



Mabonga (Suing as the Administrator to the Estate of the Late Vincent Mabonga Namukoa) v Namukoa & another (Environment & Land Case E016 of 2024) [2025] KEELC 4485 (KLR) (11 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4485 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE E016 OF 2024**

CK NZILI, J

JUNE 11, 2025

BETWEEN

GLADYS NAKHUMICHA MABONGA (SUING AS THE ADMINISTRATOR TO THE ESTATE OF THE LATE VINCENT MABONGA NAMUKOA) ... PLAINTIFF

AND

KENNETH KUNDU NAMUKOA 1ST DEFENDANT

JULIUS SIMIYU NAMUKOA 2ND DEFENDANT

JUDGMENT

1. The plaintiff, a widow suing as the administratrix of the estate of the late Vincent Mabonga Namukoa, who was the registered owner of land known as Title No. Waitaluk/Mabonde Block 14/Tulwet/187, bought in 1985, for Kshs. 40,000/=, and now held jointly with her two children in trust of the rest of the beneficiaries, has sued her brothers-in-law, the defendants, for trespass, encroachment and construction of a house, cultivation and cutting down of trees on the suit land. She prays for:
 - a. Permanent injunction prohibiting and restraining the defendants from erecting permanent structures, cutting down trees, cultivating, selling, leasing, remaining on and continuing in occupation or interference with the land measuring 1.487 Ha.
 - b. Vacant possession and in default eviction from the land.
 - c. General and exemplary damages for trespass and damages on the property.
2. The defendants opposed the plaint dated 18/4/2024, through a further amended defence and counterclaim, in which they denied the contents of the plaint. It was averred that though the plaintiff was the legal administrator of the estate, she filed the succession cause in Nairobi while the estate was in Kitale without consulting them as beneficiaries of the estate. The defendants pleaded that it was their



- late father who registered the land in the name of their late brother to hold it in trust, and which the late father distributed amongst them in 1985 and in which each person has his own share including their late father.
3. Equally, the defendants averred that their late brother and other elder children continued living on the land before separation occurred between their mother and the late brother. The defendants denied the alleged acts of trespass, encroachment and illegal developments, since they have lived on the land peacefully with their late brother since 1985, after which each developed his own share of the land as shown by their late father Mr. Namukoa Situma.
 4. By way of a counterclaim, the defendants averred that the suit land is cumulatively 12.2 acres and since it is jointly owned or occupied, the court to order for its subdivision into three portions as per the wishes of their late father 37 years ago and for a permanent injunction restraining the plaintiff, her servants, agents or relatives from trespassing into it once it is subdivided and portions transferred to them.
 5. In reply to defence and defence to the counterclaim, the plaintiff averred that the children of her late husband were through a succession cause declared the beneficiaries to the estate pursuant to the plaintiff being equally appointed as their administrator of the estate. The plaintiff averred that the late husband was the sole proprietor of the suit property, now legally distributed in a probate cause, hence the court has no jurisdiction to determine the validity or otherwise of the verbal will of the late Francis Namukoa Situma, as pleaded by the defendants. The plaintiff averred that the defendants have not proved the ingredients of adverse possession to entitle them to the suit property.
 6. At the trial, Gladys Nyakundi Mabonga testified as PW1. She relied on a witness statement dated 18/4/2024 as her evidence-in-chief. PW1 told the court that she was a widow of Vincent Mabonga Namukoa (deceased), who passed on, on 24/10/2020, leaving behind 6 children as beneficiaries of his estate composed inter alia, the suit land. PW1 told the court that she applied for and obtained letters of administration in Nairobi High Court Succession Cause No. E372 of 2021, in which the beneficiaries consented to the mode of distribution of the estate as per a grant and confirmed grant of letters of administration dated 6/8/2021 and 28/6/2022.
 7. PW1 stated that together with Moses Kiabi and John Wekesa Mabonga, they were to be jointly registered as owner of the suit land in trust for the rest of the beneficiaries, which took place on 20/2/2022. PW1 told the court that her late husband solely acquired the land on 17/11/1985 for Kshs. 40,000/=, hence her brothers who are the defendants are trespassers on the land, committing acts of wastage, and destruction and denying them their right to the land. PW1 said that none of the defendants have challenged both the grant and the title to the land, and or handed over vacant possession after a demand letter was sent to them, after engaging the local administration.
 8. The plaintiff relied on a copy of the temporary grant, certificate of confirmation of grant, copy of title deed, handwritten sale agreement and a demand letter as P. Exhibit Nos. (1) - (4) respectively.
 9. In cross-examination, PW1 told the court that the defendants have denied her access of the suit land and have gone ahead to share it amongst themselves without her consent, approval or justification. PW1 told the court that her late husband told her that he solely educated the defendants up to university, hence the land exclusively belonged to him, but unfortunately passed on before he could evict them from the land. PW1 added that she never included the defendants in the succession cause, despite having lived on the land for many years. She said that she was a second wife to the deceased after he divorced his first wife. PW1 could not ascertain the date that the defendants entered the suit land together with their families, otherwise, the late husband left them on the land, without giving them a formal notice to vacate, for an alternative land, he had acquired for them elsewhere.



10. Similarly, PW1 said that it was not her business to know where the defendants will move into, once eviction ensues. PW1 admitted that their late parents-in-law were all buried on the suit land. Equally, PW1 admitted that defendants' extensive developments on the suit land occurred long before her late husband passed on. PW1 said that her late husband had sought intervention from the village elders for the defendants to move out of his land in vain. Likewise, PW1 said that her efforts to amicably settle the matter at the village and clan elders' level was unsuccessful, hence this suit.
11. Again, PW1 stated that she has nowhere to live with her children since the defendants have wholly subdivided the suit land and fenced it off. She admitted that the sale agreement is signed by inter alia, her sister and the late father-in-law. PW1 said that attempts to mediate the matter out of court were thwarted when the 2nd defendant became abusive and violent.
12. Kenneth Kundu Namukoa, testified as DW1. He produced a copy of a death certificate of the late Francis Namukoa Situma testimonial/or eulogy of his late mother, testimonial/or eulogy of his late brother as D. Exhibit Nos. (1), (2) and (3), respectively.
13. In cross-examination, DW1 told the court that the plaintiff as per the eulogy of his late brother was a second wife. DW1 said several of her siblings passed on and were buried on the suit land including his late parents. Further, DW1 admitted that he had nothing in terms of documents to show that the late father owned the suit land. He insisted that the defendants are entitled to the land due to long use, occupation and possession.
14. Julius Simiyu Namukoa, testified as DW2. He confirmed that he lives on the suit land, which his late father solely acquired and registered under the late brother's name. DW2 said that he has undertaken several developments on the suit land, though not pleaded in the defence and counterclaim. He added that even though the land was shared in 3 equal portions on the ground, the changes were not effected on the register and the area Registry Index Map (RIM). DW2 said that he had no photographs to show the developments he has undertaken on the suit land.
15. However, DW2 admitted that he did not file an objection during the succession cause to stake a claim on the suit land. DW2 said that his late brother did not formally share out the suit land until he passed on, even though he was aware of their respective shares and occupation for he died suddenly. DW2 said that their late father passed on, on 3/1/2000 and they were yet to file letters of administration on behalf of his estate.
16. The plaintiff relies on written submissions dated 7/4/2025, isolating three issues for determination. On constructive trust, the plaintiff submitted that the defendants did not adduce any material to buttress their wild assertion that they were beneficiaries of the suit land after purported being subdivided into portions and shown where to occupy by their late father, with the full knowledge of their late brother. The plaintiff submitted that there is evidence that the deceased bought the land, registered it under his name, and was currently jointly owned by the plaintiff and her children, thereby ruling out any alleged or intended constructive trust. Reliance was placed on Leah Chelangat Tirop -vs- Joel Kiprono Kering [2018] KEHC 7786 [KLR], citing with approval Godfrey Githere -vs- George Kagia & Others [2008] eKLR.
17. In addition, the plaintiff submitted that no evidence was tendered to show that the defendants' late father and the late son exercised any control or intention to found a trust, which intention must be clear before the court can infer trust as held in Charles K. Kandie -vs- Mary Kimoi Sang [2017] KECA 775 [KLR]. The plaintiff submitted that equity in this case necessitated the land be held in trust for the deceased's children and not the defendants. Equally, the plaintiff submitted that the title deed that is held by them was not subject to any overriding interests such as actual occupation, customary rights



- or one which the proprietor is aware of under Section 28 of the [Land Registration Act](#) to be recognized by law.
18. In this case the plaintiff submitted that the defendants have failed to meet the criteria set out in *Kiebia -vs- M'Lintari & Another* [2018] KESC 22 [KLR], as the land is now under the names of the plaintiff and her children, after a successful probate cause where the defendants did not lodge an objection based on any equitable legal or otherwise rights or interests. Further, the plaintiff submitted that the defendants were neither beneficiaries nor occupiers of the suit land to be able to defeat the rights of the lawful proprietors of the land and therefore, any attempt to assert an interest on the suit land is legally unsound, untenable and also contrary to the fundamental rules, principles of justice and equity. In absence of a title deed, lease, licence, court order or family arrangement granting them legal or equitable rights, the plaintiff submitted that the continued occupation of the suit land by the defendants is unjustified, unlawful and unsustainable.
 19. The defendants relied on written submissions dated 27/3/2025. The defendants submitted that they have constructed on the suit land which their late father purchased out of savings while working in Chepchoina ADC Farm and as a businessman and have lived thereon since 1985, as per attached photographs showing three houses, a store and a fence. Equally, the defendants submitted that the letters of administrations were secretly obtained and the title deed obtained by the plaintiff, was not in good faith but intended to evict them from the suit land, where their late parents and other relatives are buried as per photographs attached to the submissions. Therefore, the defendants submitted that they have lived on the suit land with each having a portion including their late parents, with no interference or objection from their late brother for a period of 39 years. The title held by their late brother and now the plaintiff, is subject to their possessory and occupational rights or interests. Reliance is placed on *Samuel Odhiambo & Others -vs- Jubilee Jumbo Hardware Ltd & Another* [2018] eKLR, *Arthi Developers Ltd -vs- West End Butchery Ltd C.A No. 246 of 2013*. Section 80 (1) of the [Land Registration Act](#) and *Alice Chemutai Too -vs- Nickson Kipkurui Korir & Others* [2015] eKLR, since the issuance of letters of administration and title deed was out of misrepresentation and concealment of material facts.
 20. The court has carefully gone through the pleadings, evidence tendered, written submissions and the law. The issues calling for my determination are:
 - i. If the plaintiff has pleaded and proved trespass to her land by the defendants.
 - ii. If the defendants have pleaded and proved justification to be on the land on account of overriding interest based on trust.
 - iii. Whether the plaintiff is entitled to the reliefs sought.
 - iv. Whether the defendants are entitled to the reliefs sought in their counterclaim.
 - v. What is the order as to costs?
 21. The plaintiff brings the suit as an administrator of the estate of the late Vincent Mabonga Namukoa. She relies on a temporary grant dated 6/8/2021, a certificate of confirmation of grant dated 28/6/2022, a title deed issued on 20/2/2024 to her, Moses Kiabi Mabonga and John Wekesa Mabonga to hold it in trust of Mose Kiabi, Gloria Namwo, Mercy Wafula, Emmanuel Wafula, Salome Wanjala and John Wekesa Mabonga. The plaint is not accompanied by an authority to plead and prosecute the suit on behalf of the co-owners of the suit land or the beneficiaries to the land held in trust. The verifying affidavit is not accompanied by such authority to plead and sue on behalf of the co-owners to the suit land. A co-owner cannot sue without the consent or approval of co-tenants as provided under Sections



- 91 and 94 of the [Land Registration Act](#). Therefore, I find the suit by the plaintiff as incompetent for lack of consent to sue and prosecute it from the co-owners.
22. The second issue is whether the plaintiff has proved trespass to the suit land, encroachment and illegal developments by the brothers-in-law. Trespass, under Section 3 of the [Trespass Act](#) refers to entry into private land without reasonable excuse and commission of unjustified acts without the consent of the occupier. It consists of interference with the right to possession. An applicant must prove that he has the right to immediate and exclusive possession of the land. Mere physical presence on the land do not necessarily amount to possession sufficient to bring an action on trespass. See *Silantoi Ene Santa Nkoipiyia & another -vs- Natasha Ene Santa Ngopia* [2021] eKLR.
 23. It is not in dispute that the parties in this suit are a sister and brothers-in-law. The defendants plead that the registration of the suit land in favour of their brother was subject to overriding interests or rights for the land solely belonged to their late father and was registered in the name of their late brother to hold in trust for them. The defendants aver that during the lifetime of their late father, he had shared the land into three equal portions and showed the plaintiff where to live pending issuance of letters of administration. In *Kiambi -vs- Kamilichai & Others* ELC 60 of 2019 [2023] KEELC 17262 [KLR] (3rd May 2023) (Judgment), the court said that a title to land may be subject to overriding interest as provided under Section 25 and 28 of the [Land Registration Act](#).
 24. In *Joseph Kipchirchir Koech -vs- Philip Sang* [2018] eKLR, the court cited Black's Law Dictionary 8th Edition, that trespass is entry into one's ground without lawful authority and doing some inconsiderable damage to his suit property and that a continuing trespass is invasion on another's right. In *Park Towers Ltd -vs- John Mithamo Njika & Others* [2014] eKLR, trespass was said to be proved without need to establish any specific damage or loss to be awarded costs.
 25. In *Matheka Mulonzya -vs- Tiku Katheka* [2014] eKLR, the court observed that the description of the land and its identification with certainty was critical in the suit. See also *Catholic Dioceses of Malindi Registered Trustees -vs- Kotano & Others* ELC 348 of 2016 [2023] KEELC 18335 [KLR] (25th June 2023) (Judgment).
 26. In this suit, the defendants have pleaded occupation of the land for 39 years without interruption or complaint by the successors in title. They averred and testified that the land had been subdivided by their late father before he passed on in 2000, among the three sons. The defendants insist that their late brother did not evict them from the land before he passed on. In *Joseph Ndungu Kivesu -vs- Elijah Chege Mugo* [2019] eKLR, the court observed that the owner of the land had knowledge of the occupants on his land for more than 12 years and the developments of four houses therein, hence the claim for eviction was not merited.
 27. In *Pacifica Moraa Onkundi -vs- Joseph Nyabasa Ondara & Another* [2013] eKLR, the court ordered for the share of the land to be given to the dead defendant, as the land was distributed for her house among the children. In *Veronicah Mbithe Kwinga & Another -vs- Haron Ndambuki Waema* [2018] eKLR, the court declined an injunction since the land belonged to their late father, who had allocated it to their late mother.
 28. The plaintiff does not refute that the defendants have been on the land for over 39 years. The late husband, as conceded by the plaintiff left the defendants occupying the land when he passed on. He did not evict them from the land during his lifetime. The plaintiff took no immediate action after her late husband passed on to evict them from the land. In *Titus Kuto Kipungar -vs- Selina Tamining & Others* [2016] eKLR, the land was in the name of the elder brother and husband to the 1st defendant and father to the 2nd defendant. They had sought for eviction and demolition of the houses of the



defendants on the land. The defendants in this suit had raised a counterclaim based on trust. The court found that the defendants had not invaded the land in 2010 as claimed by the plaintiff. The court also found the defendants entitled to remain on the land. On trust, the court cited with approval *Mwangi Mbothu & Others -vs- Gachira Watimu & Others* [1986] eKLR, that the intention of the parties to create a trust must be clearly determined before a trust is implied.

29. In this suit, the intention of the brothers to live together and in harmony on the suit land is not disputed. The plaintiff's late husband did not raise any alarm on the defendants' occupation of the land. The plaintiff does not dispute the continuous occupation of her land by the defendants.
30. To find a claim based on trust, the defendants has to meet the criteria in *Kiebia (supra)* and *Mukunga -vs- Mbui* [2004] 2 [KLR] 256 that:
 - a. The land in question was before registration family, clan or group land.
 - b. The claimant belongs to the family, clan or group.
 - c. The relationship of the claimant to such family, clan or group is not remote or temporary.
 - d. The claimant could have been entitled to be registered as owner or other beneficiary but for some intervening circumstances.
 - e. The claim is directed at registered owner who is a member of the family.
31. Conditions (2), (3) and (4) above have been satisfied by the defendants. On condition (1), the plaintiff has not called the seller of the land to verify and establish that the exclusive contributor of the Kshs. 40,000/= was her late husband. To allow his brothers and the parents to live and be interred on the land after death without objection shows that the land did not exclusively belong to the plaintiff. The various developments on the land and its continued use, possession and occupation leaves no doubt in my mind that the parties intended to create a trust.
32. In *Munyu Maina -vs- Hiram Gathiha Maina* [2013] KECA 94 [KLR], all sons from the two houses were living and cultivating their respective portions of the land as given by their deceased father. Upon the demise of the father, the respondent was requested to subdivide the land so that each of them could have a separate title. The respondent declined, claiming that he was the absolute and indefeasible owner of the land, hence no trust over the title was in existence. The Court of Appeal held that there was a presumption of continuance and an uninterrupted occupation that the appellant occupied and had continued to live on the portion of the suit land on the same terms upon which he entered in 1962, without permission and consent of the respondent. The court said that such a presumption was rebuttable presumption of fact and the burden of proof shifted to the respondent, which he had not discharged otherwise, the appellant had an overriding interests under Section 30(f) of the Registered *Land Act* (repealed), which is a right of the person in possession or actual occupation of the registered property.
33. In this suit, the plaintiff has not explained on a balance of probability how the defendants gained entry into the land under what terms, why they were allowed to develop the land by her late husband and why he did not order them to vacate the land until he passed on. Settlement of the defendants on the portion said to have been shown by their late father is a piece of evidence which the plaintiff has not challenged. The burden of proving or disproving that fact was on the plaintiff under Section 112 of the *Evidence Act*, that the sale of the land did not envisage an intention of trust. The late father-in-law and the sister-in-law, were witnesses in the sale agreement. The defendants are saying that they were beneficial owners of the land and that is why the late brother had no problem with their use, occupation, possession and developments of their respective portions. See *Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi &*



- Another, Nyeri C.A. No. 345 of 2000. The defendants in my view, have discharged their burden of proof under Section 116 of the Evidence Act, when demonstrated the overriding interests.
34. In Mburu -vs- Wainaina C.A. No. 143 of 2019 [2025] KECA 181 [KLR] (6th February 2025) (Judgment), the court took judicial notice that the elder son, would be registered in trust for his siblings. The court held that in the circumstances that the land was family land, the respondent belonged to the said family, a brother to the current registered owner, and he could have been registered, as owner but for his age and he had been in possession for over 60 years.
 35. The plaintiff has pleaded that the defendants failed to challenge the distribution in the succession cause, hence this court has no jurisdiction to determine the issue of trust. Article 162(b) of the Constitution defines what the jurisdiction of the High Court is. In Re Estate of Mumbua Mutua(deceased) [2017] eKLR, the court held that matters on third party claim against the estate who do not fall under beneficiaries or dependants are within the jurisdiction of the Environment and Land Court for a Family Division of the High Court can only deal with ascertainment of dependants (beneficiaries, what the assets and liabilities of the decease are and the distribution thereof). I find the objection lacking merits.
 36. The defendants have asked the court to order that the land be subdivided equally among the three brothers. They have tendered evidence of developments on the land regarding their respective portions. The law is that evidence must be tendered during the hearing. Written submissions cannot replace pleadings or evidence. Trying to sneak evidence through annexures to the written submissions cannot assist the defendants. The said annexures have not been subjected to cross-examination and produced as exhibits. They are therefore irrelevant and shall not be considered by this court.
 37. The plaintiff has however, admitted in her pleadings and evidence that indeed her brothers in law have shared the land amongst themselves and effected permanent developments therein. None of the parties tendered evidence on the respective acreage occupied by either of them. A customary trust claim cannot be time-barred by dint of Section 20(2) of the Limitation of Actions Act. It is also not defeated by successors to the title. Its prove depends on facts as to whether the holding of the title is for the benefit of other members of the family, whether or not they are in possession or actual occupation of the land as held in Kiarie -vs- Kinuthia (supra).
 38. Customary trust is presumed by Section 25(b) of the Land Registration Act. The defendants in my view have proved the specific category of customary trust, that they have been on the land not as invitees by the late brother but as of right. See Mburu -vs- Wainaina Civil Appeal 143 of 2019 [2025] KECA 181 [KLR] (6th February 2025) (Judgment).
 39. The upshot is that the court declines to allow eviction of the defendants from the suit land, since they have demonstrated justification why they are on the land. The counterclaim is allowed in terms of declaring that the title held by the plaintiff and her co-owners is subject to the overriding interests in favour of the defendants. The suit property shall equally be shared into three portion among the plaintiff and the two defendants, within two months from the date hereof. Each party to bear their owns costs.

JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 11TH DAY OF JUNE 2025.

In the presence of:

Court Assistant - Dennis

Farah for Plaintiff present



Defendants in person present

HON. C.K. NZILI

JUDGE, ELC KITALE.

