted this suit vide a Complaint dated 11th March 2021, seeking the following orders;
 - a. A declaration that Mburi Kinguru (deceased), the Defendant's husband and for whose estate the Defendant is sued, was registered as the owner of the land parcel no. Mutira/Kirunda/476 in trust for the Plaintiff and other children of Kinguru Mbuuri and for determination of the trust by the Defendant being ordered to transfer half of the land to the Plaintiff in seven days after judgment and in default, the Deputy Registrar of this court to sign all transfer documents on behalf of the Defendant.
 - b. Costs and interest.
2. The Plaintiff averred that he belonged to the Ukiuru Clan, specifically, Mbari ya Kamica. His father was Kinguru Mburi, his mother was Susana Wanjiku Kinguru, and his Stepmother was Mwari Wakibanga. His siblings included Tabitha Wambia (deceased), Mburi Kinguru (deceased), Prisca Wanja Kinguru, Francis Mugweru (deceased), and Esther Wangui.
3. He explained that their Clan traditionally allocated land to men only and if a father passed away, the land for his family would be registered in the name of his firstborn son, who would hold it in trust



for his siblings. During land demarcation, since their father, Kinguru Mburi, was deceased, the clan registered their clan land in the name of Mburi Kinguru, the firstborn son, to hold in trust for the other siblings.

4. The Plaintiff stated that before demarcation, they all lived in various villages. After Mburi Kinguru was allocated the land parcel known as Mutira/Kirunda/476, the entire family of Kinguru Mbuuri moved onto the land. The family later got other land in Mwea where the Plaintiff moved to leaving his coffee bushes under the care of the Defendant's son. The Plaintiff further averred the family of Kinguru Mburi has buried several of their relatives on this land, including Susana Wanjiku, the Plaintiff's mother who died in 1990, Mwari Wakibanga, the Plaintiff's stepmother, and Francis Mugweru, the Plaintiff's brother, who died in 2019.
5. The Plaintiff claimed that the suit land was cultivated by him, his brother Mburi, and Francis Mugweru. He stated that when he planted 300 coffee bushes, he needed to be registered with the Mutira Farmers Cooperative Society, who required the land title and that his brother Mburi agreed to accompany him to the society's offices to confirm that the Plaintiff owned the coffee bushes on the land registered in Mburi's name.
6. The Plaintiff further stated he constructed a house on the land, which was later destroyed by weather conditions while he was away for business in South Ngariama. Although he currently does not reside on the land, he stated he continues to cultivate it and relies on it for his livelihood. He explained that his brother Francis Mugweru had planted 200 coffee stems and macadamia trees on the land, and had constructed a house thereon. The Plaintiff averred that after his brother Mugweru passed away, his coffee bushes were taken over by the son of the Defendant. The Defendant however prevented the Plaintiff from utilizing the land following Mugweru's death.
7. After Mbuuri's death, the Plaintiff averred that he and Mugweru held a clan meeting on the suit land, attended by the Defendant, the Sub-Chief, and two other clan members and it was resolved that Mugweru and the Plaintiff would be allocated one acre each with a title deed, but this was not effected. The Defendant however later indicated she was willing to give to the Plaintiff only one half acre which the Plaintiff deemed insufficient.
8. The Plaintiff asserted that the Defendant secretly filed a succession cause for his brother's estate and was subsequently registered as the owner of the land. Although his brother Mugweru attempted to challenge the grant, he passed away before the matter could be determined. The Plaintiff maintains that Mburi was allocated the suit land in trust for him and his brother and prays that the land be shared equally.
9. The Defendant filed her Defence on 25th March 2021, asserting her status as the registered owner of land parcel Mutira/Kirunda/476, which measures 1.21 hectares. She contended that, as the owner, she cannot be sued in her capacity as the administrator of another's estate. According to her statement, the land was originally registered in her late husband's name, and following his passing, it was lawfully transferred to her on 5th June 2012 through a succession process that faced no objections.
10. The Defendant further averred that the Plaintiff's brother, Francis Mugweru, had applied for the revocation of the grant and had obtained temporary restraining orders, but died before the application was determined. The Defendant averred that her ownership was established through a legitimate process and argued that the Court lacked the jurisdiction to challenge the succession proceedings' decisions or redistribute the land in a manner contrary to the original Court's Ruling. The Defendant prayed for the dismissal of the suit.



Evidence of the Parties

11. On 19th February 2024, PW1, the Plaintiff, testified and he adopted his witness statement dated 5th March 2021 and further relied on the documents filed vide her list of documents dated 11th March 2021 and further documents as per list dated 26th April, 2021 and 3rd August, 2022.
12. During cross-examination, the Plaintiff stated that his claim related to him being awarded one and half acres of the suit land that rightfully belonged to their late father but was registered in his brother's name, to hold in trust for himself and his siblings. He explained that their father had two wives and ten children and that from his mother he was the only son who was now alive.
13. The Plaintiff recalled that the clan allocated the land in Mwea to the children of his father's second wife in 1969. The land was registered under the name of Mburi, a son from that marriage, to hold in trust for his siblings. He stated that his wife had passed away and that he had four children who currently reside in a plot. He expressed a desire for the land to be divided into two equal shares, emphasizing that he was the only surviving son.
14. Priscilla Wanja Wandege (PW2) testified and adopted her witness statement dated 22nd April 2021. She stated she was the Plaintiff's elder Sister from the same mother. She explained that during the land demarcation process, women were not permitted to attend clan elders' meetings. She stated the land was registered in the name of their eldest brother. She noted that since the land allocation, the family of Mburi Kinguru had primarily utilized the land. She stated she also lived on the suit land before she got married but that she presently resides on her husband's land.
15. The Defendant testified as DW1 and reiterated the contents of her witness statement and placed reliance on her bundle of documents as per the list dated 21st April, 2021. She explained her relationship with the Plaintiff, noting that the Plaintiff was the younger brother of her late husband.
16. DW1 detailed that the suit land belonged exclusively to her husband, who received it from the clan after their marriage. She clarified that when the land was granted to her late husband in 1959, his father had already passed away.
17. During cross-examination, she confirmed that only her husband was allocated land, and his siblings did not receive any portion. Although her mother-in-law and four of her children visited the land, she stated they never constructed anything there and she was uncertain about their current whereabouts. DW1 was also unaware if her late husband had given coffee stems to his brothers.
18. Regarding the burial of Mugweru, she indicated that he was not interred on the suit land and did not have a house there. She denied any ongoing clan disputes with her brothers-in-law and asserted that she was not informed of any clan recommendations for her to allocate an acre each to the Plaintiff and his sibling.

Parties Written Submissions, Analysis and Determination

19. The Plaintiff filed his written submissions dated 24th May 2024, where he contended that his claim was founded on the doctrine of customary trust. He submitted that during land demarcation the clan was instrumental in the allocation of land and that each member of the clan was entitled to a single parcel of land parcel, which was exclusively allocated to men. He argued that the collective occupation of the land by the entire family signified that the suit land should be recognized as family property.



20. The Plaintiff submitted that following his brother's death, Mburi Kingulu, the Defendant secretly applied for succession without involving the family members and that she failed to disclose to the succession Court the interest of the other family members regarding the trust property.
21. The Plaintiff contended that clans historically did not reference the term "trust" in land titles, and asserted that customary trust constituted an overriding interest in land matters and urged the Court to uphold his interest in regard to the suit land.
22. The Plaintiff relied on the Cases of Richard Nyamemba Auka & 2 Others v Josephine Motarohi & 2 Others (2014) eKLR, Henry Mwangi v Charles Mwangi CA 245 OF 2004(2013) eKLR, and Isaac M'Inanga Kiebia v Isaya Theuri M'Lintari & Another (2018) eKLR.
23. The Defendant filed her written submissions dated 30th May 2024, where she asserted that the Plaintiff has the legal obligation to prove how his late brother, Mburi Kinguru, was registered as the owner of the suit land in 1959. She argued that it was illogical for the Plaintiff to claim a half share of the suit land when their father had ten children. She explained that after leaving the colonial village, only her mother-in-law settled on the suit land and that Mburi sibling or step-sibling ever lived on or cultivated the land.

To support her position, she relied the following cases: *Karanja Wanjihia v. Duncan Wanjihia & 4 Others* (2004) eKLR, *Isaac M'Inanga Kiebia v. Isaya Theuri M'Lintari & Another* (2018) eKLR, and *Purity Kabari Karuri & 6 Others v. Nancy Kariuko Ndwiga*, Kerugoya ELC No. 107 of 2016.

After reviewing the parties' pleadings, evidence, and written submissions, the primary issue for determination is whether the late Mburi Kinguru held the suit land in trust for himself and his siblings, and secondly whether the transmission of such land through succession would extinguish such trust if it existed.

24. It is not disputed that Mburi Kinguru (deceased) was the elder brother of the Plaintiff and that at the time of land consolidation and demarcation he, Mburi Kinguru was registered as proprietor of the suit property that would otherwise have been registered in the name of his father, who however was deceased as at the time of the registration in 1959. The Plaintiff's and Mburi Kinguru's father, Kinguru Mburi, had two wives. The Plaintiff testified that he and the Defendant's husband were children of their father's 1st wife. He stated that the children of the 2nd wife were given land at Mwea and it was only the children of the 1st wife who were entitled to share the suit land.
25. The rights of a registered proprietor of property are outlined in Sections 24, 25, and 26 of the [Land Registration Act](#), 2012. Section 24(a) provides as follows:

- “ 24. Subject to this Act,
 - a. The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land, together with all rights and privileges belonging or appurtenant thereto.”

26. Section 25(1) and (2) provide as follows:-
 1. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—



2. Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
27. Section 26(1) provides as follows:-
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
31. The rights of registered proprietors of registered land however are subject to the overriding interests as specified under Section 28 of the *Land Registration Act*, 2012. Section 28 of the Act provides as follows:-
28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—
- (a) spousal rights over matrimonial property;
 - (b) trusts including customary trusts;
 - (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
 - (d) natural rights of light, air, water and support;
 - (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
 - (f) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;
 - (g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
 - (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
 - (i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
 - (j) any other rights provided under any written law.



28. The concept of customary trust was well explained and articulated by the Supreme Court in the Case of Isack Kiebi M'inanga v. Isaaya Theuri M'Lintari & another [2018] eKLR. The Court in the stated:-

“Each case has to be determined on its own merits and quality of evidence. Not every claim of a right to land qualifies as a customary trust. What is essential is the nature of the holding of the land and the intention of the parties. If the holding is for the benefit of other family members, then a customary trust is presumed to have been created in favor of those members, regardless of whether they are in possession or actual occupation of the land.”

Some elements that qualify a claimant as a trustee include:

1. The land in question was, before registration, family, clan, or group land.
 2. The claimant belongs to that family, clan, or group.
 3. The claimant's relationship to the family, clan, or group is not so remote that their claim seems idle or adventurous.
 4. The claimant could have been entitled to be registered as the owner or other beneficiary of the land but for intervening circumstances.
 5. The claim is directed against a registered proprietor who is a member of the family, clan, or group.
29. The provisions of the law above are to the effect that the overriding interests, such as customary trust, need not be noted on the Register of the suit land. It, therefore, follows that registration of a person as a proprietor of land does not preclude him from holding an interest in trust for another. Customary trust is an encumbrance on land. These are non-registrable rights that run with the land. They are overriding. They subsist on the land.
30. In the case of Kanyi vs Muthiora (1984) KLR 712, the Court stated that;
- “The registration of the land in the name of the Appellant under the Registered Land Act(Cap 300) did not extinguish the Respondents rights under Kikuyu Customary Law and neither did it relieve the Appellant of her duties or obligations under section 28 as trustee.....The trustees referred to in Section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under Customary law, if the Act had intended to exclude Customary law rights it would have been clearly so stated.”
31. The legal burden of proving the existence of a customary trust lies with the individual claiming a right under that trust. To discharge this burden, the claimant must provide evidence that:-
- a) The properties in question are ancestral clan land;
 - b) During the adjudication and consolidation process, a specific family member was designated to hold the land on behalf of the entire family;
 - c) The individuals named in the land registry are the family members designated to hold the parcels for the family's benefit.
32. Essentially, the claimant must clearly establish the foundational elements of the title, creating a direct link between the trust, the title holder, and the claimant. In the present case it is admitted the land was clan land and that the Defendant's husband was registered as the owner as he was the eldest son of Kinguru Mburi and that he was so registered since the father who would otherwise have been registered



had died. The Plaintiff has argued his brother was registered to hold the land as a trustee for himself and the family.

33. In the Case of Justus Maina Muruku v Jane Waithira Mwangi [2018] eKLR the Court stated as follows;
- “...under Kikuyu Customary Law, to which both parties are subject to, the eldest son inherits land as a Muramati to hold in trust for himself and other heirs. It would follow that even when the suit land was under the name of the Plaintiff’s father, it was subject to customary trust. The registration of the Plaintiff pursuant to the grant of administration did not extinguish the trust on behalf of the lineage of Romano Kung’u. The land was already subject to customary trust.”
34. The burden of establishing the existence of a trust rests with the Plaintiff and the evidence presented must be such as is sufficient to demonstrate that indeed the deceased was registered to hold the suit land in trust for the family.
35. The Plaintiff in his evidence exhibited a copy of the green card for the suit land, which clearly showed that his brother, Mhuri Kinguru, was the first registered proprietor of the suit land in 1959, and that the Defendant (the deceased wife) was subsequently registered in 2012, following succession proceedings in Kerugoya PMSucc Cause No. 286 of 2016. The Plaintiff adduced evidence that he and his deceased brother, Francis Mugweru, had coffee trees on the suit land that they had been tending in the suit land and the letters dated 22nd July 2022 from Mutira Farmers Co-operative Society Ltd produced in the evidence confirmed that the Plaintiff and his deceased brother had membership numbers with the Co-operative Society.
36. Upon a careful evaluation and analysis of the evidence adduced by the parties the irresistible conclusion that the Court comes to, is that the Plaintiff’s brother, Mhuri Kinguru (deceased) was registered as the owner of land parcel Mutira/Kirunda/476 to hold in trust for himself and his siblings. At the time the deceased was registered in 1959 his father and the Plaintiff’s father had died and as was the norm, the clan registered him, Mhuri Kinguru, being the eldest son of Kinguru Mhuri, to hold the land on his own behalf and on behalf of the rest of the family. It could not have been the clan’s intention that the Plaintiff’s elder brother was to hold the land absolutely to the exclusion of his other siblings. The suit land in my view was allocated by the clan to the Defendant’s late husband under the customary law and was held by her husband subject to customary trust.
37. Section 28(b) of the *Land Registration Act*, 2012 expressly provides customary trusts constitute overriding interests that do not require to be noted in the title register. Applying the guidelines expounded by the Supreme Court in the Case of Isack Kiebi M’Inanga –vs- Isaya Theuri M’lntari & Another (supra). I find and hold that the Plaintiff’s claim properly fits as a claim falling under customary trust for the reason that the suit property constituted family or clan land before it was first registered in the name of Mhuri Kinguru (deceased); the Plaintiff was a brother to the deceased and hence a member of the family; and the claim is directed against the Defendant who is presently the registered owner and is a member of the family.
38. The Plaintiff is the only surviving brother of Mhuri Kinguru (deceased) the other brother Francis Mugweru having died in 2019. The registration of Mhuri Kinguru (deceased) was subject to the overriding customary rights and interest of the Plaintiff and consequently when the Defendant carried out succession to the estate of her husband (Mhuri Kinguru) pursuant to which she was registered by transmission of land parcel Mutira/Kirunda/476 she was so registered subject to overriding interest of a customary trust in favour of the Plaintiff.



39. In the premises I am persuaded the Plaintiff has proved his case on a balance of probabilities and I accordingly enter Judgment in favour of the Plaintiff and make the following consequential orders:-

1. A declaration be and is hereby issued that Mhuri Kinguru (deceased) held land parcel Mutira/Kirunda/476 under customary trust and that the transfer to the Defendant by way of transmission was subject to overriding customary trust in favour of the Plaintiff.
2. That the customary trust is hereby determined and the Defendant is ordered to subdivide land parcel Mutira/Kirunda/476 and to transfer one half portion thereof to the Plaintiff, Charles Muthike Kinguru.
3. That the Deputy Registrar is hereby authorized to execute any appropriate and necessary documents on behalf of the Defendant to give effect to this Judgment.
4. Each party to bear their own costs of the suit.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 14TH DAY OF NOVEMBER 2024.

J. M. MUTUNGI

ELC - JUDGE

