



REPUBLIC OF KENYA



**Bor & 8 others v Sang (Environment and Land Appeal E033 of 2024)
[2025] KEELC 4169 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4169 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL E033 OF 2024**

MN MWANYALE, J

MAY 29, 2025

BETWEEN

VIVIAN KORIR BOR 1ST APPELLANT
JOSEPH CHERUIYOT BOR 2ND APPELLANT
JONATHAN BOR 3RD APPELLANT
SAMUEL KIPNGETICH BOR 4TH APPELLANT
PAUL KIPNGETICH BOR 5TH APPELLANT
PATRICK KIPNGENO BOR 6TH APPELLANT
JOEL KIPRUTO BOR 7TH APPELLANT
CATHERINE BOR 8TH APPELLANT
AGNES CHEPKOSKEI BOR 9TH APPELLANT

AND

RICHARD KIPKOECH SANG RESPONDENT

JUDGMENT

1. Aggrieved by the Judgment delivered on 23.09.2024 by Hon. M.I.G Moranga C.M in Kilgoris MCELC No. 18 of 2018 filed a Memorandum of Appeal dated 16.10.2024 penning 8 grounds of Appeal thereof and sought the following orders: -
 - i. That the appeal be allowed and Judgment and decree in Kilgoris SPMC ELC 18/2018 be set aside.
 - ii. The Honourable court do find in favour of the Appellants thereby dismissing the Respondents claim and proceed to allow the counter-claim.



- iii. That the Honourable court do declare that the Registration of the Respondent as the owner of Land parcel No. Transmara/Angata/Barigoi was encumbered by Constructive Trust and Customary Trust and the subsequent registration of the Respondent as the proprietor of the suit parcel did not in any way affect or dissolve the Trust.
 - iv. Costs of the counter-claim and the Appeal be awarded to the Appellants.
2. The grounds of Appeal in respect of this Appeal are:
- i. The Learned Trial Magistrate erred in law and in fact in finding that the Respondent proved his case when there was conflicting testimony on how the Respondent acquired the suit land being Transmara/Angata Barigoi/540.
 - ii. The Learned Trial Magistrate erred in law and in fact in failing to find that before the creation of land parcel No. Transmara/Angata Barigoi/539 and land parcel No. Transmara/Angata Barigoi/540, the whole land was one customary/ancestral/family owned by the late Kipsang Arap Korir, the father of the Respondent and the 2nd to 9th Appellants, and the husband to the 1st Appellant.
 - iii. The Learned Trial Magistrate erred in fact and in law by dismissing the Appellants counter-claim in entirety despite proof of the same.
 - iv. The Learned Trial Magistrate erred in fact and in law in failing to apply both High Court, Court of Appeal and Supreme Court decisions which were binding on her on the issue of overriding interest in the nature of Constructive Trust and Customary Trust, which rights had been infringed by the Respondents.
 - v. The Learned Trial Magistrate erred in law by failing to properly be guided by the fact that members of the family of the Late Kipsang Arap Korir having been in possession and occupation of land parcel No. Transmara/Angata Barigoi/540 in the period ranging from 1968 being prior to 2002, acquired an overriding interests on the suit parcel of which the Respondent during registration of the suit parcel into his name on 14.08.2014 had knowledge, Notice both actual and constructive of the Appellants competing overriding interests which ranked in priority and protected by law, thereby divesting the Respondent of a claim of Bonafide doctrine.
 - vi. The Learned Trial Magistrate erred in fact and in law by failing to be guided by the possession and actual occupation by the Appellants and other members of the family of the late Kipsang Arap Korir, which conferred upon the Appellants with overriding interests in the nature of Constructive Trust and Customary Trust and that the Respondent held land parcel No. Transmara/Angata Barigoi/540 in trust for the Appellants, therefore registration per se, of the Respondent over the suit land does not relieve the Respondent from any duties and/or obligations to which he is subject as a Trustee.
 - vii. The Learned Trial Magistrate erred in fact and in law by failing to be persuaded and guided by the report of the Land Registrar and the Surveyor Transmara showing occupation of Transmara/Angata Barigoi/540 by some of the Appellants and their families prior to 2002 when the file for the suit land was opened and prior to 14.08.2014 when the suit land was registered in the name of the Respondent, the Appellants acquired overriding interest in the nature of Constructive Trust and Customary Trust as such the Appellant's overriding interest ranked in priority against the Respondents interests which was not Bonafide.



- viii. The Trial Magistrate erred in law and fact in failing to consider the Appellants' submissions and authorities in support thereof.
3. On the strength of the above grounds the Appellants sought for the prayers enumerated at paragraph 1, of this Judgment.
4. Upon admission of the Appeal, parties were directed to proceed by way of written submissions.

Appellants Submission

5. The Appellant has submitted generally on the proceedings before the lower court culminating to the present appeal and has framed submitted on a sole issue for determination to wit whether the appeal is merited?
6. It is the Appellants' submission that no evidence of the purchase of the suit property by the Respondent was adduced in court. The Appellants further submitted that they had been in occupation of the suit property Transmara/Angata Barigoi/540 from 1968 and cannot have trespassed in 2006 or 2014 or 2016 as alleged.
7. On customary Trust the Appellant submit that the same is recognised at Section 28 of the Land Registration Act and submits that in determining the existence or otherwise of a Customary Trust; The Appellants cite the case of *Isack Kieba M'Inanga vs. Isaaya Theuri M'Intari and Another* SCOK No. 10 of 2015; where the test for Customary Trust was held to be as follows: -

“Each case had to be determined on its own merits and quality of evidence. Some of the elements that would qualify a claimant as a Trustee were;

- a. The land in question was before registration, family, clan or group land.
 - b. The Claimant belonged to such family, clan or group.
 - c. The relationship of the claimant to such family, clan or group was not so remote or tenuous as to make his/her claim idle or adventurous.
 - d. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
 - e. The claim was directed against the registered proprietor who was a member of the family, clan or group....”
8. The Appellants further placed reliance on the decision in *Peter Gitonga Vs. Francis Maingi Mikiara*, as well as *Kanyi Vs. Muthiora* (1984) KLR 1972.
9. On the strength of the above the Appellants prayed that the Appeal be allowed.

Respondent's Submissions

10. The Respondent submits generally that for a claim of Customary Trust to have arisen, it must be proved that: -
- i. The suit properties were ancestral clan land.
 - ii. During adjudication and consolidation, one member of the family was designated to hold on behalf of the family.



- iii. The registered persons were the designated family members who were registered to hold parcels of land on behalf of the family, in essence, one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.
11. Placing reliance on the decision in the case of Joseph Marisin Vs. Joseph Kibilat S. Bargaliet, the Respondent submits that a first registration is indefeasible even if obtained by fraud.
12. The Respondent further submits that Customary Trust must be proved by evidence as it is question of fact.
13. The Respondent submits that a Trust cannot be implied by the court unless there was intention to expressly stated.
14. The Respondent further submits that a Customary Trust is not an overriding interests.
15. On the strength of the above submissions the Respondent prays for the dismissal of the appeal.
16. Before framing issues for determination, the court notes the following undisputed facts in this Appeal.
 1. The Appellant was registered as the proprietor of Transmara/Angata Barigo/540 on 01.11.2000 and a title deed issued on 14.08.2014.
 2. The Appellants and Respondents are all relatives, the Appellants being brothers and step mother to the Respondents, and sons and wife of the late Kipsang Arap Korir who was registered as proprietor of Transmara/Angata Barigo/539 on 01.11.2000 and a title issued to him on 11.10.2007.
 3. That the registration of Transmara/Angata Barigo/539 and Transmara/Angata Barigo/540 was done on the same date, both parcels having been within the Angata Barigo Adjudication Section.
17. Having analysed, the Record of Appeal and the submission of the parties, the court frames the following as issues for determination.
 - i. Whether or not the Appeal is merited? Under this head, the court shall examine
 - a. Whether Constructive Trust and/or Customary Trust as did pleaded in the Counter-claim was proven before the trial court or before this Appellate court?
 - b. Whether the Respondent had proven his case on a balance of probabilities before the trial court.
 - ii. What orders ought to issue?
 - iii. Who bears the costs of the Appeal?

Analysis and Determination

18. The court is aware of its duties as a first Appellate court, “to reconsider the evidence, evaluate it itself and drawn its own conclusion” as was held in the case of *Selle and Another Vs. Associated Motor Boat Company Ltd and Others* (1968) EA 123.
19. In framing the issues as it has, the court is aware that for the appeal to be merited, the counter-claim pleaded before the trial court must be merited. The court shall now examine what the counter-claim before the trial court pleaded.



20. At paragraphs 21 – 23 of the counter-claim, the Appellants as counter-claimers pleaded the issue of Constructive Trust and Customary/family Trust and breach thereof by the Respondent who was the first born of the late Kipsang Arap Korir.
21. Does the counter-claim and evidence establish a Constructive Trust?
22. What constitutes a Constructive Trust and the other Trusts generally were considered in the decisions in the case of Twahib Hatayan and Another Vs. Said Sagger Ahmed al Heidy 2015 (eKLR) as Sirma Vs. Singoei 2022 KECA 708 KCR.
23. In the Twahib Hayan decision the court defined a Constructive Trust the as follows: - “a Constructive Trust is an equitable remedy imposed by the court against one who has already acquired by wrong doing.....while a resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggests that the transferor did not intend to confer a beneficial interest upon the transferee.”
24. In the Sirma decision, it was held that “a common thread between the resulting trust or constructive Trust is that they both serve the same objective to defeat unjust enrichment and to return property to the true owner.”
25. In Macharia Mwangi Maina decision, the court inferred a Constructive Trust, where a vendor who had received full purchase price, and put the purchaser in possession pending completion of the Transaction.
26. The circumstances and evidence in this case is that the Respondent was registered as the owner of the Transmara/Angata/Barigo/540 which property was in accordance with the ground report adduced in evidence as well as the survey report borders Transmara/Angata/Barigo/539 which was registered in the name of his late father during adjudication.
27. There is no issue of purchase by the Appellants and occupation pursuant to the said purchase for a Constructive Trust as defined in the Macharia Mwangi Maina decision to be inferred by the court.
28. Thus, the counter-claimers have not proved that their occupation of the suit land was pursuant to a purchase so as the court can infer Constructive Trust.
29. On customary Trust; both the Appellant and Respondent have cited the decision in the case of Isaack M’Inanga Vs. Isaya Theuri and Another where the court gave the elements to be proven for customary Trust to apply.
30. The elements to be proven were stated to be as follows

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- a. The land in question was before registration, family, clan or group.
- b. The claimant belongs to such family, clan or group.
- c. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim adventures.
- d. The claimant could have been entitled to be registered as owner or other beneficiary of the land but for some intervening circumstances.



- e. The claim is directed against registered proprietor who is a member of the family, clan or group”.

31. The onus to prove the above elements was on the Appellants as counter-claimers.
32. The Appellants proved occupation of the suit property before registration, the Respondent however produced as P.Exhibit 2 letter dated 10.09.1999 by the area chief, which confirmed a decision by 55 elders made on 10.06.1996, which resolved the suit property, belonged to him.
33. The Appellants have thus not proven that the suit property was family land, and that they could have been entitled to registration of the same.
34. The court finds that the Appellant has not proven elements 1 and 4 of the element stated in the Isaack M’Inanga decision, and that Customary Trust as pleaded has not been proven.
35. The Registration of the Respondent as the owner of the suit property was made under the provisions of the Land Adjudication Act. Was the Respondent registered as a Trustee on behalf of the Kipsang Arap Korir family?
36. It was undisputed that the Registration of the Respondent was made during the life time of Kipsang Arap Koriri, in fact on the same date that Kipsang Arap Korir was registered as proprietor of Transmara/Bargoi/539, the Respondent was registered on a first registration as owner of Transmara/Bargoi/540.
37. The trial court made the same finding and this court thus finds no fault on the said finding.
38. Certainly, the Respondent could not have been registered as Trustee since the patriarchy Kipsang Arap Korir himself was alive, during adjudication and registration.
39. It follows that the Respondent did prove his case on a balance of probabilities before the trial court.
40. Before making final determination of the Appeal, the court notes that the authorities submitted by the Respondent, in support of the proposition that Customary Trusts are not overriding interests are authorities that do not present the current position of the law. Section 28(b) of the Land Registration Act recognises Customary Trust as overriding interests. The Obiero Vs. Opiyo case dealt with Section 30 of the Repealed Registered Land Act which is no longer applicable.
41. As noted elsewhere the Respondent’s Advocates cited the decision of Isaack M’Inanga and at paragraph 53 of that decision the Supreme court expressly reversed the Obiero Vs. Opiyo decision which the Respondent placed reliance before this court. It seems to the court that the learned counsel did not appraise themselves with the whole of the Isaack M’Inanga decision because had they done so, they would not have relied on Obiero Vs. Opiyo KC72 E.A 227. At paragraph 53 of the Isaack M’Inanga case the Supreme court held as follows: - “53. We also declare that rights of a person in possession or actual possession under Section 30(g) of the Registered Land Act, are customary rights. This statement of Legal Principle, therefore reverses the old pronouncements to the contrary in Obiero Vs. Opiyo and Esiroyo Vs. Esiroyo. Once it is concluded that such rights subsist, a court need not fall back upon a customary trust to accord them legal sancity since they are already recognised by Statute as overriding interests.”
42. Finally, the Joseph Marisin decision on the indefeasibility of a first registration cited by the Respondent, does not conform to the current legal position, in view of Section 26(1) of the Land Registration Act



and the later decisions on the same; including the decision in Munyu Maina Vs Hiram Gathiha Maina (2013) where the court held

“We have stated that when a registered proprietor root of title is challenged it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances, including any and all interests which would not be noted in the register...”

43. The upshot is that the Appellant failed to prove both Constructive and Customary rights and that the Learned Magistrate reached the correct conclusions and there is no basis to set aside her Judgment, as the Appeal herein lacks merits and the same is hereby dismissed as the Judgement delivered on 23.09.2024 is upheld.

44. As the parties are close relatives each party shall bear its own costs; in the lower court and Appeal.

DATED AT KILGORIS THIS 29TH DAY OF MAY, 2025.

HON. M.N MWANYALE

JUDGE

In the presence of

CA – Emmanuel/Sylvia

Mr. Bunde for the Appellant

Ms. Gogi for the Respondents

