



REPUBLIC OF KENYA



Longolereng & another v Limangura & 2 others (Environment and Land Appeal E015 of 2024) [2025] KEELC 1167 (KLR) (12 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1167 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL E015 OF 2024**

**CK NZILI, J
MARCH 12, 2025**

BETWEEN

CHEPOTIS KAYA LONGOLERENG 1ST APPELLANT

MOSES KEYA LORENGA 2ND APPELLANT

AND

JOYLINE CHEPTOO LIMANGURA 1ST RESPONDENT

MUSA PROTUS LIMAPUS 2ND RESPONDENT

DANIEL KATOLIKI RIPONYANG 3RD RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate (Hon. Kipchumba Kenei) in Kapenguria Magistrates Court ELC No. E011 of 2023 delivered on 20/6/2024)

JUDGMENT

1. What is before the court is the Amended Memorandum of Appeal dated 9/10/2023. The appellants, who were the plaintiffs at the lower court, fault the trial court for:-
 1. Not considering the advanced age of PW1 and the loss of memory which was brought to the court's attention.
 2. For disregarding the evidence of PW1.
 3. For upholding the defendants' counterclaim, yet it had no sufficient evidence to sustain it.
 4. For failing to properly evaluate the evidence on record, including the honesty of some of the witnesses, especially DW7, and the failure to tender sale agreements in support of the 1st respondent's testimony.



5. For not considering that the 1st respondent and her late husband had never occupied, utilized, or visited parcels No. 700 and 712.
 6. For disregarding the appellants' documentary evidence of occupation and possession of parcels No. 702 and 712 for 50 years, without interference from anybody.
 7. For believing the respondents' evidence that the 1st appellant had not resided on the land without any tangible evidence to support it.
 8. For disregarding the principle of law that a girl child has a right to inherit a share of parents' property regardless of whether she is married or not.
 9. For declining to conduct a site visit.
 10. For ignoring the evidence that the 2nd and 3rd respondents had demolished the appellants' houses on the suit parcels of land.
 11. For taking into consideration evidence of entry of the 1st respondent into the suit parcels in 2020 with the permission of the appellants without tangible evidence to that effect.
 12. For disregarding vital evidence that the 1st appellant, being the only child in her house, had been given the two parcels of land by her late father.
 13. For finding that the appellants had failed to prove the existence of customary trust.
2. As a first appellate court, this court is mandated to re-examine the entire lower court record and come up with its independent conclusions on both facts and law, while mindful that the trial court had the benefit of seeing and hearing the witnesses testify. In the case of *Selle & Another -vs- Associated Motor Boat Co. Ltd & Others* (1968) E. A 123, the court observed that an appeal is like a re-trial, while in *Peters -vs- Sunday Post Ltd* [1958] EA 423, the court said an appellate court must review the evidence to determine whether the conclusion of the trial court should stand.
 3. In *Abok James Odera T/A A. J Odera & Associates -vs- J. P Machira T/A Machira & Co. Associates* (2013) eKLR, the court observed that an appellate court must re-evaluate, re-assess, and re-analyze the extracts on the record and see if the conclusion of the trial court should stand and give reasons either way.
 4. Guided by the above caselaw, the appellants had sued the respondents by a plaint dated 13/3/2023, seeking:
 - (a) Declaration that parcels Nos. 700 and 712 of Mwino' A' Adjudication Section West Pokot County, was ancestral land.
 - (b) Declaration that the appellants are the lawful and beneficial owners of the suit parcels of land and that the respondents were trespassers thereon.
 - (c) Declaration that the sale of parcel Nos. 700 and 712 of Mwino' A' Adjudication Section to the 2nd and 3rd respondents by the 1st respondent was null and void.
 - (d) Permanent injunction restraining the respondents from trespassing onto and interfering with the appellants' quiet possession.
 - (e) General damages for trespass and malicious damage.
 5. The respondents opposed the appellants claim through a joint defense and counterclaim dated 29/6/2023. They denied that the suit parcels of land were ancestral land before the adjudication process



- commenced. The respondents denied that the 1st appellant and her late father had their matrimonial home in parcels No. 700 and 712.
6. On the contrary, the respondents averred that the two parcels of land along other plots were purchased by the 1st respondent's late husband in 1996 and 2003, respectively, and took vacant possession. It was averred that the 1st appellant got married and settled in the Kokotendwo Adjudication Section with her late husband, where they established a home and was still living in the Section, which is separated from Mwino' A' adjudication Section by River Wei Wei.
 7. The respondents denied that the registration of the land in the name of the late Clement Ropti Amon was on account of trusteeship for the 1st appellant and her late husband as alleged or at all. Therefore, the respondents averred that the 1st respondent was lawfully recorded as owner of the two parcels of land in place of her late husband and lawfully sold the same to the 2nd and 3rd respondents, who are the current rightful owners of the parcels of land.
 8. By way of a counterclaim, the 2nd and 3rd respondents reiterated that they had purchased and subsequently registered as rightful owners of the land. Further, the 2nd and 3rd respondents averred that the entry and possession of parcels No. 700 and 712 by the appellants was with permission from the 1st respondent, which resulted in them losing the planted crops. The 2nd and 3rd respondents termed the 2nd appellant a trespasser who should be forcefully evicted from the two parcels of land.
 9. The 2nd and 3rd respondents counterclaimed for:
 - (a) Dismissal of the main suit.
 - (b) Declaration that the two parcels of land belong to them.
 - (c) Declaration that the appellants are trespassers and should be evicted from the two parcels of land.
 - (d) General damages for trespass.
 10. By a reply to the defense and defense to the counterclaim dated 21/7/2023, the appellants averred that the 1st respondent lacked the capacity to sell the suit parcels of land to the 2nd and 3rd respondents. The appellants averred that the 1st appellant inherited the two parcels of land from her late father, which the 1st respondent illegally and unlawfully transferred to herself and later, without any color of right, transferred to the 2nd and 3rd respondents. The appellants denied the alleged trespass, terming the counterclaim as ill-advised, misconceived, and disclosing no cause of action against them.
 11. At the trial, Chepotis Keya Longoleren testified as PW1. Her claim was supported by Moses Keya Loreng'a and Ngariatenna Lemokoi, who testified as PW2 and PW3, respectively. They all relied on witness statements dated 31/7/2023 as their testimony in chief. It was the appellants' testimony that the suit parcels of land were ancestral and inherited land from the appellants' late father, Mr. Lemkoi Chetele, who was the original owner, which was left to PW1 and her late husband Longuren Amon, where they constructed a matrimonial home, brought up all their children and have lived for over 50 years.
 12. PW1 told the court that at the demarcation stage, they did not have ID Cards; they permitted their late son Clement Ropti Amon, who was the 1st respondent's husband, to be registered as the owner in trust for the family members. PW1 told the court that her late son passed on, on 8/11/2013 and was buried on his 5 acres of land situated at Kamolo village. PW1 told the court that, to her dismay, the 2nd and 3rd respondents on 8/11/2022 trespassed on the land (parcel No. 712), claiming ownership, leading to PW2, a son, making a report with the police vide OB No. 10/02/11/2022.



13. More so, PW1 told the court that after she went to check on the status of the suit parcels of land at the Land Adjudication office, it she discovered that in October 2020, the name of her late son was canceled and replaced with that of the 1st respondent. PW1 told the court that again on 25/2/2023, the 2nd and 3rd respondents trespassed on the land, claiming ownership and, with the help of hired goons, demolished her houses and cut down several trees and crops with the intention of unilaterally evicting her from the land.
14. Similarly, PW1 said that in the month of January 2021, she discovered that the 1st respondent had unlawfully sold parcel No. 712 to the 2nd respondent without her consent or knowledge, yet the 1st respondent had no proprietary interest or rights over the land. The appellants relied on a list of documents dated 21/7/2023, which contained an OB extract dated 4/08/011/2022; a letter dated 17/2/2023; consent to go to court dated 10/3/2023; adjudication records for parcel Nos. 700 and 712 of Mwino' A' Adjudication Section; photographs of the destroyed houses and crops dated 24/1/2023 and sale agreement dated 3/10/2021. P. Exhibit No. (1)-(6) and MFI-P7, respectively.
15. PW1 insisted that she inherited the two parcels of land from her late husband, who was also buried at his third wife's residence. PW1 stated that both her children were born and raised in the suit parcels of land. She said that by the time her late son died, they had no dispute over its ownership or occupation. PW1 denied ever living with the 1st respondent on the suit land since she had migrated to the other side of the land. PW1 denied that the late son had bought the suit parcels of land from Marko Lemkoi. She urged the court to allow her to continue living on the suit parcels of land, which is her inheritance.
16. Equally, PW1 insisted that she belongs to her late husband's clan - Kosoum Chepotiskai, which initially owned the suit parcels of land. PW1 said that her late husband had 6 wives and that she was the first wife. PW1 said that she lived in the suit parcels of land together with one co-wife and her late husband, alongside the 2nd appellant, who is a husband to 2 wives. PW1 said that her late son died exactly a year after marrying the 1st respondent and left behind one grandchild. PW1 said that her son was buried in Mnagei Kapenguria Kamoraco, where he used to reside. PW1 said that her permanent developments on the suit land were evident as per photographs produced as MFI P.7 upon destruction by the respondents.
17. PW2 essentially confirmed the testimony of his mother, PW1. Shown MFI D4(a), PW2 denied receiving a letter from the area chief to vacate the land allegedly temporarily, under his occupation. PW2 denied signing the agreement dated 17/10/2022. PW2 denied that the late brother had bought the land, as alleged by the respondents. He said that he was born and brought up on the land parcels, which his sister-in-law, the 1st respondent, had never occupied or lived on. PW2 insisted that the two parcels of land belonged to his mother. Otherwise, his late brother had never ordered them to vacate the land before he passed on.
18. More to, PW2 told the court that one of his wives and her children lived on the disputed land together with PW1. PW2 told the court that PW1 and his late father had lived on the suit parcels of land for more than 50 years. PW2 told the court that one of his late sons was also buried in the parcel No. 700.
19. PW3 told the court that PW1, a step-sister, had lived on the suit parcels of land which is ancestral land, since giving birth to her first child, with no complaints from any clan member. PW3 insisted that the land belonged to PW1 and not her late son Clement. PW3 told the court that their late father passed on in 1972, and as of 1952, when she was born, she found PW1 residing on parcel No. 700. PW3 confirmed that the River Wei Wei was the boundary between Kokotwendo and Mwino Adjudication Sections. Again, PW3 also told the court that their late father had divided all his parcels of land among



- his wives, which took the nature of a ritual while seated and eating a goat as he distributed the land parcels. PW3 denied that Sikolonyang or Marko Lemkoi were residing on parcels No. 700 and 712.
20. Joyline Cheptop Lomangura testified as DW1. She relied on a witness statement dated 29/6/2023 as her evidence-in-chief. Her testimony was that she was a secondary school teacher who married the late Clement Roptui Amon on 15/12/2012 and died on 18/2/2023 in a road traffic accident, leaving behind a son, Clement Philan.
 21. DW1 told the court that the appellants, a mother and son-in-law, looked down upon her as a daughter or sister-in-law and never wanted her or her son to inherit the suit parcels of land, which belonged to her late husband. DW1 denied that the suit parcels of land were ancestral land. DW1 said that the appellants had no proprietary interest in the suit parcels of land and had never lived thereon as alleged or at all. According to DW1, parcel No. 700 had been lawfully purchased by her late husband from the late Marko Lemkoi, a step-brother to PW 1, before the adjudication process commenced. Regarding parcel No. 712, DW1 said that it was brought from three persons at Kshs.78,000/=, by her late husband.
 22. According to DW1, the 1st appellant had her home in parcel No. 2564 and that the suit parcels of land were registered in the name of Chetoy Lorenga Cheposia. DW1 told the court that she was the one who allowed PW2, her brother-in-law, to occupy parcel No. 700 after his initial land was washed away by floods but had now refused to vacate it. DW1 admitted selling the two parcels of land to the 2nd and 3rd respondents, since they exclusively and lawfully belonged to her late husband.
 23. DW1 relied on a marriage certificate dated 15/12/2022; death certificate; letter dated 7/2/2023 from the lands office, sale agreements dated 8/9/2023 and 3/1/2023; letter from the chief dated 28/2/2023 and map for the two Adjudication Section as D. Exhibit No. 1 - 7(a) and (b), respectively.
 24. In cross-examination, DW1 told the court that PW1 had only resided on parcel No. 700. DW1 however admitted that she only stayed with her late husband for one year, during which time she became aware of his relationship with the family and how he acquired the suit parcels of land from his uncles. DW1 said that she had never visited, lived, or occupied the suit parcels of land. She had no sale agreements on how her late husband acquired the same.
 25. Additionally, DW1 said that most of the facts in her evidence were gathered from the in-laws and her witnesses. DW1 said that the two parcels of land were registered under her name as a beneficiary to the estate of her late husband. DW1 said that after she sold the two parcels of land to the 2nd and 3rd respondents, the demolition of the structures was undertaken with her permission without obtaining any orders of eviction from the court. DW1 also said that after selling the parcels of land, the buyers took vacant possession and demolished the structures.
 26. DW1 admitted the existence of Criminal Case No. E334/2023 against a son to her in-laws. DW1 said that she knew very little about her in-laws. DW1 said that she had never stayed in the suit parcels of land.
 27. Catherine Lorengeoi testified as DW2. She relied on her witness statement dated 29/6/2023. She said that she was a wife to the late Marko Lemkoi, a step-brother of the 1st appellant. DW1 told the court that her late husband inherited the land parcel No. 700 from the late father Lemkoi Ngurakeris, which he sold to the late Clement in 2013, before they relocated to Nyarapat. DW2 told the court that PW1 lives in the Kokotendwo/Sondany Land Adjudication Section and not in the Mwino Adjudication Section.
 28. DW2 admitted that PW2 was on parcel No. 700 with the permission of DW1. DW2 admitted that the late Clement passed on in 2013, after which DW1 became the registered owner. DW2 had no sale agreement between the late Clement and her late husband. She could also not tell how her late husband



- was given the land in the first instance. Equally, DW2 could not tell who was in occupation of the suit parcels of land since 1996. She said that the land was sold at Kshs.30,000/=. DW2 admitted that the 1st appellant was her step-sister-in-law, who even attended her wedding. She also admitted that Clement was a son to PW1. According to her, PW1 was given parcel No. 711 by her late father many years ago.
29. DW3 was Samson Kamsait. He relied on his witness statement dated 29/6/2023 and his evidence-in-chief. He said he jointly owned parcel No. 712 with the other two persons before they sold it to the late Clement for Kshs.24,000/=. DW3 said that he had no documents to show whether he previously jointly owned the land or sold it to the deceased. DW3 said that all the sale agreements went with the deceased. DW3 admitted that PW1 was his step-sister. DW3 said that after selling the land in 1996, he left the land and had never returned therein. DW3 admitted that the land initially belonged to his father, Lemoi Ngurakorisi. DW3 said that he did not know the mother of PW1 who was older than him, and got married while he was young. DW3 denied that PW1 lived on parcel No. 712.
 30. Stephen Lopoel testified as DW4. He relied on a witness statement dated 29/6/2023 as his evidence-in-chief. He denied that PW1 had lived on the suit parcels of land, which he termed as against Pokot customs for her to live with her late husband on her clan land. DW4 admitted that the husband to the 1st appellant had 3 wives. He admitted that the 1st appellant was given parcel No. 711 through her son, the 2nd appellant, as her share at Mwino' A'. DW4 denied that the 1st appellant was given parcels No. 700 and 712 or resided thereon.
 31. Benson Peyarai testified as DW5. He relied on his witness statement dated 5/12/2024 as his evidence-in-chief. He admitted writing D. Exhibit No. 4(a) and (b) as the area chief. DW5 said that the suit parcels of land initially belonged to the uncles of the late Clement Amon. He said that PW1 resided in Kokotendwo and not on the suit land. DW5 said that he was not sure if the appellants were involved when the suit parcels of land were changed from the name of Clement Amon to the 1st respondent by the land adjudication officer.
 32. Further, DW5 confirmed that there were houses on parcel No. 700 built by the Red Cross after the 2020 floods and landslides, where PW2 used to reside. DW5 told the court that PW2 was the one residing on the land after obtaining a court order. DW5 admitted that DW1 gave the brother-in-law a notice to vacate the land as per D. Exhibit No. 4(b). DW5 admitted that prior to the Red Cross houses, there were traditional house structures before 2020 on the land.
 33. Daniel Katoliki Riponyang testified as DW6. He relied on an affidavit dated 4/5/2023 as his evidence-in-chief. DW6 said that he bought parcel No. 700 on 8/9/2022 for Kshs.320,000/=. He admitted that the 2nd appellant's wife lived on parcel No. 700 with effect from 2019, after the landslides, when the Red Cross helped her put up some houses on the land belonging to DW1. DW6 said that the 2nd appellant was given time to vacate the land, which they did on 4/11/2022, after which he began tilling the land until he was served with a court order. He asked to be allowed to return to the land. DW6 said that he conducted a search and established that the 1st respondent was the owner of the land, though someone else was in occupation at the time, a wife to the 2nd appellant. DW6 said that the 1st respondent had offered PW2 the land but was unable to afford it. DW6 admitted to demolishing the structures on the land.
 34. DW6 had no receipt to show the payment of Kshs.320,000/= or the source of the money. DW6 admitted that the sale agreement had a guarantee clause to the effect that the 1st respondent or her family would not object to the sale. DW6 said that he was able to know the history of the land before the purchase.



35. Musa Protus Limapus testified as DW7. He relied on the witness statement dated 3/1/2023 as his evidence-in-chief. He admitted purchasing parcel No. 712 for Kshs.830,000/= from 1st respondent, a wife to the late Clement, a clan member. He sought eviction orders from the appellants. DW7 admitted that the 1st appellant's husband was known to him and that they only farmed, but never vested on parcels No. 700, 711, and 712. DW7 said that the late Clement was the one using parcels No. 700 and 712, while PW2's wife was on parcel No. 711. DW7 said that after Clément's death, the son of the 2nd appellant started tilling the two parcels of land.
36. Further, DW7 said that the wife of the 2nd appellant moved to parcel No. 700 while the sons were residing on parcel No. 712. Though he paid for the land, DW7 said that he never occupied it. DW7 admitted that before Clement owned the land, PW1 was utilizing it, while after he passed on, PW2 was the one farming on the land. DW7 admitted that there were traditional houses, cows, and goats in both parcels No. 700 and 712, occupied by the relatives of the late Clement.
37. DW7 said that before he bought the land, he never asked PW1 and PW2 if they had any beneficial interest in the land; otherwise, his visit to the land office indicated that the owner as the 1st respondent. DW7 had no deposit slips for the purchase price. PW7 insisted that he only needed consent from the 1st respondent to purchase the land since she was the recognized owner.
38. The appeal was canvassed by way of written submissions. The appellants relied on the ones dated 15/11/2023, isolating four issues for the court's termination. On the burden of proof, the appellant submits that they, together with their witnesses, discharged the same by demonstrating actual possession and occupation of the suit lands for over 50 years and the births of all their ten children on the land, including the late Clement Amon, which evidence was not challenged by rival evidence from the respondents. The appellants termed the objection to the production of the photographs as a mere technicality curable under Article 159(d) of *the Constitution*.
39. Further, the appellants submitted that the said occupation was corroborated by the 3rd respondent's evidence and an application dated 23/7/2024 for eviction. The appellants termed the evidence tendered, despite her advanced age of PW1 at 93 years, as credible and reliable, especially regarding the circumstances under which the 1st registration of the suit land was done in the name of her late son. The appellants submitted that inconsistency in evidence that is satisfactorily explained is not grave and does not amount to untruthfulness, especially where, in this case, the same was corroborated by defense witnesses.
40. Regarding the counterclaim, the appellants submitted that the same was not proved, especially regarding the alleged purchase and sale of land, which did not meet the requirements of Section 3(3) of the Law of Contracts Act and Section 38 of the *Land Act*. In this case, the appellants submitted that the respondents failed to prove the root of their title or occupation or possession of the suit parcel of land by the 1st respondent. Reliance was placed on Dominic Otieno Ogonyo & Others -vs- Helida Akoth Walori [2022] eKLR.
41. On whether the 2nd and 3rd respondents were bona fide purchasers for value, the appellants submitted that they were unable to meet the terms and conditions set in Katende -vs- Haridar & Company Limited [2008] 2 E.A.173as cited with approval in Lawrence Mukiri -vs- Attorney General & Others [2013] eKLR, more so when no due diligence was conducted before the sale, the conduct of the 1st respondent betrays them, for she did not accompany them to the suit land to inspect, identify, or cause a survey during the preparation of the sale agreement, and lastly; when no payment documents were produced for Kshs.24,000/=, Kshs.830,000/= and Kshs.320,000/=. Reliance was placed on Daudi Kiptugen -vs- Commissioner of Land & Others [2015] eKLR.



42. The appellants submitted that other than the mere allegations of purchase of the suit parcels of land by the late Clement Amon from his uncles, there was no credible evidence produced to support it for the 1st respondent to have a good title that she could pass to the 2nd and 3rd respondents. Additionally, the appellants submitted that they had an overriding interest in the suit parcels of land, which the 2nd and 3rd respondents overlooked.
43. In any event, the appellants submitted that the late Clement Amon was aware of the said overriding interests hence the reasons that he did not sell or deal otherwise the suit parcels of land, adverse to the aforesaid trust. The appellants submitted that the sale of the two parcels of land by the 1st respondent to the 2nd and 3rd respondents was in breach of the overriding interest. Consequently, the appellants urged the court to find the appeal merited and allow it with costs.
44. The respondents relied on written submissions dated 13/12/2024. The first ground is that the record of appeal is incomplete for lack of a certified copy of the decree contrary to Order 42 Rules 2 and 13 (4) (f) of the Civil Procedure Rules. Reliance is placed on Kitale ELC Land Appeal No. 7 of 2020, Bernard Kamau Mbugua -vs- Khimji Karshan Chabhadia & Others.
45. On grounds 8, 9, 11, and 12 of the appeal, the respondents submitted that the lower court findings that the 1st appellant did not reside on the suit parcels of land were well founded on evidence, hence cannot be faulted going by paragraph 6, 7, and 8 of the plaint, evidence in chief of PW1 on pages 67, 70, 74-75 of the record of appeal vis-à-vis that of the 1st respondent and her witnesses at pages 84, 96, 97, 104 and page 46. The respondents submit that photographic evidence was adequately rejected for non-compliance with Section 106 B(4) of the Evidence Act.
46. On rejection to visit the suit parcels of land, the respondents submitted that a ruling to that effect was recorded on 21/3/2024, which was not appealed against; otherwise, the visit was unnecessary to the determination of the suit.
47. On grounds 6 and 7 of the record of appeal, the respondents submitted that the finding that the late Clement Amon, husband to the 1st respondent, had bought the land from the former owner, cannot be faulted, for it was corroborated by credible witnesses including the wife to the former owner, the area chief, and the 2nd and 3rd respondents, which evidence met the test of a sale of land under Section 3(3) of the Laws of Contract Act.
48. In any event, the respondents submitted that Section 3(3) of the Law of Contract Act is inapplicable to the purchase of land under an adjudication section that is not yet complete, hence the reason why the appellants had to seek and obtain a consent to sue under Section 30(1) of the Land Adjudication Act. The respondents submitted that before the Land Adjudication Act was applied, the suit parcel of land was trust land; hence, the sale to the late Clement Amon by his uncles, who had some occupation license, was regular. Further, the respondents submitted that the late Clement Amon was regularly the owner of the land after his interests in the land were ascertained, recorded, and shown on the map.
49. On customary trust, the respondents submitted that the ingredients of the same were not pleaded, proved, or a relief sought for a declaration of the same in the appellants' pleadings, yet parties are bound by their pleading and that a relief not sought cannot be granted to a party. Reliance was placed on George Roine Titus & another -vs- John P. Nangurai (as personal representative of Harry Lewis Nangurai, now deceased) [2001] eKLR.
50. The court has carefully re-analyzed the entire record of the court below, the grounds of appeal, and the written submissions. The issues calling for my determination are:



- (1) If the record of appeal meets the requirements of the law.
 - (2) If the appellants pleaded any trust against the respondents.
 - (3) If the appellants proved their claim to the required standards,
 - (4) If there was a competent counterclaim against the appellants.
 - (5) If the respondents proved their counterclaim.
 - (6) If the appeal has merits.
 - (7) What is the order of costs?
51. Order 42 Rule 3 (4) of the Civil Procedure Rules provides that the pleadings, notes by the trial magistrate made at the hearing, the transcript of any official shorthand, electronic recordings, all affidavits, maps, and other documents put in evidence before the magistrate and the judgment or order are the documents that form a record of appeal. What the appellants have included in the record of appeal dated 9/10/2024 on pages 183, 188, 198-199, and 221-223 are documents from the advocates' offices, which have advocates' notes on them and comments. The intention of the law, as I understand is that documents included in a record of appeal are the ones drawn from the original trial court file and not those which are in the appellant's advocate's office file.
 52. The mischief is to avoid a situation where an appellant includes as part of the record of appeal documents or pleadings that were never on record before the trial court. The record of appeal must, therefore, only reflect what was before the trial court and not any other extrinsic material, foreign to the trial court and the opposite party. Documents or pleadings held at an advocate's office can only form part of a record of appeal or a court file with leave of court during a reconstruction of a misplaced or lost original court file. See KCB -vs- Sheikh Osman Mohamed C.A No. 179 of 2010.
 53. The purpose of pleadings as held in Dakianga Distribution (K) Ltd -vs- Kenya Seed Company United [2015] eKLR is to communicate the essence of the case, which is sought to be advanced to the defending party and the court on what issues are before it for determination, for it to conduct a fair trial. The cardinal principle is that a pleading must state all the material facts to establish a reasonable cause of action or defense.
 54. The primary pleading by the appellants was the plaint dated 13/3/2023. Paragraph 6 sought a declaration that the suit parcels of land were ancestral; hence, the appellants were lawful and beneficial owners, having been inherited from the late Lemkoi, 1st appellant's father.
 55. In paragraphs 7-13, the appellants pleaded the nature, circumstances, particulars, and nexus on how the suit parcels of land were acquired, settled on, developed, recorded, trespassed into by the 2nd and 3rd respondents and how they established that they had changed hands from the name of the late Clement Amon to the 1st, 2nd and 3rd respondents, despite their beneficial interest witnessed by long use, possession, occupation and developments therein spanning over 50 years. In paragraphs 13-14 of the plaint, the appellants pleaded that the sale and subsequent transfer between the 1st, 2nd, and 3rd respondents was unlawful, null, and void for lack of their approval, consent, or knowledge, since the 1st respondent had no interest whatsoever in the suit land.
 56. It is not disputed that the late Clement Amon passed on 8/11/2013. A cause of action has been defined as acts on the part of the defendant that give rise to a cause of complaint on the part of the plaintiff. See D.T. Dobie & Company (Kenya) Limited -vs- Joseph Mbaria Muchina & Another [1980] eKLR. The cause of action, as pleaded by the appellants, was that the suit parcels of land were subject to their



- overriding interest, which affected the rights of the registered owners and which the respondents had breached.
57. In the joint defense and counterclaim dated 29/6/2023, the respondents in paragraph 4 denied that the land parcels formed part of the ancestral land.
58. The respondents, however, admitted that the suit parcels of land formed part of trust land before it was subjected to the adjudication process. The respondents pleaded that the late Clement Amon acquired the suit parcels of land in 1996 and 2003. The respondents denied the particulars of use, possession, and occupation of the land parcels by the appellants before they came under their registration. The respondents pleaded that the 1st respondent was lawfully recorded as the owner in place of her late husband and thereafter lawfully sold the same to them. They denied that they were trespassers on the land; otherwise, it was the appellants who ought to be forcefully evicted from the land since they were bonafide owners of the land.
59. It is trite law that parties are bound by their pleadings, and issues for determination flow from the pleadings. See *Raila Amollo Odinga & Others -vs- IEBC & Others* [2017] eKLR and *Stephen Mutinda Mule -vs- IEBC* [2014] eKLR. Order 2 Rules 1, 2, 3, 4, and 10 of the Civil Procedure Rules define pleadings generally. The Order specifies matters that must be specifically pleaded. Some of them are on recovery of land, its possession, misrepresentation, fraud, breach of trust, undue influence, condition of mind, malice and fraudulent intention.
60. Unfortunately, the parties in this file did not draw out any issues of fact and law arising out of their pleadings for the courts' determination as provided under Orders 11 and 15 of the Civil Procedure Rules. Nevertheless, my finding is that the claim by the appellants as to customary trust was correctly pleaded.
61. The next issue is whether the appellants proved the customary claim to the required standards. The locus classicus on trusts is the case of *Isaack M'Inanga Kiebia -vs- Isaya Theuri M'Lintari* [2018]. The tests for establishing customary or ancestral trust were set out:-
- (a) The land in question was before the registration family, clan or group land.
 - (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.
 - (d) The claimant could have been entitled to be registered as an owner or other beneficiary but for some intervening circumstances.
 - (e) The claim is directed against the registered proprietor who is a member of the family, clan, or group.
62. Section 51 of the *Evidence Act* provides that a court can take an opinion on a relationship by the conduct of a member of the family with special means of knowledge, including the grounds on which the opinion is based. Under Sections 60 and 61 of the *Evidence Act*, a court has discretion to take judicial notice of specific facts.
63. In *Ernest Kinyanjui Kimani -vs- Muiro Gikanga & Another* [1965] EA 735, the court held that African and African customary law forms part of the law of the land, which must be accurately and definitely established by calling evidence to prove it. In *Mbui -vs- Mukangu* (2004) eKLR, customary trust was defined as a concept of intergenerational equity, where the land was held by one generation for the benefit of the succeeding generations and where it was passed down from one family member to another, the presumption of trust being subject to evidence. In *Kanyi -vs- Muthiora* [1984] KLR 712,



- the court observed that a registration of the suit land could not extinguish rights held under the Kikuyu Customary Law. Further, in *Muthuita -vs- Muthuita* [1988] 1KLR 42, the court held that customary trust is proved by leading evidence on the history (root) of the suit property and on the relevant law on which it was founded and to which the claimant subscribed.
64. In *Peter Gitonga -vs- Francis Maingi M'Ikiara Meru* HCCC No. 146 of 2000, the court found a trust created by looking at the surrounding circumstances of the registration to determine the intention or purpose thereof. In *Susan Mumbi Waititu -vs- Mukuru Ndete & Another* [2007] eKLR, the court held that trust must be proved with cogent evidence.
 65. In *Omollo -vs- Oluoch* Civil Appeal 46 of 2017 [2023] KECA 271 [KLR] (February 18th, 2022) (Judgment), the court held that customary trust is an overriding right recognized under land laws, which does not necessarily have to appear in the title register, under Section 28(b) of the [Land Registration Act](#), which subsists on the land and affects it without it being noted in the register, and a party alleging it must meet the tests in the case *Kiebia -vs- M'Lintari* (supra). The court observed that evidence must be led to prove the existence of such a trust and each case must be determined on its own merits and the quality of the evidence presented.
 66. In *Kiarie -vs- Kinuthia* [2022] KEELC 13336 (KLR), the court observed that what is essential is the nature of the holding of the land, the intention of the parties, and if the holding is for the benefit of other members of the family then customary trust could be presumed to have been created in favor of such parties, whether or not they are in possession or actual occupation of the land.
 67. In *Black Laws Dictionary* 9th Edition, trust is defined as a right enforceable in equity to the beneficial enjoyment of the property to which another holds legal title, a proprietary interest held by one person (trustee) at the request of another (settlor), for the benefit of a third party, (beneficiary).
 68. The [Trustee Act](#) defines trustee and trust to include implied, constructive and other cases where the trustee has a beneficial interest in the trust property. See *Arvind Shah & Others -vs- Mombasa Bricks & Tiles Ltd & Others* SC Petition No. 18 (E020) of 2022. Trusts may be created either expressly or by operation of law. Trusts are proved as a matter of fact through evidence. See *Mumo -vs- Makau* [2002] EA 120. In *Elijah Njeru Mugo & Another -vs- Njiru Samuel M'Rwingo* [2014] eKLR, the court held that registration per se does not relieve a proprietor from any duties or obligations to which he is subject as a trustee.
 69. In *Charles Kahende Kinuthia & another -vs- Naomi Nyabae Kamuyu* [2014] eKLR, the court found that the registration was solely on account of the proprietor being the firstborn son and that the acts of him allowing the late mother and all his siblings to live and occupy the land, since its registration pointed to an intention to create a trust.
 70. In *Mugambi (Legal Representative of the estate of Geoffrey Mugambi Nkanata (Deceased) -vs- Jackson & Others* [EL Appeal] E045 of 2023 [2024] KEELC 3800 [KLR] (May 8th 2024) (Judgment), the court held that the manner in which the land came under the name of the appellant while he was a minor, allowing the late father and siblings to occupy, plant, tender and harvest coffee for almost four decades showed that he was willing to share the land as a family land.
 71. In *M'Mboroki -vs- M'Mboroki* [E&L 20 of 2020 [2023] KEELC 16483 [KLR] (March 22nd 2023) (Judgment), the court cited [Kambo -vs- Mwangi Civil appeal No. 186 of 2017](#) KECA 54 (KLR) (April 28th 2022) (Judgment), that occupation and or possession of the land was a necessary ingredient for a customary trust to be established.



72. Guided by the foregoing case law, the relationship between the appellants and the 1st recorded owner of the land, Clement Amon, who is the late husband of the 1st respondent, is not disputed. The 1st appellant adopted her witness statement dated 13/3/2023 as her evidence-in-chief and produced adjudication records as P. Exhibit Nos. 1 - 6. In cross-examination, she gave vivid details on the history of the land, her late husband's clan, where she said she had lived all her life. She said that they lived together with the 2nd appellant, and one of his wives, PW1, told the court that the homestead of her late son was in her late husband's land, Talai side, and was buried in Mnagei Kapenguria Kamorao, where he used to work and reside, together with her daughter Grace.
73. PW1 was emphatic that the land she was occupying was her late father's land. In paragraphs 3, 4, and 5 of the witness statement dated 13/3/2023, which was adopted as her evidence in chief, PW1 narrated the circumstances on which she settled on the land, developed it, and permitted her late son to register as a trustee for she had no ID Card to hold it in trust for the family members.
74. In cross-examination, none of the respondents challenged the factual evidence by PW1. Despite her age and normal lapses in recollecting the parcel numbers, the evidence of PW1, in my view, appeared consistent and reliable compared to her daughter in law whose evidence was hearsay, for she was not privy to the history of the ancestral or family land and the family relationships. PW2 corroborated the evidence of PW1 on the circumstances leading to the registration of the land in the name of the late Clement Amon. There is evidence that the photos marked equally show the manner of settlements and developments on the suit parcels of land prior to the death of the late Clement despite the rejection of MFI-P7, which had also been attached to the affidavit in support of the application dated 13/3/2023 as annexure marked MKL '5', which the date of taking the photos indicated as 24/2/2023. It leaves no doubt that indeed the applicants were the ones occupying the land with the full knowledge of the late Clement Amon before he passed on.
75. Equally there is evidence that after the death of the late son, DW1 allowed the appellants to continue exclusively living on the suit parcels of land until 2020, when they were recorded under her name. Both DW1 and DW7 acknowledged that there were houses and structures on the suit land belonging to the appellants. DW1 did not deny that PW2 was living on the suit land. DW6 and DW7 equally admitted that the appellants had been on the land for some time. DW1 and DW6 admitted that there was a notice to vacate the land served upon the 2nd appellant. Equally, DW7 admitted to demolishing some houses on the suit land.
76. Possession and occupation are key in leading evidence on customary trust. The onus was on the appellants to prove its existence as held in *Juletabi African Adventures Ltd & Another -vs- Christopher Michael Lockley* (2017) eKLR. He who alleges a trust must prove, as held in *Alice Wairimu Macharia -vs- Kirigo Philip Macharia* [2019] eKLR. The evidence tendered by the appellants on the history of the land parcels as arising out of a common patriarch was not disputed.
77. That evidence is supported by the young step-brothers and step-sister-in-law of the 1st appellant, who were called as witnesses by the respondents. The only point of divergence is that the late Clement Amon, according to the respondents, had solely acquired the suit parcels of land from his uncles. In attempts to rebut the existence of the customary trust, the evidential burden was on the respondents to establish that they legally obtained the suit parcels of land that had no existing overriding interests in favor of the appellants. When a title to land is under attack, every step towards its acquisition becomes an issue. The burden is on he who waives an instrument of ownership to show that he acquired the title legally, formally and free of any encumbrances, including those not noted in the register. See *Munyu Maina -vs- Hiram Gathiha Maina* (2013) eKLR and *Samuel Kamere -vs- Land Registrar Kajiado* (2015) eKLR.



78. There is no dispute that the late Clement Amon passed on 18/11/2013. The suit parcels of land came under the name of the 1st respondent on 26/11/2020 going by the adjudication records. The sale agreements produced as D. Exhibit 5(a) & (b), and especially 5(b) describe the registered owner as the late Clement Roptui Amon (deceased) as per West Pokot/Mwino Adjudication Section. Therefore, as at the time the late Clement Amon passed on, the suit property belonged to him. It means, therefore, that it was free property belonging to his estate as per the [Law of Succession Act](#).
79. There is no evidence from the land adjudication office that the two parcels of land had been transferred to the 1st respondent before her late husband passed on. Any dealing with the land after his demise would, therefore, amount to intermeddling with the property of a deceased person under Section 82(a) of the [Law of Succession Act](#), Cap 160. Before the trial court, the 1st respondent did not plead or produce any letters of administration or transfer forms duly executed, which enabled her to be recorded as the owner of the suit parcels of land in 2020.
80. Equally, the 1st respondent did not attach transfer records of the land signed by her late husband as the transferor and herself as the transferee. Similarly, the 1st respondent did not avail before the trial court duly executed transfer forms and adjudication records on how she became the recorded owner of the suit parcels of land while the recorded owner was deceased. The adjudication records availed before the trial court had glaring omissions and anomalies contrary to the [Land Adjudication Act](#).
81. Further, the 2nd and 3rd respondents, other than producing the sale agreements, did not avail the land adjudication records showing when the transfers of the two parcels of land to their names occurred, who effected and signed for them. In *Wabala -vs- Ngalu & another* [2025] KECA 95 (KLR), the court observed that Sections 70,71, 74 and 109 of the [Evidence Act](#) are relevant in addressing the authenticity and attestation of transfer forms and the court can only act on facts as proved and not assumptions; since a title is an end product as held in *Dina Management -vs- County Government of Mombasa & others* (2023) eKLR.
82. From the foregoing, the 1st respondent had no good title to pass to the 2nd and 3rd respondents; the two parcels of land belonged to a deceased person. It is the respondents who assert that the sale, transfer and subsequent registration of the suit parcels of land in their names were legal, regular and formal. Establishing those facts to defeat the alleged customary trust by the appellants was critical to their case under Sections 107 (1) and (2), 109, and 112 of the [Evidence Act](#). When a root title is under challenge, it is not enough to wave the title paper and claim ownership. Every paper trail becomes an issue to show that the acquisition, transfer, and registration was formal, regular, procedural and legal, without a break in the chain. See *Hubert L. Martin & Others -vs- Margaret and Kamar & Others* [2016] eKLR, *Munya Maina -vs- Hiram Gathiha Maina* (supra).
83. In *Bandi -vs- Nzomo* Civil Appeal No. 16 of 2020, the court observed that Sections 107, 109, and 112 of the [Evidence Act](#) apply to anyone who wishes the court to believe in the existence of any fact or who would fail if the other side adduced no evidence has the burden to prove its existence. It is the respondents who alleged that the suit parcels of land were bought by the late Clement Amon for value from his uncles and brothers to the 1st appellant in 1996 and 2003.
84. Land sale agreements before the law of contract was amended in 2003 required proof of taking possession and or continued full possession in part performance of the oral contract.
85. In *Peter Mbiri Michuki -vs- Samuel Mugo Michuki* [2014] eKLR, the court observed that Section 3(7) of the [Law of Contract Act](#) excluded Section 3(3) for contracts on land sale made before 1/6/2003. Evidence tendered by the respondents to sustain the claim did not show that the late Clement Amon or the 1st respondent had actual or constructive possession of the land until he passed on in 2013. On



- the contrary, between 2013 and 2020, when the 1st respondent became the recorded owner, she was clear that she had not stepped into, used, or possessed the suit parcels of land. The seller of the land to the deceased was clear in his evidence that he had not stepped into the land since 1996 and could not verify who was on the land until it came into the names of the respondents.
86. DW1 told the court that she solely relied on her in-laws and neighbors to know the relationship of the extended family. Compared to the appellants, her evidence was more hearsay than within her knowledge. She was, therefore, unable to tell the trial court on what basis she was denying that there was an intended trust when the land was recorded in the name of the late Clement Amon.
 87. DW1 was unable to tell under what circumstances the appellants were on the land and why her late husband did not issue a notice for them to vacate during his lifetime. She was unable to tell the court why, between 2013 and 2020, she allowed the land to be used by the appellants or to be left without a caretaker. None of the respondent's witnesses were able to explain who was on the land before 2020 if the 1st respondent herself told the court that after her late husband died, she never stepped into the suit land, including the day that she allegedly sold and transferred the same to the 2nd and 3rd respondents.
 88. In *Parkar & Another -vs- N.O & 2 Others* (Civil Appeal 139 of 2020 [2023] KECA 908 [KLR]) (24th July 2023) (Judgment), the court observed that Sections 8 and 33 of the [Evidence Act](#) list exemptions to hearsay evidence and that Section 3 and 5 thereof provides for admissibility of documentary evidence. In this appeal, the respondents did not tender documents to show that the deceased had been transferred the land by the uncles during the adjudication section and, hence, was not a first recorded owner. The land adjudication officer was not called to produce the adjudication record showing or supporting the respondents' defense and counterclaim that the land was not ancestral. The 1st respondent was not party to the sale in 1996 or 2003. She was only married a year before her late husband passed on.
 89. So, DW1 was not privy to the sale and the manner in which her late husband bought the land for her evidence to be believed under Sections 33(b) and 35 of the [Evidence Act](#). Her evidence was, therefore, incapable of passing the checkpoints of admissibility, relevancy and proof.
 90. Coming to bona fide purchaser for value, the 2nd and 3rd respondents did not plead the doctrine and lead evidence that they were unaware of the occupation and the interest or rights of the appellants. On the contrary, they all told the court that they did not bother to ask the immediate family of the seller, whom they knew, whether they were objecting to the sale. Honesty, good faith, lack of knowledge, valuable consideration, valid title, and not being party to the fraud are what the respondents had to plead and prove for their counterclaim to be sustained going by *Katende -vs- Haridar & Co. Ltd* (supra).
 91. A nullity is a nullity. Land illegally or unprocedurally acquired by the 1st respondent without letters of administration and or proper paper trail could not be passed to the 2nd and 3rd respondents. See *Macfoy -vs- United African Co. Ltd* (1961) 3 ALL E.R 1169 and *Dickson Ndegwa Mbugua -vs- City Council of Nairobi*, Civil appeal No. 254 of 2010.
 92. The 2nd and 3rd respondents were unable to prove payment of any consideration to acquire the two parcels of land. Other than the letters confirming ownership, the 2nd and 3rd respondents failed to avail any land transfer records from the land adjudication office in their favor. In *Said -vs- Shume & Others* Civil Appeal No E050 of 2023 [2024] KECA 866 [KLR] (July 20th, 2024) (Judgment), the court observed that the factors in *Katende -vs- Haridar* (Supra) and *Lawrence Mukiri -vs- Attorney General & Others* [2013] eKLR must be satisfied before a conclusion can be drawn that the purchaser was bona fide and innocent. The documents at the lands adjudication office, which the 2nd and 3rd respondents relied upon, were not availed at all.



93. On the contrary, the 2nd and 3rd respondents did not tell the court if they had verified and established from the land adjudication office that the transfer of land belonging to a deceased person had been lawfully acquired by the 1st respondent. Due diligence includes visiting the suit land, establishing who is in possession or occupation, and enquiring on what basis, as held in *Torino Enterprises Ltd -vs- Attorney General* Petition No. 5 (E006) of 2022 [2023] eKLR.
94. Awareness of what the 2nd and 3rd respondents were purchasing and establishing who was in possession in the absence of the deceased owner was critical. The evidence of the area chief was unreliable and misleading. The area chief had no powers in law to issue eviction notices and or verify ownership of land. He could, therefore, not be termed as an independent witness. The 2nd and 3rd defendants were also from the vicinity, who opted for reasons known to them to ignore the appellants in dealing with the deceased parcels of land without involving the 1st respondent's mother and brother-in-law. See *Arthi Highway Developers -vs- West End Butchery Ltd & others*(2015) eKLR.
95. The 2nd and 3rd respondents, in view of their evidence, cannot purport to invoke the doctrine of bona fide purchaser for value without notice. They looked the other way and failed to see the presence of the appellants on the land, which was a clear warning sign that there were overriding interests. D. Exhibit 5(a) had an explicit clause referring to the appellants. It was a clear case of "buyer be aware," which the 2nd and 3rd respondents ignored. The signs and warnings were all clear for the 2nd and 3rd respondents. See *Kenya Post Office Savings Bank Staff Retirement Benefits Scheme Registered Trustees -vs Attorney General & others* (2025) KECA 438 (KLR), it is paramount for a purchaser to do due diligence by investigating the root of the title they intend to acquire, in order to detect any illegalities that may bar from obtaining a valid title deed or impede their right to enjoy the protection under Article 40 of *the Constitution*, since the law does not operate in a vacuum. The court also cited *Dina Management -vs- County Government of Mombasa & others* (supra), that the limitation in Article 40(6) of *the Constitution* does not cover irregularly acquired property.
96. The counterclaim had no titular heading. The defendants to the same were not defined. The basis for granting orders of forcible eviction was not based on any facts and law.
97. Regarding a scene visit, the same is at the discretion of the court. The ruling dated 21/3/2024 was not appealed against. It is not the business of courts to assist parties who come to court to gather evidence. The court finds the ground as lacking merits. Equally, the photographs marked as PMF'7' were rejected correctly for non-compliance with Section 106 (B) of the *Evidence Act*. Such an anomaly cannot be cured under Article 159 of *the Constitution*. The appellants had an opportunity to regularize the same by attaching a certificate, which they failed to do before closing their case.
98. Given the foregoing, I find that the judgment of the trial court was inconsistent with the pleadings and the evidence tendered. It is set aside and replaced with an order allowing the primary suit and dismissing the counterclaim by the respondents. Costs of the lower court and in this appeal to the appellants.

JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 12TH DAY OF MARCH 2025.

HON. C.K. NZILI

JUDGE, ELC KITALE.

In the presence of:

Court Assistant - Laban

Kiarie for the Respondents present



No appearance for the Appellants

