

KENYA / JUDGMENT

M'Ithinji v M'Itonga

[2025] KEELC 6572 (KLR)

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Environment and Land Court

BEFORE

BM Eboso

CASE / FILE NUMBER

Environment and Land Appeal E048 of 2023

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M'Ithinji v M'Itonga (Environment and Land Appeal E048 of 2023) [2025] KEELC 6572 (KLR) (1 October 2025) (Judgment) Neutral citation:

[2025] KEELC 6572 (KLR) Republic of Kenya In the Environment and Land Court at Meru Environment and Land Appeal E048 of 2023 BM Eboso, J October 1, 2025 Between Zakaria M'Ithinji Appellant and Josephine Tei M'Itonga Respondent (An appeal against the Judgment of the Senior Principal Magistrate Court at Nkubu [Hon. S K Ngetich, SPM] dated 15/11/2023 in Nkubu SPMC E & L Case No. E030 of 2021)

Judgment

Introduction

1. The two parties to this appeal are siblings. The appeal challenges the Judgment of the Senior Principal Magistrate Court at Nkubu [Hon S K Ngetich, SPM] rendered on 15/11/2023 in Nkubu SPMC E & L Case No. E030 of 2021. The key issue that fell for determination in the said suit was whether the appellant held land parcel number Igoji/Kinoro/962 in customary trust for himself and for the respondent. Invariably, that is the key issue that falls for determination in this first appeal. I will briefly outline the background to the appeal and summarize the parties' submissions before I analyze and dispose the issue.

Background

2. Through a plaint dated 2/8/2021, the respondent instituted Nkubu SPMC E & L Case No. E030 of 2021 against the appellant, seeking the following reliefs against him: (i) a declaration that the appellant held land parcel number Igoji/Kinoro/962 [hereinafter referred to as "the suit land"] in trust for her in terms of Section 28 of the Land Registration Act 2012; (ii) an order cancelling the registration of the suit land in the name of the appellant and decreeing joint

registration in the ratio of $\frac{1}{4}$ share for the respondent and $\frac{3}{4}$ share for the appellant; and (iii) an order awarding her costs of the suit and interest thereon. 3. The case of the respondent was that the appellant was her biological brother. The two of them were daughter and son of the late M'Itonga M'Nceru [hereinafter referred to as "the deceased"]. The suit land was gathered by and originally belonged to their deceased father. The deceased died in 1970. Prior to his death, the deceased transferred the suit land to the appellant to hold it in trust for himself and for all the family members. She [the respondent] was born and raised on the suit land. Although she got married, her marriage ended in 1993 and she had been living in a rented house in the neighbourhood because the appellant had refused to let her enter and live on the suit land. 4. The respondent contended that the suit land was trust property that did not belong to the appellant solely. She itemized various particulars of trust and contended that the appellant was in breach of the trust by, inter alia, refusing to cede her share of the suit land. 5. The appellant filed a statement of defence dated 23/8/2021 in which he admitted that the suit land was originally owned by their late father, the late M'Itonga M'Nceru. He, however, denied the allegation that the land was transferred to him to hold it in trust for himself and for their family members. He contended that their late father transferred the land to him absolutely, adding that their late father similarly gave land to their brother, the late Festus Magambo. He wondered why the respondent was not laying claim to the land held by the late Festus Magambo. He urged the court to reject and dismiss the respondent's claim. 6. Upon conclusion of trial and upon receiving submissions, the trial court rendered the impugned judgment in which it made a finding that the respondent had proved that the appellant held one (1) acre out of the suit land in customary trust for her benefit. The trial court decreed the appellant to transfer to the respondent the one (1) acre within 90 days. The trial court awarded the respondent costs of the suit. Appeal 7. Aggrieved by the findings and decree of the trial court, the appellant brought this appeal, advancing the following five (5) grounds of appeal: 1. The Learned Senior Principal Magistrate erred in law and in fact in finding in favour of the respondent when she had totally failed to prove her case on the required standard. 2. The Learned Senior Principal Magistrate erred in law and in fact in finding that the appellant held 1 acre of L.R Igoji/Kinoro/962 when the respondent did not prove trust. 3. The Learned Senior Principal Magistrate erred in law and in fact in misinterpretation of Land Registration Act NO. 3 of 2012 and in concluding that the extra 1 acre given to the appellant by their father belongs to the respondent. 4. The Learned Senior Principal Magistrate erred in law in his analysis of evidence hence arrived at wrong and erroneous conclusion. 5. The judgment of the Learned Senior Principal Magistrate is against the weight of law and evidence. 8. The appellant urged this court to allow the appeal; set aside the impugned judgment in its entirety; and decree the respondent to bear costs of both this appeal and the suit in the lower court. Appellant's Submissions 9. The appellant filed written submissions dated 30/5/2025 through M/s Ayub Anampiu & Company Advocates. Counsel for the appellant invited the court to examine the evidence tendered by the respondent. Counsel contended that the respondent failed to prove her case on a balance of probabilities, observing that during cross-examination, the respondent admitted that she had two brothers who were given land by their late father but failed to explain why

she chose to pursue the appellant and not their other brother, the late Festus Magambo. Counsel contended that the respondent failed to prove that the appellant held the suit land in trust for her. Observing that the appellant's title was a first registration title, counsel argued that the title was indefeasible except in "specific circumstances". 10. Counsel made reference to the evidence of the appellant and submitted that the deceased transferred the suit land to the appellant during land adjudication and later transferred another 3 acre parcel to the late Festus Magambo. Counsel argued that their late father left the appellant to take care of two of their sisters [Beatrice Thirindi and Consolata Nduru] while Festus Magambo was to take care of the respondent, adding that the respondent had, in fact, constructed a house on Festus Magambo's land. Counsel argued that the appellant was supposed to pursue Festus Magambo for her share of the family land. Counsel urged the court to allow the appeal. Respondent's Submissions 11. The respondent opposed the appeal through submissions dated 25/6/2025, filed by M/s John Muthomi & Co Advocates. Counsel observed that the factual findings and conclusions that were arrived at by the trial court accorded with the evidence on record, adding that the interpretation and application of the law by the trial court was in tandem with the prescribed manner. Counsel argued that the trial court reached the correct decision in finding in favour of the respondent. 12. Making reference to paragraph 3 of the respondent's plaint, paragraph 3 of the defendant's defence, and paragraphs 5 to 7 of the impugned judgment, counsel submitted that the trial court's findings and conclusions were based on the pleadings and the evidence on record. On interpretation and application of the law, counsel cited the framework in Section 28 of the Land Registration Act and the pronouncements of the Supreme Court of Kenya in *Kiebia v M'Linturi & another* (Petition 10 of 2015) (2018) KESC 22 and submitted that the trial court was properly guided by the above law and jurisprudence. 13. Lastly, counsel submitted that the respondent proved her claim, adding that her evidence was corroborated by PW2. Counsel urged the court to reject the appeal.

Analysis and Determination

14. The court has read and considered the original record of the trial court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions in the appeal. The court has also considered the relevant legal frameworks and jurisprudence. As observed in the opening paragraph of this judgment, the key question to be determined in this first appeal is whether the appellant holds land parcel number Igoji/Kinoro/962, measuring four (4) acres, in customary trust for himself and for the respondent. Before I analyze and dispose the issue, I will outline the principle that guides this court when exercising appellate jurisdiction. 15. This is a first appeal. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows: "As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusion. 16. The principle was similarly outlined in *Abok James Odera t/a A J. Odera & association v*

John Patrick Machira t/a Machira & Co Advocates [2013] eKLR as follows: “ This being a first appeal, we are reminded of our primary role as a first appellate court, namely to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.” 17. Does the appellant hold land parcel number Igoji/Kinoro/962 in customary trust for himself and for the respondent? The equitable concept of customary trust in the African Society has been the subject of discourse in a number of judicial pronouncements, starting with *Obiero v Opiyo* [1972] EA 227 and immediately followed by *Esiroyo v Esiroyo* [1973] EA 388. The jurisprudence that prevailed up to early 1980s was that: (i) the registration of land under the now repealed Registered Land Act (Cap 300) extinguished customary rights to that land for all purposes; (ii) rights under customary law or such rights as existed prior to registration were not overriding interests under Section 30 of the repealed Registered Land Act ; and (iii) the trust envisaged under the provision of Section 28 of the repealed Registered Land Act was the one recognized under English common law and doctrines of equity; and (iv) African customary law was incapable of creating a trust to which the title of a registered proprietor would be subject after registration of land. 18. The above jurisprudential trajectory changed in the early 1980s when the Court of Appeal in *Kanyi -v- Muthiora* [1984] KLR 712 recognized the African (Kikuyu) customary rights as overriding interests under Section 30 of the repealed Registered Land Act . In 2000, the Court of Appeal re-affirmed the new interpretation of the law in *Mbui Mukangu -v- Gerald Mutwiri Mbui* [2001] eKLR. 19. The Supreme Court of Kenya made an in-depth analysis of the concept of customary trust and interpreted the law with emphatic clarity in 2018 in *Isack M’Inanga Kuba v. Isaaya Theuri MLithari & another* [2018] eKLR as follows: “ 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. 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. We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered Land Act, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in *Obiero v. Opiyo* and *Esiroyo v. Esiroyo*. Once it is concluded, that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests. 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 occupation of the land." A customary trust falls within the ambit of the proviso to Section 28 of the 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. 20. The parties' respective cases have been summarized in the preceding paragraphs of this judgment. The two parties to this appeal are siblings [brother and sister]. There was common ground that the suit land belonged to the parties' late father, M'Itonga M'Nceru, who died in 1970. The respondent testified that she was born and raised on the suit land where they had their home. She moved from the suit land at the point of entering into a marriage. Her marriage collapsed in 1993 after 14 years. She has no other land to call home. She lives in rented shelter because her attempt to re-enter the suit land has met disapproval and resistance from the appellant who has been waving the title that their late father caused to be registered in his name. She contended that she has been rendered "destitute and homeless". 21. The respondent further testified and led corroborating evidence to the effect that their clan convened a meeting to discuss the dispute and resolved that the appellant was to give to her and her two sisters one (1) acre. The respondent added that, at the time her father died in 1970, she was 11 years, adding that since the appellant was the eldest child, he was given 4 acres "so that he takes care" of his siblings who were still young (minors). 22. PW2 [Titus Kirimi] testified that he was the Clan Secretary of the Boriara Nthiga Clan to which the appellant and the respondent belong. He confirmed that the clan adjudicated the dispute and resolved that the daughters of the late M'Itonga M'Nceru were to be given one (1) acre out of parcel number Igoji/Kinoro/962. He produced signed minutes of the Clan Elders Meeting bearing the list of the elders who were in attendance. 23. On his part, the appellant confirmed through his defence and through his evidence that the suit land belonged to their late father, M'Itonga M'Nceru. He stated that the respondent got married to one Nkoroi Njeru in 1979 and they lived at Murungurune. He added that their late father left him "to take care" of their two sisters, Beatrice Tirindi and Consolata Nduru while his late brother, Festus Magambo, was to take care of the respondent and their other sister, one Florence Kajuju. 24. The appellant did not controvert the respondent's evidence that the respondent was born and raised on the suit land. He did not controvert the evidence that the suit land was the only home which the respondent had prior to getting married in 1979. He called the respondent's former husband as DW3 and he

(DW3) testified that he had set aside ½ of an acre for the respondent but he gave the said ½ acre to his daughter. 25. It is clear from the parties' pleadings and from the evidence on record, including the minutes of the Clan Elders Meeting, that the suit land is family land that belonged to the late M'Itonga M'Nceru. It was for that reason that the Clan Elders resolved that the daughters of the late M'Itonga M'Nceru were to be given one (1) acre out of the suit land. It is also clear from the totality of the evidence on record that the suit land is the only home which the respondent had prior to her 14 years marriage stint. Her marriage having collapsed, she was entitled to go to the only place she knew as her home; the land where she belonged. 26. The appellant indirectly conceded that there was trustship by contending that he was "to take care of" their two other sisters [Beatrice Tirindi and Consolata Nduru] while his brother, Festus Magambo, was "to take care" of the respondent and one Florence Kajuju. There was no evidence that the appellant had ceded any portion of the 4 acres under the trustship. The evidence that was placed before the trial court was that the suit land was the only home that the respondent had known prior to her collapsed 14 year marriage. 27. There was no evidence to suggest that the late M'Itonga M'Nceru intended to give his son [the appellant] the suit land absolutely and leave his minor children homeless. If that was the intention, the idea of "take care of" would not have arisen. The appellant was a trustee, a fact which he indirectly acknowledges by using the phrase "take care of". 28. Having evaluated the evidence that was before the trial court, this court, like the trial court, comes to the conclusion that the appellant held and holds land parcel number Igoji/Kinoro/962 in trust for himself and for the respondent. 29. In the circumstances, this court does not have a proper basis for disturbing the findings and the decree of the lower court. The court was not invited to disturb the apportionment ratio. In the circumstances, the court will refrain from disturbing the ratio. The result is that the appeal is rejected and dismissed for lack of merit. 30. In tandem with the principle in Section 27 of the Civil Procedure Act, the appellant shall bear costs of this appeal. DATED, SIGNED AND DELIVERED AT MERU THIS 1ST DAY OF OCTOBER, 2025. B M EBOSO [MR] ELC JUDGE

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