Kiprop & 3 others v Andrew & 2 others (Land Case Appeal E003 of 2023) [2025] KEELC 1145 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1145 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

LAND CASE APPEAL E003 OF 2023

BN OLAO, J

MARCH 13, 2025

BETWEEN

CONNY KIPROP ..... 1ST APPELLANT

LEAH NASIKE OPIYO ALIAS SUSAN OPIYO ..... 2ND APPELLANT

ELIZABETH OPIYO ..... 3RD APPELLANT

AKINYI NDALO KHAJUSU ..... 4TH APPELLANT

AND

JOSEPHAT ANDREW ..... 1ST RESPONDENT

HUSSEIN OUNDO MUKHEBI ..... 2ND RESPONDENT

ABDALLA ALI ..... 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the Hon. Patrick Olengo – Senior Principal Magistrate - delivered on 21st September 2022 in Busia CMC ELC Case No E27 of 2021)

JUDGMENT

1. Josephat Andrew, Hussein Oundo Mukhebi and Abdalla Ali (the 1st, 2nd and 3rd Respondents respectively) were the plaintiffs in Busia CMC ELC Case No E27 of 2021. They approached the trial Court vide their amended plaint dated 23rd March 2021 in which they impleaded Conny Kiprop, Susan Opiyo, Elizabeth Opiyo and Akinyi Ndalo Khajusu (the 1st, 2nd, 3rd and 4th Appellants herein) alleging that the Appellants had fraudulently sub-divided the family land parcel land No Bunyala/Bulemia/242 then registered in the name of Paul Opiyo Sumba (the deceased) to create land parcels No Bunyala/Bulemia/5411, 5033, 5012 and 5409 (the suit land). The first two parcels were registered in the name of the deceased while the last two parcels were registered in the name of Leah Nasike Opiyo alias Susan Opiyo. Particulars of that fraud were pleaded in paragraph 13 of the amended plaint. They therefore

sought the main remedy that the original land parcel No Bunyala/Bulemia/242 revert in the name of the deceased and to be subjected to the succession process. They also sought an order regarding the body of the deceased being released to the 1st Respondent for burial but that appears to have already been determined by the time the suit came up for hearing before the subordinate Court.

2. By an amended statement of defence dated 11th May 2021 and filed on 12th May 2021, the Appellants admitted that the land parcel No Bunyala/Bulemia/242 was registered in the name of the deceased but added that prior to his death, he had voluntarily sub-divided it and transferred a portion in the name of his daughter Leah Nasike Opiyo and also to the 1st Respondent who resides on the same but is yet to register it in his name citing lack of funds. They denied the allegations of fraud levelled against them.

3. The Appellants filed a reply to the defence in which they joined issues with the Respondents.

4. The suit was heard by Hon. P. Olengo Senior Principal Magistrate who, vide a judgment delivered on 21st September 2022, found in favour of the Respondents and entered judgment for them as per their amended plaint.

5. Aggrieved by that judgment, the Appellants lodged this appeal seeking to have it set aside. The following eight (8) grounds of appeal have been proffered:

    1. That the learned Trial Magistrate erred both in law and in fact in finding the claim in favour of the Respondents herein and holding that the parcel No Bunyala/Bulemia/242 reverts to the name of the deceased without any basis or sound legal reasoning.

    2. That the learned Trial Magistrate erred both in law and in fact when he found that the sub-division of parcel that gave rise to Bunyala/Bulemia/242 was not done as the surveyor did not appear physically on the ground.

    3. That the learned Trial Magistrate erred in law and in fact when he held that the deceased Opiyo did not sign the application for consent forms nor obtain consent from the Board despite the overwhelming evidence of the Land Registrar who confirmed that the application form, Land Control Board Consent, transfer and all other necessary and legal process were duly signed and/or complied with before registration was effected.

    4. That the learned Trial Magistrate erred in law and in fact when he failed to take into account the evidence adduced on behalf of the Appellants and instead embarked on a fishing expedition and relying on imaginary evidence which was not placed before him for consideration.

    5. That the learned Trial Magistrate erred in law and in fact in holding that the deceased OPIYO did not have full possession of his full facilities when the mutation and sub-division was done and that it was the Appellants' wide scheme to have him sub-divide and transfer his land unproportionally and without any basis.

    6. That the learned Trial Magistrate erred in law and in fact when he failed to make a determination of all the issues placed upon him including the allegations of fraud and the death of the 2nd Appellant in whose name parcel No Bunyala/Bulemia/242 was registered.

    7. That the learned Trial Magistrate erred in law and in fact in holding that the deceased OPIYO was holding the said parcel of land in trust for the entire family and therefore the family ought to have been involved in the sub-division in the absence of evidence being led and/or the same being pleaded.

    8. That the learned Trial Magistrate erred in law and in fact when he failed to evaluate the entire evidence placed before him hence arriving at a wrong decision.

6. Directions having been taken that the appeal be canvassed by way of written submissions, the same were filed by Mr Otieno instructed by the firm of Masiga Wainaina & Associates Advocates for the Appellants and by Mr Wangira instructed by the firm of Wangira Onkoba & Company Advocates for the Respondents.

7. I have considered the record of appeal and the submissions by counsel.

8. This being a first appeal, this Court has a duty to re-evaluate the evidence and make an independent decision. In the case of Okeno v Republic 1972 E.A 32, the then East Africa Court of Justice identified that duty as follows:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandy v R 1975 E.A 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions – Shantilal M. Ruwala v R 1957 E.A 570. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide, whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post 1958 E.A 424".

The above has been reiterated in many subsequent cases. See, for example, Selle & Another v Associated Motor Boat Company Ltd & Others 1968 I Ea 123 And Also Kiruga v Kiruga & Another 1958 KLR 348.

9. Before I delve into the appeal itself, I must address an issue which, though not raised in the Memorandum of Appeal, has been raised by counsel for the Appellant in his submissions. At page 2 of his submissions, counsel for the Appellants has stated as follows:

> " Before considering the other grounds, it is important to determine the question whether the plaintiffs had locus to bring this suit on behalf of the deceased property.
>
> It is our submission that the plaintiffs herein lacked locus to bring the present suit on behalf of the deceased for lack of grant of letters of administration ad litem."

A cursory perusal of the Memorandum of Appeal shows that the issue of the locus standi of the Respondents to file the suit which led to the impugned judgment was not raised and neither was it pleaded nor canvassed during the trial. Order 42 Rule 4 of the Civil Procedure Rules provides that:

> " The Appellant shall not, except with leave of the Court, urge or be heard in support of any ground of objection not set forth in the Memorandum of Appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the Memorandum of Appeal or taken by leave of the Court under this rule:
>
> Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground." Emphasis mine.

It is clear from the above, therefore, that whereas an appellate Court has a discretion and indeed power to consider any ground of appeal other than that set out in the Memorandum of Appeal, all the parties must be given sufficient opportunity to address the Court on that new ground – *Margaret Njeri*

Mbugua -v- Kirk Mweya Nyaga C.a. Civil Appeal No 110 Of 2012 [2016 eKLR]. Counsel for the Respondents did not make any submissions on the issue of the Respondents' locus standi to file the suit in the subordinate Court though served with Appellants' submissions.

10. Notwithstanding the fact that counsel for the Respondents did not submit on the issue of locus standi and that the same was not raised at the trial, that is an important issue which can be raised at any stage of the trial including an appeal. In the case of Kihanya & 4 Others v Gichuri & Another C.A. Civil Appeal No 15 of 2019 [2024 KECA 852 KLR], the Court of Appeal stated at paragraph *19* that:

> " It is settled law that an objection to jurisdiction can be raised at any stage. Nonetheless, such an objection should be raised at the earliest opportunity. The failure to raise the issue locus standi before the trial Court is not fatal nor is there a bar to the said issue being raised at this stage. Accordingly, we will first address the issue whether the Respondents had the capacity to institute the impugned suit. If the answer to the said issue is in the affirmative, we will proceed to determine the other issues raised but if the answer is in the negative, then the instant appeal will be disposed on that ground alone."

The Court then went on to cite the case of Alfred Njau & Others v City Council Of Nairobi 1982 KAR 229 where it was held that:

> " The term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".

The Court went on to add in Kihanya & 4 Others v Gichuri & Another (supra) at paragraph *21* thus:

> " Locus standi is so cardinal in civil proceedings. This is because without locus standi, a party lacks the right to institute and/or maintain the suit even where a valid cause of action subsists. It can be equated to a Court acting without jurisdiction."

The Court proceeded further to cite Amlers Precedents Of Pleadings Lexis Nexis Ltc Harms et al 2018 at page 248 where it is stated that:

> " The question of locus standi is in a sense procedural, but it is also a matter of substance. It concerns the sufficiency and directness of a person's interest in the litigation to be accepted as a litigating party. It is also related to the capacity of a person to conclude a jural act. Sufficiency of interest depends on the facts of each case and there are no fixed rules."

As already stated earlier in this judgment, this Court exercising appellate jurisdiction has a duty to re-evaluate the evidence which was before the trial Court and arrive at its own conclusions in deciding whether or not to affirm the decision being appealed. Further, under Section 78 of the *Civil Procedure Act*, this Court has the power to perform the same duties which are conferred upon the trial Court.

11. Having said so, it is not in dispute that the original land parcel No Bunyala/Bulemia/242 was first registered in the name of the deceased on 2nd October 1985. In paragraph 20 of the amended plaint, it was pleaded that he died on 6th March 2021. The Register to the land parcel No Bunyala/Bulemia/242 shows that it was closed on 8th October 2019 upon sub-division to create the suit land. That means that the sub-division was done during the life time of the deceased. In paragraph 37 (a) and (d) of the amended plaint, the Respondents sought the following substantive remedies:

    a. "A declaration be and is hereby made that the sub-division of land known as Bunyala/Bulemia/242 was illegal and or no legal consequences and is hereby reversed."

b. –

c. –

d. "An order of rectification of the register for land known as Bunyala/Bulemia/242 be and is hereby rectified to revert to the original Bunyala/Bulemia/242 in the name of Paul Opiyo and the improper sub-division done earlier is cancelled."

It must be clear from those pleadings that the Respondents approached the trial Court ostensibly to protect the Estate of the deceased and specifically the land parcel No Bunyala/Bulemia/242 which they want to revert to the name of the deceased. It was therefore necessary that the Respondents first obtain a grant of Letters of Administration to clothe them with the necessary authority or locus standi before instituting that suit. It is clear from Section 82 of the *Law of Succession Act* that a person can only institute or enforce a suit on behalf of the Estate of a deceased person after appointment as a personal representative. It is now well settled that where a suit is filed relating to the Estate of a deceased person without a grant of representation, the proceedings are null and void for want of locus standi – Virginia Edith Wamboi v Joash Ochieng Ougo & Another 1982 – 88 I KAR.

12. Since the Respondents had no locus standi to entitle them to file the suit in the subordinate Court seeking orders in relation to the property No Bunyala/Bulemia/242, it means, as was stated in Macfoy v United Africa Co Ltd 1961 3 ALL E.R 1169, it means that the proceedings were null and void and therefore incurably bad. Their suit was for striking out. On that ground alone, this appeal must be allowed.

13. Should I be wrong, I will now interrogate all grounds.

14. In ground NO 5, the Appellants have taken issue with the trial magistrate for holding that deceased did not have full possession of his faculties when the land parcel No Bunyala/Bulemia/242 was subdivided. When he was cross-examined on 10th November 2021 by MS ARON, counsel for the Appellant, on the mental status of the deceased, this is what Josephat Andrew Opiyo the 1st Respondent and who was the 1st plaintiff in the trial Court said at page 298:

> " According to his age he was not up (sic) mentally. He was misled with somebody close. He was not able to reason on that day."

While addressing that issue of the deceased's mental capacity, this is what the trial magistrate said at pages 323 and 324 of volume 2 of the record of appeal:

> " It is also true that when sub-division was done the said Opiyowas over 90 years. He was sickly and from what is coming from the evidence on record he was shielded by the 1st defendant from relatives and in particular the 1st plaintiff herein who was his only surviving son ... From the above stated, I do not think the deceased who was 94 years as at the time of sub-division and who was suffering from some illness had full possession if (sic) his faculties where the mutation was done and sub-division was done. I do not think he was aware of what was going on. He was also locked from other members of the family. One wonders why this was happening. This could have been part of the wider scheme to have him sub-divide and transfer land unproportionately among family members."

From the above, it is clear that both the 1st Respondent and the trial magistrate took it upon themselves to conclude that the deceased was not in full control of his mental capacity when the land parcel No Bunyala/Bulemia/242 was being partitioned. It goes without saying that both the 1st Respondent and

the trial magistrate are not medical practitioners and they are therefore not in a position to properly assess the mental capacity of the deceased. In the case of Grace Wanjiru Munyinyi & Another -v- Gedion Waweru Githunguri & 5 Others C.A. Civil Appeal No 202 of 2005 [2011 eKLR], the Court of Appeal while setting aside the judge's finding that a Donor of a Power of Attorney was of un-sound mind held that:

> " The starting point is the presumption that must always exist, until it is proved otherwise, that every person is of sound mind. It is a logical presumption otherwise no one would be held responsible for their actions. It is also the position in law, and we find persuasive authority for it in the Wiltshire Case (supra), that the burden of proof lies on the person who asserts the incapacity. In the WILTSHIRE CASE, those who were asserting mental incapacity as cited in paragraph (6) above, called a medical practitioner who had been attending to the defendant for fourty years, and testified that he examined the defendant three months after the sale agreement and "found symptoms of senile degeneration in that he was delusional, confused, and incoherent" and in his opinion the defendant was "incapable of managing his own affairs by reason of mental infirmity".

In the case of Patrick Machira v Patrick Kahiaru H.C.C.C No 113 of 1999 (UR), the Court having reviewed several English authorities summarized the law as follows:

> " It is a very serious thing to say of, and concerning a person, that such person is a person of unsound mind or suffers mental disorder. The law presumes that every person is mentally sound, unless and until he is proved mentally disordered. And, even where one person is shown to be of unsound mind one must always bear in mind that the degrees of mental disorder are widely variable, and incompetence to do any legal act or inability to protect one's own interests, must not be inferred from a mere name assigned to the malady from which a person may be suffering."

And in MMG v Tribunal To Investigate The Conduct of Lady Justice Mmg Petition 10 [E013 of 2022] 2023 KESC 73 KLR, it was held that:

> " Mentally incapacity must be diagnosed by a qualified professional."

While there were medical chits showing that the deceased had been attended to in various hospitals, the burden was on the Respondents to call a qualified medical professional to demonstrate that the deceased was not in a position, due to any mental incapacity, to execute any transfer documents in respect to the land parcel No Bunyala/Bulemia/242. There was therefore no basis upon which the trial magistrate could have concluded, as he did, that he did "not think the deceased who was 94 years as at the time of sub-division and who was suffering from some illness had full possession if (sic) his faculties where (sic) the mutation was done and sub-division was done. I do not think he was aware of what was going on." That assertion together with the evidence of the 1st Respondent that the deceased, "According to his age he was not up mentally," was therefore only opinion evidence by lay persons and should not have formed the basis of any decision which can be supported. The trial magistrate therefore erred in law and in fact in holding that the deceased was not in full control of his mental faculties when the sub-division of the land parcel No Bunyala/Bulemia/242 was done.

15. Grounds NO 2, 3 and 4 of the Memorandum of Appeal can be considered together. The Trial Magistrate is faulted therein to have erred both in law and fact for finding that the sub-division which gave birth to land parcel No Bunyala/Bulemia/242 was not done since the surveyor did not physically appear on the land and also for holding that the deceased did not sign the application nor obtain

consent despite the overwhelming evidence of the Land Registrar who confirmed that all the necessary legal processes were complied with. When he testified before the trial magistrate on 2nd March 2022, the County Land Registrar Busia Mr Wilfred Nyandoro Nyaberi (DW2) had the following to say in his evidence in chief with regard to the sub-division of the land parcel No Bunyala/Bulemia/242 as per page 304-305 of the record of appeal:

> " I am Wilfred Nyaberi County Land Registrar Busia. I know the land parcel No Bunyala/ Bulemia/242. Court – shown a document and the application. I have them in my file. It is certified. I swore an affidavit. It was sworn by myself. I said that it was not signed. I later looked at my file I found the singed (sic). We have the original and duplicate to the Land Control Board. The original was pinned together (sic) the duplicate application not signed and the original application form was pinned together with the duplicate letter of consent by the time of receiving summons. I opted to swear an affidavit and my allegations are the application which was not signed but later I realized that there was a mistake of the application and the consent. I have come to Court to clarify that the affidavit I swore was in respect of unsigned application. I wish to produce the original application ... It is indicated approved – the application was approved. After the approval a surveyor was engaged who sub-divided the land and the mutation, original title, certificate of compliance were presented for redistribution and subsequent opening of the registers. I have all the documents. I would wish the Court to look at them."

The record shows that the witness proceeded to produce some documents including the mutation and original title. And when he was cross-examined by Ms Wangira counsel for the Respondents, he said:

> " And the sub-division would not have been proper if the application was not signed."

In the face of the above testimony from the Land Registrar with regard to how the land parcel No Bunyala/Bulemia/242 was sub-divided and transferred, the trial magistrate had the following to say at page 323-324 of the impugned judgment:

> " What comes out clearly is that the sub-division of land parcel No Bunyala/Bulemia/242 into various parcels of land was done during the lifetime of one Paul Opiyo Sumba who was the registered owner. It is this sub-division and transfer that the plaintiffs said was illegal, fraudulent and unfair. It is also true that when sub-division was done, the said Opiyo was over 90 years old. He was sickly and from what is coming from the evidence on record he was shielded by the 1st defendant from relatives and in particular the 1st plaintiff herein who was his only surviving son. It is during this period that the said parcel of land Bunyala/Bulemia/242 was subdivided and resultant parcels transferred as stated earlier in this judgment. It is also noted that subdivision of land should first be a physical exercise where the surveyor visits the ground and takes measurements before reducing the same to paper work and coming up with mutation forms. There is no evidence that this happened."

With those comments, the trial magistrate proceeded to trash the survey exercise and subsequent subdivision of the land parcel No Bunyala/Bulemia/242. The record shows that there was indeed conflicting testimony from the parties herein with regard to the sub-division of the land parcel No Bunyala/Bulemia/242 to create the suit land. The Respondents' case was that the exercise was

conducted fraudulently without their involvement. In his evidence in chief, the 1st Respondent said at page 287:

> " I live on my late father's land which I learnt to be Bunyala/Bulemia/242. In 2019 I realized it was sub-divided into 4 pieces without my family getting involved."

The same was repeated by the 2nd Respondent who said at page 300 that:

> " I was told the land was subdivided without involving me. I was told by my aunts not to come home so as not to stress my grandfather. Sub-division was fraudulent."

The Appellants denied the allegations of fraud levelled against them.

16. In light of those competing versions of how the land parcel No Bunyala/Bulemia/242 was sub-divided, the trial magistrate was of course obliged to decided which version to believe and which version to reject. The evidence of the Land Registrar was that the sub-division of the land parcel No Bunyala/ Bulemia/242 was done procedurally. That was the testimony of an expert witness and generally, such evidence is extremely persuasive in assisting the Court to reach its own independent opinion – Shah & Another -V- Shah & Others I E.A 290. The Land Registrar having vouched for the validity of the process in which the land parcel No Bunyala/Bulemia/242 was sub-divided by the surveyor and the documentation authenticated, and in the absence of any other expert opinion to rebut that testimony, it was not proper for the trial magistrate to simply trash such expert testimony on the basis of the deceased's age and illness when, as I have already stated above, the suggestion that the deceased was not in full control of his faculties when the sub-division of the said land was done was not well founded. The trial magistrate ought to have found, on the basis of the evidence before him, as presented by the Land Registrar Mr Nyaberi (DW2), that the sub-division of the land parcel No Bunyala/Bulemia/242 to create the suit land was done procedurally. By holding otherwise, the trial magistrate erred both in law and in fact.

17. Grounds NO 2, 3 and 4 are therefore also allowed.

18. Grounds NO 1, 6 and 8 can also be considered together. The trial magistrate is faulted for arriving at the decision which he did without any basis or sound legal reasoning, failing to make a determination on the issues of fraud and failing to properly evaluate all the evidence before him.

19. The thrust of the Respondents' case was that the Appellant had fraudulently sub-divided the land parcel No Bunyala/Bulemia/242 without their (Respondents's) knowledge. The allegations of fraud were pleaded in paragraph 13 (a) to (g) of the amended plaint. The duty was therefore on the Respondents to prove those allegations to the required standard. Section 107(1) of the *Evidence Act* is clear. It reads:

> " 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."

It is trite law that allegation of fraud must be strictly pleaded and proved to a standard higher than in ordinary civil cases. In the case of Kinyanjui Kamau v George Kamau 2015 eKLR, the Court stated thus:

> " It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo v Ndolo [2008] I KLR (G & F) 742 where the Court said that: "... we start by saying that it was the Respondent who was alleging that the will was a forgery and he burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery

> or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; in cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

To prove those allegations of fraud, the Respondents only called the 1st and 2nd Respondents. In his evidence in chief, the 1st Respondent had the following to say on the issue of fraud at page 272 of the record:

> "I want to rely on the documents I have filed herein. I live on my late father's land which I learnt to be Bunyala/Bulemia/1242 (sic). In 2019, I realized it was sub-divided into 4 pieces without my family getting involved. They have nowhere to go. It was sub-divided fraudulently."

On his part, the 2nd Respondent said at page 275 of the record that:

> "I was told the land was sub-divided without involving me. I was told by my aunts not to come home so as not to stress my grandfather. Sub-division was fraudulent."

Having elaborately set out the allegations of fraud and illegality, the trial Court would have expected the Respondents to lead evidence to prove those allegations. But as is clear even the 2nd Respondent was simply alluding to hearsay testimony as told by his aunts.

20. On the part of the trial magistrate, not even a fleeting reference was made to the well-trodden jurisprudential path which a Court considering allegations of fraud must follow. The trial magistrate appears to have laid much emphasis on the deceased's advanced age and lack of mental capacity which, as is now clear, was not well founded, and also the claim that the deceased did not execute the relevant documents neither did the surveyor visit the land, which testimony was adequately discounted by the Land Registrar who, it was not suggested, had any reason to give false testimony against or in favour of any of the parties herein. In the process, the trial magistrate failed to apply relevant case law and properly evaluate all the evidence before him and thereby arrive at the wrong decision.

21. Grounds No 1, 6 and 8 therefore succeed.

22. Finally, in ground No 7, it is alleged that the trial magistrate erred in law and in fact by holding that the deceased held the land parcel No Bunyala/Bulemia/242 in trust for the entire family which should therefore have been involved in its subdivision.

23. On the issue of trust, the trial magistrate made this finding at page 324 of the record of appeal:

> "Further, this was ancestral land where the deceased's family members lived. The issue of customary trust arises. He was holding in trust for other family members who should have been involved in the process of sub-division which they were not. Even if the sub-division was legal and proper, then the transferors were not getting the land transferred to the (sic) absolutely but to hold in trust for other family members. Further, the deceased had other beneficiaries and it is not conceivable that the deceased in his right senses would give out 11.6 acres to one person leaving out 7 members of the family to share 11.1 acres."

From paragraph 37 of the amended plaint and which I have already partially referred to earlier in this judgment but which I shall now cite in extenso, the Respondents had sought the following five (5) remedies:

a. A declaration be and is hereby made that the sub-division of land known as Bunyala/Bulemia/242 was illegal and of no legal consequences and is hereby reversed.

b. The transfer of land known as Bunyala/Bulemia/5409 and Bunyala/Bulemia/5412 in the name of Leah Nasike Opiyo long after she had died or any person going by that name was illegal, be and is hereby cancelled and reversed and the register rectified accordingly.

c. An order be and is hereby granted that the body of the late Paul Opiyo Sumba be given to Josephat Andrew Opiyo and other family members for burial in the deceased's home at a spot identified by the clan members.

d. An order of rectification to revert to the original Bunyala/Bulemia/242 in the name of Paul Opiyo Sumba and the improper sub-division done earlier is cancelled.

e. A declaration that the land known as Bunyala/Bulemia/242 and any other land in the name of the late Paul Opiyo Sumba is subject to the *Law of Succession Act* Cap 160 of the Laws of Kenya.

f. Any other orders that the Honourable Court may find appropriate to grant.

g. Costs of this suit.

A party claiming entitlement to land by way of trust must lead evidence to prove the same. As is clear from paragraph 37(a) to (g) of the amended plaint which I have reproduced above, the Respondents did not plead any trust, leave alone the customary trust on which the trial magistrate proceeded to make a finding on in their favour. And if he was minded to invoke the principle of a constructive trust, he did not do so. What is clear, however, is that he made reference to a customary trust but as was held in Salesio M'itonga -v- M'arithi M'athara & Others 2015 eKLR, the burden to prove trust rested on the Respondents and they were required to lead cogent evidence to prove the customary trust and if they did, the trial magistrate ought to have specifically pointed it out in the impugned judgment. It is instructive to note that in the said judgment, the trial magistrate said it was not conceivable that one party was given 11.6 acres and 7 others 11.1 acres. It must be remembered that a proprietor of land has the absolute discretion, during his life time, to distribute his land in the manner he deems fit. There was nothing to suggest that any family member was left destitute and if the deceased deemed it fit to distribute the land parcel No Bunyala/Bulemia/242 in the manner in which he did, that did not defeat the concept of trust. There was no evidence to suggest that the parties herein were entitled to an equal share of the land parcel No Bunyala/Bulemia/242 so that concept of aequitas est quasi aequalitas would be invoked as the trial magistrate appeared to suggest in the impugned judgment. And if the trial magistrate was persuaded that the Respondents had proved a rust, the best option was to determine the trust and apportion the land parcel No Bunyala/Bulemia/242 after reverting it to the name of the deceased.

24. Ground No 7 of the Memorandum of Appeal is allowed.

25. Having considered this appeal, this Court allows it and makes the following disposal orders:

1. The judgment of the trial magistrate dated September 21, 2022 and all the subsequent orders are hereby set aside.

2. As the parties are family, they shall meet their own costs both here and in the Court below.

BOAZ N. OLAO

JUDGE

13THMARCH 2025

Judgment dated, signed and delivered on this 13th day of March 2025 by way of electronic mail with notice to the parties.

Right of Appeal

BOAZ N. OLAO

JUDGE

13TH MARCH 2025