



**Kimbio v Kimbio (Environment and Land Appeal E010 of 2024)  
[2025] KEELC 1368 (KLR) (Environment and Land) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1368 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VOI  
ENVIRONMENT AND LAND  
ENVIRONMENT AND LAND APPEAL E010 OF 2024**

**EK WABWOTO, J**

**MARCH 20, 2025**

**BETWEEN**

**JACKTON MWAKABA KIMBIO ..... APPELLANT**

**AND**

**MAXWEL MALISO KIMBIO ..... RESPONDENT**

*(Being an appeal from Judgment delivered by Hon. C. K. Kitbinji  
(P.M) in Voi ELC Case No. E004 of 2023 on 19th June 2024)*

**JUDGMENT**

1. The Apex Court of the land being the Supreme Court of Kenya in the case of Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR expressed itself as follows;
  58. “ ..... It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the Registered *Land Act* (now repealed), in Section 25 of the *Land Registration Act*, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered *Land Act*, have now been subsumed in the “customary trusts” under Section 25 (b) of the *Land Registration Act*. Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land.”
2. The dispute herein pits two brothers being the Appellant and the Respondent herein in respect to the parcel of land known as Voi/Ndara 'A'/4389 measuring 21.23 Ha.



3. The Respondent instituted the suit before the trial court vide his Plaint dated 27<sup>th</sup> February 2023. It was his case that he is the beneficial, legal and bona fide owner of the said suit parcel. On or about the 22<sup>nd</sup> October 2022 the Appellant without any justifiable cause caused the Land Registrar, Taita Taveta County to register a caution against the suit parcel without his consent or permission an action which was meant to defeat a sale transaction between him and other known third parties for the disposal of 12 acres which was to be exercised from the vast suit property upon consideration.
4. The suit was filed seeking for a declaration that the Respondent was the absolute owner of the said parcel, and order compelling the Land Registrar to remove the caution registered against the suit parcel, a permanent injunction against the Appellant, damages for unlawful caution, costs of the suit and interest.
5. The Appellant denied the Respondent's claim before the trial court and sought to have it dismissed with costs. He filed a statement of defence and counterclaim dated 22<sup>nd</sup> September 2023. It was his case that he has an overriding interest over the property, the Respondent is out to satisfy his greed and the Respondent holds the same on behalf of the family and has no share of the land since he has already sold his portion. It was also his case that the said caution was registered legally to protect his right and that of his other siblings. It was stated that the Respondent could not purport to own the suit property yet at the time of registration it was clear that the Respondent was to hold the suit property in trust for the whole family. He sought the following reliefs in his counterclaim; a declaration that the suit parcel is family land and that the Respondent was holding it in trust of other siblings and or beneficiaries and costs of the suit.
6. In the evidence before the trial court, the appellant testified that the Respondent is his younger brother, the land in dispute is family land which was registered in the Respondent's name, he placed a caution to protect the interests of the family.
7. He also called his elder brother Thomas Wandeto Kimbio who testified as DW2. It was the testimony of DW2 that the said land was family land which their late father had given it to Jackson Kimbio, Maxwell Kimbio, Chrispinus Kimbio and himself. It was also his testimony that there were two parcels wherein one parcel was registered in the names of the Appellant and the and the other parcel in the names of the Respondent. He also stated that the land that was registered In the names of the Appellant was subdivided, after subdivision the Appellant and the Respondent got 11 acres each, while Chrispus and himself got 10 acres each wherein they all sold their portions.
8. It was also his testimony that after the sale, the remaining land was the one registered in the names of the Respondent upon which the Respondent decided to sell and exclude them. This prompted the Appellant to lodge a caution with a view of protecting the family interests. It was also his testimony that by the mere fact that the land was registered in the names of the Respondent, it did not mean that the same was his land. According to him the land belonged to the family.
9. The Respondent's case was that, the entire suit parcel was his land being the absolute owner, he settled into the same in the year 2010 and made it habitable. He also constructed a dwelling house on the said parcel. The demarcation was done in the year 2018 and title deed issued in 2019. In 2023 he was approached by third parties who were interested in purchasing a portion of the said land but later discovered that the Appellant had lodged a caution against the same making it impossible for him to enjoy the quiet and peaceful occupation of the property.
10. The Learned Magistrate upon considering the case before her delivered her judgment on 19<sup>th</sup> June 2024 in favour of the Respondent. She granted the following orders;



- i. The Plaintiff is the true, absolute and undefeasible owner of all parcel of land being Voi/Ndara 'A' /4389 measuring approximately 21.23 Ha situated in Voi Sub-County.
- ii. An order is hereby issued compelling the 2<sup>nd</sup> Defendant to remove and or cause to be removed the caution registered against the suit property.
- iii. A permanent injunction is hereby issued restraining the Defendants and their agents, servants and or representatives from entering, encroaching upon, conducting any constructions, disposing of and or interfering in any manner whatsoever with the suit property.
- iv. The Plaintiff will have costs of the suit.

## **The Appeal**

11. The Appellant being aggrieved by the said judgement filed the instant appeal vide a memorandum of appeal dated 2<sup>nd</sup> July 2024 which was premised on the following grounds;
  - i. That the Learned Magistrate erred in both law and fact by declaring the Respondent as the true and absolute owner of Voi/Ndara A/439.
  - ii. That the Learned Magistrate erred in both law and fact by deciding that there was insufficient evidence to prove that the suit parcel was trust land.
  - iii. That the Learned Magistrate erred in both law and fact by finding that the Respondent had proved her case on a balance of probabilities.
  - iv. That the Learned Magistrate erred in both law and fact by disregarding the evidence adduced by the Appellant and his witness who were siblings to the Respondent.
  - v. That in whole the finding and holding of the Learned Magistrate as contained in her judgment delivered on 19<sup>th</sup> June 2024 is inconsiderate, erroneous, unlawful and untenable by law.
12. The Appellant prayed for the following reliefs in respect to his appeal:-
  - a. The Appeal be allowed.
  - b. That the Judgment of the Principal Magistrate in its entirety be set aside and this court do allow the Appellant's Counterclaim.
13. This being the first appeal, the mandate of this court is to consider the evidence, evaluate it and make a finding with the caveat that the Court lacks the advantage of the trial Magistrate who saw and heard the witnesses. See, the cases of Jabane -vs- Olenja [1968] KLR 661 and Selle vs. Associated Motor Boat Co Ltd & Others [1968] EA 123 where this Court stated:

“...this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 ...”
14. The appeal was contested by the Respondent and parties took directions to have it canvassed by way of written submissions. The Appellant filed written submissions dated 13<sup>th</sup> December 2024 while the Respondent filed written submissions dated 29<sup>th</sup> January 2025.



### **The Appellant's written submissions**

15. Citing the cases of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* (Supra), *Twalib Hatayan Twalib Hatayan & Another vs Said Saggar Ahmed Al. Heidy & Others* [2015] eKLR and *Peter Gitonga vs Francis Maingi M'Ikiara Meru High Court No. 146 of 2000*, the Appellant submitted that the suit parcel was family land held in trust by the Respondent and that customary trusts are recognized within the provisions of Section 28 of the *Land Registration Act* and these trusts are overriding trusts which ordinary law may not be noted in the register and therefore a proprietor's title is defeasible on grounds of trust.
16. The Appellant faulted the Learned Magistrate for finding that the suit land was not trust land yet the Appellant had tendered sufficient evidence demonstrating as much including calling the Respondent's sibling to confirm the same.
17. It was also submitted that the Learned Magistrate erred in law and fact by considering extraneous matters not pleaded and hence reaching a faulty decision. It was argued that the trial magistrate erred by tackling the issue of the other siblings not being enjoined as parties to the suit who were the Appellant's witnesses that neither did the Appellant exhibit an authority to sue and plead on their behalf. It was contended that the said issue had not been pleaded by either party and hence the trial magistrate had no authority to address herself on the same.
18. The court was urged to grant the reliefs sought together with costs of the Appeal.

### **The Respondent's submissions**

19. The Respondent submitted that the trial court rightly found that the Respondent had proved his case to the required standard. It was submitted that from the case law cited by the Appellant, it was clear that customary trust must be established before this court can even entertain the Appellant's position that the land in question amounts to customary trust and mere allegations of the same are not enough.
20. It was argued that the Appellant did not adduce any evidence either by way of family meetings, a will or records at the land's registry demonstrating that indeed the suit parcel was under their father's name or was held in his name in trust for the family members.
21. The Court was urged to find that the appeal has no merit and to dismiss the same with costs.

### **Analysis and Determination**

22. Having considered the entire Record of Appeal, the grounds raised in the memorandum of appeal and the written submissions filed by the parties, this court proceeds to determine the Appeal on the following issues:-
  - i. Whether the suit parcel known as Voi/Ndara 'A'/4389 registered in the names of the Respondent was held in trust for the family or whether the Respondent was indeed the absolute owner.
  - ii. What are the appropriate reliefs to grant herein.
23. The said issues shall be considered sequentially.



**Issue No. (i) Whether the suit parcel known as Voi/Ndara 'A'/4389 registered in the names of the Respondent was held in trust for the family or whether the Respondent is indeed the absolute owner.**

24. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the Evidence Act, which provides as follows:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

25. The Appellant’s case was that the suit parcel was family property which was held in trust by the Respondent on behalf of their family.

26. The Respondent on the other had contended that the same was his property and it was never registered as family property upon which he held it in trust on behalf of the family.

27. It is evident that trusts including customary trusts are recognized as overriding rights within the provisions of Section 28 of the Land Registration Act and these trusts being overriding rights are ordinarily not noted in the register and therefore a proprietor’s title is defeasible on grounds of trust. Within the provisions of Section 25 of the Land Registration Act, certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, bind the registered proprietor on the terms noted in the register.

28. It is settled law that to prove a trust in land; one need not be in actual physical possession and occupation of the land. This was the position upheld by the Supreme Court in the case of *Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another* (Supra).

29. The question that then arises is whether the Appellant discharged the burden that the Respondent held the suit property in trust for the family.

30. Section 24 of the Land Registration Act 2012 provides as follows;

“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.”

31. Section 25 of the Land Registration Act recognizes overriding interests in registered land including trusts. It provides;

“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—

a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and



b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

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.”

32. Whereas Section 28 of the same Act provides;

“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) deleted by *Act No. 28 of 2016*, s. 11(a);
- (b) trusts including customary trusts
- (c).....
- (d)....
- (e).....
- (f)...
- (g).....
- (h)...
- (i) ..... and
- (j) any other rights provided under any written law.”

33. The Appellant herein pleads the existence of a trust. According to the Black’s Law Dictionary, 9<sup>th</sup> Edition; a trust is defined as:

“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).”

34. Under the *Trustee Act*,

“...the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”

35. The supreme court in the case of *Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another* (Supra) stated;

“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.”
36. In the case of *Justus Maina Muruku vs Jane Waithira Mwangi* [2018] eKLR the court noted that customary trusts are an encumbrances on land. That they are non-registrable rights which run with the land.
37. In the present case it is worth noting that in proving land ownership and also in considering whether or not the said property was registered in trust on behalf of the family, it is important for the court to examine the root of the suit land. From the evidence that was tendered before the trial court, the parties are siblings who share the same father. Evidence was led to the effect that their father had two wives and that the other family/house had their own properties and that the current suit properties belonged to them. The Appellant called a witness Thomas Wandeto Kimbio who was their elder brother. The witness maintained that the land is family land and the Respondent could not deal with the same to the exclusion of family members. The witness also stated that when their father was alive he sat the entire family down and gave the suit land to the four brothers; Thomas Wandeto Kimbio, Jackton Mwakaba Kimbio, Maxwel Maliso Kimbio and Chrispus Luge and further that their father’s wishes was that they should all benefit from the said land.
38. From the analysis of the evidence that was tendered, it was evident that the Respondent did not purchase the suit property but acquired the same after demarcation in the year 2018 and title issued in the year 2019. There is crucial evidence that indeed the Respondent did not buy the property. It was family land which was registered in his name.
39. The Respondent did not call any other family member to controvert the testimony tendered by the Appellant and DW2 in respect as to who the suit property was acquired.
40. 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. Trust is an encumbrance on land. These are non-registrable rights which run with the land. They are overriding. They subsist on the land. From the above analysis and based on the evidence adduced and weighing it on a balance of probabilities, the Court finds that the elements of what would constitutes a trust on land as reiterated by the Supreme Court in the case of *Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another* (Supra) are applicable herein and they have been successfully proven by the Appellant and as such it is the finding of this court that that trust subsists on the suit land in favour of the family and as such the Respondent cannot be deemed as the absolute owner of the suit parcel. This particular finding determines the appeal and this court need not consider the other grounds of appeal raised by the appellant.
41. Having found that there exists trust on the suit land, it is the finding of this court that the appeal is merited. The learned magistrate erred in law and fact in holding that the Respondent was the absolute owner and that the Appellant had failed to join other siblings as parties to the suit yet clearly the Appellant went ahead and called their elder brother Thomas who confirmed that indeed the suit parcel



was family land as per the wishes of their late father. On this particular issue it was also worth noting that the learned magistrate failed to appreciate the provisions of Order 1, rule 9 of the Civil Procedure Rules on misjoinder and non-joinder of parties which stipulates that no suit shall be defeated by reason of the misjoinder or non-joinder of parties since the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

### **Issue No. ii What are the appropriate reliefs**

42. The Appellant had filed a counterclaim before the trial court seeking for the following relief; a declaration that the suit parcel is family land and that the Respondent was holding it in trust of other siblings and or beneficiaries and costs of the suit.
43. The court has pronounced itself as much and having been satisfied that the Appellant has been able to demonstrate that the suit parcel was family land being held in trust, it is the finding of this court that the appeal is merited and warrants the grant of the reliefs sought. The court shall proceed to grant the said relief as was sought in his counterclaim.
44. In respect to costs, it is trite law that costs follow the event unless otherwise ordered by the court. Considering that dispute involves family members, the appropriate order would be to direct each party to bear own costs.

### **Final Orders**

45. In conclusion, the appellant's appeal succeeds and the judgment of the lower court is hereby set aside and substituted with the following orders;
  - i. The Respondent's suit before the lower court is hereby dismissed.
  - ii. A declaration be and is hereby issued that the suit property, Voi/Ndara 'A'/4389 is family land and the Respondent held the same in trust of other siblings and beneficiaries.
  - iii. Each party to bear own costs of the appeal and costs before the lower court.

Judgment accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 20<sup>TH</sup> DAY OF MARCH 2025.**

**E. K. WABWOTO**

**JUDGE**

In the presence of:-

Mr. Mwandoto h/b for Mr. Mwazighe for the Appellant.

Mr. Motuka for the Respondent.

Court Assistant: Mary Ngoira.

