



**Wekesa v Lusenaka (Environment & Land Case 56 of 2024)
[2025] KEELC 4232 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4232 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 56 OF 2024**

EC CHERONO, J

MAY 29, 2025

IN THE MATTER OF LAND PARCEL NO. KIMILILI/KAMUKUYWA/667

**IN THE MATTER OF THE ESTATE OF MESHACK
LUSENAKA KATILA (DECEASED) AND THE HEIRS THEREOF**

BETWEEN

ALEX MASINDE WEKESA PLAINTIFF

AND

RICHARD WEBAKALA LUSENAKA DEFENDANT

JUDGMENT

1. The plaintiff commenced these proceedings vide an Originating Summons dated 13/09/2018 seeking the determination of the following questions;
 - a. That whether the respondent legally obtained transfer of title of LR No. Kimilili/Kamukuywa/667 from Alois Wanjala (deceased) to himself.
 - b. That whether entry No's 2 and 3 dated the 12/02/2016 ought to be cancelled from the lands register.
 - c. That whether the respondent holds title to the land in trust for all the sons of Meshack Lusenaka Katila (deceased).
 - d. That whether the respondent has authority to enter into agreement and/or sale portions of LR No. Kimilili/Kamukuywa/667 to third parties.
 - e. That who should pay the costs of this suit.
 - f. That this court grants any other relief that it may deem proper and fit to grant.



2. The suit is premised on the grounds apparent on the face of the Originating Summons and the Supporting Affidavit of the Applicant sworn 27/08/2018. In his pleadings, the Applicant averred that the parties herein are sons of one Meshack Lusena Katila-dcd who purchased LR No. Kimilili/Kamukuywa/667 (hereinafter referred to as “the suit land”) from one Alois Wanjala-dcd who died in 1986 before effecting the relevant transfer. That the Respondent herein fraudulently registered himself as the proprietor of the suit land and has disregarded the mode of distribution agreed by his co-beneficiaries and is now dealing with the land exclusively as if it belonged him alone and further disposing of part of it to third parties.
3. The Respondent filed a replying affidavit sworn on 11/10/2018 in which he stated that the Applicant is not a biological son of Meshack Lusena Katila-dcd and that prior to his death, the said deceased in a family meeting mandated him to pursue the title of the suit land wherein he signed the relevant conveyance documents. That the deceased left behind two (2) wives, four (4) sons and one (1) daughter. That in a family meeting held on 21/07/2015, the suit land was to be shared amongst the four sons of the deceased and his 2nd wife as follows; Japheth Wekesa – 1.3 acres, Julius Wekesa -1.3 acres, Richard Wanjala-1.3acres, Simon Kundu 1.3 acres and Repah Namubuya-0.3 acres. He urged the court to dismiss the summons.
4. At the pre-trial conference, the parties agreed to proceed with the hearing by way of viva voce evidence.
5. During the hearing, the plaintiff called two witness. PW1 Alex Masinde Wekesa adopted his supporting affidavit sworn on 27/08/2018 and his witness statement dated 14/11/2022 as his evidence-in-chief. He produced into evidence five items contained in his list of documents dated 14/11/2022 as P-Exhibit 1-5. He testified that the defendant holds the title for the suit land for himself and in trust for the family and he lacks the authority to sell the same.
6. PW2 William Wanyonyi Lusena adopted his witness statement dated 14/11/2022 as his evidence-in-chief and reiterated the evidence by the plaintiff.
7. Despite being served with the Originating Summons and other court processes, the defendant did not enter Appearance nor file defence and the case proceeded ex-parte.

Analysis and Determination

8. I have considered the pleadings, proceedings, evidence and submissions as well as the relevant law and find that the main issue for determination in this case is whether the plaintiff has proved his claim against the defendant on a balance of probabilities.
9. Although the defendant did not participate during the hearing, the plaintiff has a duty to prove his case to the required standard.
10. In the case of Kirugi and Another Vs Kabiya & 3 others (1987) KLR 347 the Court of Appeal held as follows;

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”



11. Similarly, in the case of *Gichinga Kibutha Vs Caroline Nduku* (2018) eKLR the Court held;

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”
12. The plaintiff in this case claims that the defendant fraudulently registered himself as the owner of the suit land in his name and that his registration is subject to a trust. His argument is based on the assertion that the parties herein are siblings, therefore beneficiaries of the estate of Meshack Lusenaka Katila. He stated that the defendant has been using the suit land exclusively and has even disposed of the same to third parties despite resolutions by the family/clan on the mode of distribution of the estate.
13. In support of his case, he produced a green card as P-Exhibit 1, a copy of official search as P-Exhibit 2, copy of minutes dated 21/07/2015 as P-Exhibit 3, copy of letter dated 09/07/2016 as P-Exhibit 4, copy of a consent order as P-Exhibit 5.
14. Section 24(a) of the *Land Registration Act* provides for the interest conferred to the holder of a title to land upon registration as follows;

“Subject to this act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or apparent thereto.”
15. Section 26(1) of the *Land Registration Act* provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except;

 - a) On the ground of fraud or misrepresentation to which the person is proved to be a party or;
 - b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
16. The manner of pleadings and proof of allegations of fraud were considered by the Court of Appeal in the case of *Vijay Morjaria v Nansingh M. Darbar and Another* [2000] eKLR as follows:

“It is well established that fraud must be specifically pleaded and that particulars of fraud must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that those acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
17. The Plaintiff in his originating summons averred that the Defendant obtained title of the suit land illegally/fraudulently. However, he did not set out particulars of the alleged illegality/fraud nor did he prove them as is required under the law. In fact, the averment seems to have been abandoned and it is therefore my finding that the alleged illegalities were not established.
18. The plaintiff further alleged that the Defendant holds the suit land for himself and in trust for the beneficiaries of the estate of Meshack Lusenaka Katila. This court is aware that the law recognizes trust



as an overriding interest over registered land as stipulated under Section 28 of the *Land Registration Act*, 2012 which provides as follows:

- “28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—
- (a) spousal rights over matrimonial property;
 - (b) trusts including customary trusts;
 - (c) ...
 - ...
 - (j) ...

19. The guidelines for the claim of Customary trust was enunciated by the Supreme Court in the case of *Isack Kieba M'inanga v Isaaya Theuri M'Lintari & another* [2018] eKLR where it was held as follows:

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.”

20. The legal burden of proving the existence of a trust rests with the one who is asserting a right under customary trust. In the case of *Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others* [2005] eKLR, which cited with approval the holding in the case of *Muthuita –vs- Muthuita* [1982 – 88] 1 KLR 42, the Court of Appeal held that customary law trust is proved by leading evidence. Trust is a question of fact which must be proved by whoever is claiming a right under customary trust. A trust can never be implied by the Court unless there was intention to create a trust in the first place.

21. Now surprisingly, the plaintiff at paragraph 10 of his affidavit in support of the originating summons sworn on 27th August 2018 stated as follows;

10. That the respondent has refused to abide by the mode of distribution agreed upon by the entire family under the direction of the clan. (See copy of minutes hereto marked AWM 02).



22. The said annexure was produced as P-Exhibit 3. These were minutes dated 21/07/2015 wherein the suit land was subdivided in the following terms; Japheth Wekesa – 1.3 acres, Julius Wekesa -1.3 acres, Richard Wanjala-1.3acres, Simon Kundu 1.3 acres and Repah Namubuya-0.5 acres
23. The court further observes that the plaintiff has adduced evidence that is inconsistent with the core of his claim. The plaintiff contends that the Defendant failed to adhere to the prescribed mode of distribution in allocating the suit property. However, the Court observes that even under the said mode of distribution, the plaintiff was not listed as a beneficiary nor was he allocated any portion of the land. As such, his grievance regarding non-compliance with the distribution process does not confer upon him any proprietary interest. In essence, the plaintiff cannot assert a legitimate claim to the suit property based on a distribution framework that, even if properly implemented, would not have granted him any share. His claim, therefore, lacks legal foundation both in fact and in law
24. Having come to the conclusion that the plaintiff has not proved his case on a balance of probabilities, it follows that the plaintiff is not entitled to the orders sought. On the issue of costs, I find that in the absence of special circumstances, the general principle that costs follow the event will apply meaning the plaintiff shall bear the costs of the suit.
25. Ultimately, I find that the plaintiff has failed to prove his claim against the defendant to the required standard. The orders sought are declined and the plaintiff's suit is hereby dismissed. Since the suit is undefended, I make no order as to costs.
26. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF MAY, 2025.

.....

HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. M/S Nekesa H/B for Mr. Were for the Plaintiff
2. Defendant/Advocate- absent
3. Bett C/A.

