



**Obura & another v Obura (Environment and Land Appeal  
E008 of 2023) [2025] KEELC 1033 (KLR) (3 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1033 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E008 OF 2023  
SO OKONG'O, J  
MARCH 3, 2025**

**BETWEEN**

**GRACE AOKO OBURA ..... 1<sup>ST</sup> APPELLANT**

**FLORENCE AWUOR OBURA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GEORGE ERICK OBURA ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of HON. F.RASHID PM  
delivered on 24th January 2023 in WINAM PMC ELC NO. E011 OF 2022)*

**JUDGMENT**

1. The Respondent filed a suit against the Appellants at the Principal Magistrate's Court at Winam being PMC ELC No. E011 of 2022 (hereinafter referred to as "the lower court") seeking the following reliefs;
  1. An order of a permanent injunction restraining the Appellants by themselves, their agents, servants, employees or anybody claiming through them from trespassing onto the parcel of land known as Kisumu/Manyatta "A"/15, collecting rent therefrom or interfering with the Respondent's peaceful use and occupation thereof.
  2. General damages for trespass.
  3. Costs and interest of this suit.
2. The Respondent averred that at all material times, he was the registered owner of the parcel of land known as Kisumu/Manyatta "A"/15 measuring 0.12 Ha. (hereinafter referred to as "the suit property") together with his brother, Philip Edward Omondi Obura, deceased in respect of whose estate he was the administrator pursuant to a Grant of Letters of Administration issued in Kisumu High Court Succession Cause No. 47 of 2010, In the Matter of the Estate of Philip Edward Omondi Obura.



3. The Respondent averred that the Appellants had unilaterally taken possession and control of the suit property and had directed all the tenants in occupation of the property to pay rent directly to their bank accounts. The Respondent averred that the Appellants' action was illegal as they had no lawful interest in the suit property. The Respondent averred that there were efforts to amicably resolve the dispute but the Appellants were belligerent and non-cooperative.
4. The Appellants filed a joint statement of defence on 23<sup>rd</sup> May 2022. The Appellants denied that the Respondent was the absolute registered owner of the suit property. The Appellants denied that they had unilaterally taken possession and control of the suit property. The Appellants averred that Phillip Edward Omondi Obura's estate had not been administered and that the purported High Court Succession Cause No. 47 of 2010 was non-existent. The Appellants averred that the said Philip Edward Omondi Obura had a family and was survived by a daughter namely, Daisy Adhiambo Obura. The Appellants averred that the Respondent had overlooked the rights of Daisy Adhiambo Obura despite an explicit will by their mother, Monica Obura, deceased in which she distributed the family properties. The Appellants averred that the suit property was registered in the names of the Respondent and Philip Edward Omondi Obura, deceased to hold in trust for the family and no exclusive rights ever passed to the Respondent.
5. The Appellants averred that they had not infringed on any rights of the Respondent. The Appellants averred that the Respondent was not entitled to any of the reliefs sought in the plaint. The Appellants averred that the suit was an effort by the Respondent to challenge a valid will by their late mother through the back door so as to disinherit them. The Appellants prayed that the suit be dismissed with costs.
6. The lower court heard the suit and entered judgment in favour of the Respondent against the Appellants on 24<sup>th</sup> January 2023. The lower court found that the Respondent and Philip Edward Omondi Obura, deceased were the absolute owners of the suit property the same having been given to them as a gift by their deceased father. The court found further that the Appellants had failed to prove that the Respondent and Philip Edward Omondi Obura, deceased held the suit property in trust for the benefit of the whole Obura family. The lower court found further that the Appellants were not acting for the benefit of the daughter of Philip Edward Omondi Obura, deceased, Daisy Monica Adhiambo Obura (DW3) who was entitled to a share of the suit property since the Appellants were not sharing the rent with her. The lower court found that the Appellants were acting on their own behalf and as such were trespassers on the suit property. The lower court issued a permanent injunction restraining the Appellants from trespassing on the suit property. The court also ordered the Appellants to pay general damages of Kshs. 100,000/- and the costs of the suit.
7. The Appellants were aggrieved by the decision of the lower court and preferred the present appeal. In their memorandum of appeal dated 24<sup>th</sup> February 2023, the Appellants challenged the lower court's judgment on the following grounds;
  1. That the learned Magistrate erred in law and fact in failing to realise and appreciate that the Appellants had a common interest over land parcel numbers Kisumu/Manyatta "A"/14 and 15 and as such barring them from entering and accessing the properties rendered them homeless.
  2. That the learned Magistrate erred in law and in fact in awarding damages for trespass that were unjustified, excessive and in the absence of evidence to prove the same.
  3. That the learned Magistrate erred in law and fact when she arrived at a wrong decision while overlooking the evidence on record.



4. That the judgment of the lower court was based on wrong legal principles and caused injury to the Appellants.
8. The Appellants prayed that the appeal be allowed and the judgment of the lower court set aside and replaced with an order dismissing the Respondent's suit with costs to the Appellants. The Appellants also prayed for costs of this Appeal.
9. The appeal was heard by way of written submissions. Both parties filed submissions.

### **Analysis and Determination**

10. I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the grounds of appeal by the Appellants and the submissions by the parties. This being a first appeal, this court has to reconsider and re-evaluate the evidence on record and draw its conclusions on the issues that were raised for determination before the lower court. In *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2EA 212 the Court of Appeal stated that:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

See also, *Verani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269, *Selle v. Associated Motor Boat Co. Ltd.* [1968] E.A 123 and *Abok James Odera t/a Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR on the duty of the first appellate court.

11. The court will also not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] E.A 424 and *Makube v. Nyamuro*[1983] KLR 403.
12. From the grounds of appeal, I am of the view that the issues arising for determination in this appeal are;
  - a. Whether the learned Magistrate erred in law and fact in failing to find that the Respondent and his deceased brother, Philip Edward Omondi Obura, held the suit property in trust for the Appellants.
  - b. Whether the learned Magistrate erred in law and fact in awarding the Respondent damages for trespass that were unjustified, excessive and not backed by evidence to prove the same.
13. The suit property was registered under the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the Registered *Land Act* provide as follows:

“27. Subject to this Act –

- a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together



with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –
- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

14. In *John Gitiba Buruna & Another v. Jackson Rioba Buruna*, Court of Appeal at Kisumu, Civil Appeal No. 89 of 2003, the court stated as follows:

“Although the rights of a registered proprietor of land are indefeasible under section 28 of the Registered *Land act*, such registration does not as the proviso to section 28 states relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

15. In *Isack M’inanga Kiebia v. Isaaya Theuri M’lntari & another* [2018] eKLR, the Supreme Court stated as follows on customary trusts:

“(37) Both exponents of colonial land policy and jurisprudence, either completely disregarded, or did not fully appreciate, the nature, scope, and complexity of African land relations. Land in a traditional African setting, is always the subject of many interests and derivative rights. The content of such interests and rights is often a complex area of inquiry. Such rights could be vested in individuals or group units. The rights and interests frequently co-exist with each other. For example, the rights of members of a family do not necessarily derive from the corporate rights of the family as such, but by operation of the applicable law and customs. Besides, the enjoyment of the rights is dependent on the fulfilment of certain conditions unique to the group unit. Several rights of the members could be inferior to, or co-terminus with, or indeed superior to the sum total of the rights of a group. Hence, customary law does not vest “ownership”, in land in the English sense, in the family, but ascribes to the family the aggregate of the rights that could be described as “ownership.” (Bennett 1995:3 and Cocker 1966: 30-33).”

16. In the same case, the court stated further as follows:

“(52) Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered *Land Act*. Under this legal regime, (now repealed), the



content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. 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.”

17. In *Mwangi Mbothu & 9 others v. Gachira Waitimu & 9 others* [1986] eKLR, the court stated that:

The law never implies, the court never presumes a trust but in case of absolute necessity. The court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create trust must be clearly determined before a trust will be implied.”

18. The Respondent proved that the suit property was registered in his name and the name of his brother, Philip Edward Omondi Obura, deceased. The burden was on the Appellants to prove that the Respondent and Philip Edward Omondi Obura, deceased were registered as the owners of the suit property to hold the same in trust for them. Apart from claiming that the suit property was family land, the Appellants produced no evidence in proof of their claim that the Respondent and Philip Edward Omondi Obura, deceased held the suit property in trust for them. In their testimonies, the Appellants seemed to be acknowledging the deceased, Philip Edward Omondi Obura’s share in the suit property while denying that of the Respondent. The Appellants also claimed interest in the suit property through their deceased mother’s will. The Appellants’ mother died when the property was already registered in the name of the Respondent and Philip Edward Omondi Obura, deceased. It is my finding that the Appellants failed to prove that the property was held in trust for them. Since the



Appellants failed to establish any interest in the suit property, the lower court cannot be faulted for its finding that the Appellants were trespassers on the suit property.

19. As trespassers on the suit property, the Appellants were liable to pay general damages to the Respondent for the trespass. In *Park Towers Ltd. v. John Mithamo Njika and 7 Others* 2014 eKLR, the court stated as follows:

I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case.”

20. I am not persuaded that the general damages of Kshs. 100,000/- awarded to the Respondent by the lower court was excessive. The Appellants admitted that they were collecting rent from the tenants of the suit property. The Respondent had put the rent they were collecting at approximately Kshs. 70,000/- per month while the Appellants put the rent collection at between Kshs. 50,000/- to 60,000/- per month. The Appellants did not remit these payments to the Respondent or to the daughter of Philip Edward Omondi Obura, deceased. I find the sum of Kshs. 100,000/- that was awarded to the Respondent by the lower court as damages for trespass reasonable in the circumstances.

### **Conclusion**

21. For the foregoing reasons, I find no merit in the Appellants’ appeal. The appeal is dismissed. Since the parties are relatives each party shall bear its costs of the appeal.

**DELIVERED AND DATED AT KISUMU ON THIS 3<sup>RD</sup> DAY OF MARCH 2025**

**S. OKONG’O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Mr. Ooko for the Appellants

Ms. Wanyangu h/b for Mr. Onyango for the Respondent

Ms. J. Omondi-Court Assistant

