



**Bunusei & 2 others v Tomas (Environment and Land Appeal
E023 of 2023) [2025] KEELC 5288 (KLR) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5288 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E023 OF 2023**

EC CHERONO, J

JULY 10, 2025

BETWEEN

MEKII HENRY BUNUSEI 1ST APPELLANT

MEKII SAMUEL JUMA 2ND APPELLANT

ANDREW KIPROTICH 3RD APPELLANT

AND

JAMES KISHANGAN TOMAS RESPONDENT

JUDGMENT

Introduction

1. *Vide* a Memorandum of Appeal dated 05/12/2023, the Appellants who were plaintiffs in the former suit before the trial court in *Kimilili PM-ELC CASE NO. E006 of 2023* preferred this Appeal challenging the judgment delivered by Hon. W.K Onkunya on 22/11/2023 dismissing the Plaintiff/Appellant's case with costs to the Defendant/Respondent.
2. The brief background of the case is that the Appellants had sued the Respondent vide a plaint dated 02/02/2023 in which they averred that the Respondent is their step-brother and that he holds the suit property LR NO. LR No. Elgon/Namorio/2614[hereinafter referred to as the 'suit land'] in trust for himself and in their favour. That upon the demise of the Respondent's father, their father, one Andrew Mekii inherited his [the Respondent's] mother and that they were sired by the said Andrew Mekii as a result of the union. That the suit land which is a sub-division of LR No. Elgon/Namorio/545 was shared by the clan amongst the parties herein whereby each party settled and developed their respective portions. That the Respondent obtained ownership of the suit land which is occupied by the Appellants and now seeks to have them evicted. They sought for the following orders;
 - a. A prayed in paragraph 11 above



The plaintiffs claim against the defendant therefore is for a declaration that the defendant holds the suit land in trust for the plaintiffs, an order directing the defendant to sign the transfer instruments of the suit land in favour of the Plaintiffs, in the alternative and should the plaintiff default to effect the transfer, the officer of the court do sign the same, a permanent injunction do issue restraining the defendants, his servants, agents or any person claiming through him from interfering, general damages and costs of the suit.

- b. General damages for trespass.
 - c. Costs of the suit.
3. In his defence, the Respondent filed a statement of defence dated 12/04/2023 in which he denied the Appellants' claim and averred that the Appellants have been settled in different parcels of land where they occupy and that their claim is baseless and unfounded. He urged the court to dismiss the claim with costs.

Evidence by Parties.

4. The suit before the trial court proceeded by way of viva voce evidence with the Appellants calling three witnesses while the Respondent called five witnesses.
5. PW1 Mekii Henry Bunusei adopted his witness statement filed on 06/02/2023 as his evidence-in-chief. He also referred to his list of documents containing 8 items dated 02/02/2023 which he produced in evidence. P-Exhibit 1 is a copy of Land Control Board Consent, P-Exhibit 2 a copy of search for LR NO. Elgon/Namono/2614, P-Exhibit 3-a copy of land map, P-Exhibit 4-a land sale agreement dated 13/12/2000, P-Exhibit 5- Land sale agreement dated 17/01/2011, P-Exhibit 6-land sale agreement dated 07/06/1998, P-Exhibit 7- copy of minutes dated 04/06/2001, P-Exhibit 8-copy of ushirika bank pass book.
6. In cross-examination, the witness stated that land parcel no. 545 and 2614 which were in the name of Simeon Chemlany was sub-divided in 2017. That a survey was done and they visited the Land Control Board on 11/04/2017. That he resides in the suit land and that in the year 2001, the clan demarcated the land while it was still land no.545 and boundaries were marked. That the upper side was given to the Respondent while the lower side was given to Samuel Juma, Andrew Kiprotich and Mekii Henry Bunusei. That the chairman was one Charles Maasai while the secretary was Tutus Mongoi. That the minutes were signed by the parties herein. That Samuel was given 4 ½ acres, Kiprotich was given 4 ½ acres while he was given 5 acres. He could not tell how much was given to the Respondent. He alleged that there was fraud on the part of the Respondent who became the registered owner of the suit land.
7. In re-examination, he testified that LR No. Elgon/Namorio was sub-divided into over 40 portions i.e no. 2571 to 2614. That he did not alter the minutes of the meeting and that according to the consent, he was to be allocated the suit land.
8. PW2 Charles Chepkech Machas adopted his witness statement as his evidence-in-chief. In cross-examination, he testified that he was the area chief, Kamuneru Location until his retirement in the year 2006. He testified that one Simeon Mongoi Chemlany held LR No. Elgon/Namorio/545 in trust for his brothers namely Thomas, Reuben and Henry. That the land was sub-divided in the year 2017. That he was not part of the meeting sharing the land but the chair of the meeting who was his brother briefed him of the resolutions thereof which were to the effect that plot no. 2614 measuring 4 acres was to be shared to Mekii Henry, Juma and Kiprotich while plot no. 2571 measuring 4 acres was given to James Kishangan. That the Appellants took possession of the land in the year 2001. That Simeon Mongoi Chemlany shared the land belonging to Andrew Mekii to his sons, the Appellants herein.



9. PW3 Sangamik Simon Mangoy adopted his witness statement dated 16/05/2023 as his evidence-in-chief. He testified that Simeon Mongoi Chemlany was his father and that the parties herein are his cousins. He stated that his father called for a clan meeting in the year 2016 to distribute LR No. Elgon/Namorio/545. That the land was shared amongst the children of his brothers and individuals who had purchased various portions. He testified that the 1st Appellant was given land measuring 5.09ha for himself and on behalf of the Appellants herein.
10. DW1 James Kishangan Tomas relied on his statement of defence and his witness statement dated 12/04/2023 which was adopted as his evidence-in-chief. He produced as D-Exhibit 1 a copy of title for LR No. Elgon/Namorio/2614, D-Exhibit2 copy of certificate of search dated 11/01/2023, D-Exhibit 3 Copy of green card dated 09/02/2023. In cross-examination, he testified that the initial parcel was LR No. Elgon/Namorio/545 held by Simeon Mongoi Chemlany for himself and for his brothers namely Reuben Kotut Tomas and Barrack Chemlany. That upon the demise of his father Tomas, his mother was inherited by one Andrew, the father of the Appellants. He testified that the sons of Andrew are not residing on the suit land. He testified that the Appellants should inherit from their father. That he has established his home on LR No. Elgon/Namorio/2751. That there is a road between LR No. Elgon/Namorio/2751[4 Acres] and 2614[14 ½ Acres] and both belong to him.
11. DW2 Simeon Mungoi Chemlany adopted his witness statement dated 12/04/2023 as his evidence-in-chief. In cross-examination, he testified that he is the son of Barrack Chemlany who owned LR No. Elgon/Namorio/545 measuring approximately 43acres and that since he was the eldest son, he was the caretaker of the land on his behalf and on behalf of his six brothers namely; Andrew Mekii Chemlany, Simeon Mongoi[himself], Tomas Kishangan, Joel Chemlany, Stephen Chemlany and Reuben Chemlany. That the Respondents father was Tomas Kishangan who died in the year 1965 and upon his demise, his wife Susan was inherited by Andrew Mekii Chemlany and they sired 3 sons who are the Appellants herein. That Andrew Chemlany and Susan stayed in the land of Tomas Chemlany. That Andrew Chemlany had his own land and he was therefore not entitled to a share in LR No. Elgon/Namorio/545. That the 1st Appellant was not given a share in LR No. Elgon/Namorio/545 as the children of Andrew Mekii were bought land elsewhere by their mother. That the Appellants now plough the land given to the Respondent which is on the lower side of the road. In re-examination, he testified that he took the Respondent to the Land Control Board for transfer of his share of the land.
12. DW3 Laison Kotut adopted his witness statement dated 12/04/2023 as his evidence-in-chief. He testified that the Appellants occupy the land on the lower side while the Respondent lives on the land on the upper side. That both portions belong to the Respondent and initially belonged to his father.
13. DW4 Erastus Chenge Sagit adopted his witness statement dated 12/04/2023 as his evidence-in-chief. He reiterated the evidence by the other witnesses.
14. DW5 Joel Kinyanjui Chemlany adopted his witness statement dated 12/04/2023 as his evidence-in-chief and reiterate the contents of his witness statement. He added that his land is parcel no. 2613 which is about 14 acres.
15. Upon considering the evidence adduced, the trial court delivered its Judgment on 22/11/2023 wherein it dismissed the Appellant's case with costs to the Respondent.
16. Aggrieved by the said decision, the Appellants preferred the current appeal on the following grounds;
 - a. The learned trial magistrate erred in fact and in law when she misdirected herself on the principles governing customary trust and consequently dismissing the appellants suit.



- b. The learned trial magistrate erred in fact and in law when in reaching her decision failed to apply the facts and testimonies on the principles governing customary trust but engages in conjecture and speculation thereby basing her decision on erroneous assumptions.
 - c. The learned trial magistrate erred in fact and in law when she failed to appreciate that the suit land being in the first instance ancestral, the Respondent could have got a good title at the expense of the Appellants' overriding interest in in the same.
 - d. The learned trial magistrate erred in fact and in law when she failed to appreciate and access all the evidence on record thereby occasioning miscarriage of justice by dismissing the Appellants case.
 - e. The learned trial magistrate erred in fact and in law when in reaching her decision failed to play the facts and testimonies by not appreciating that the Appellants' father should also have been given a share of the suit land the same having been ancestral land.
 - f. The learned trial magistrate erred in fact and in law when she failed to appreciate the relationship of the parties thereby awarding costs to the respondent which might not sustain the smooth peace and stay as people of the same family.
17. The Appellants sought to have the judgment of the trial magistrate set aside and substituted with an order allowing the Appellants' claim.
18. When this appeal came up for directions, the parties agreed to have it canvassed by way of written submissions.
19. The Appellants filed submissions dated 20/04/2025 and relied in the case of *Mbui Mukangu v Gerald Kenya Mutwiri* Court of Appeal 281/00[Nyeri] where the court made reference to its own decision in *Allan Kiama v Ndio Muthunya & Others* , Civil Appeal No. 42/1978 where the court doubted that customary law rights were excluded from section 30 of the *registered land Act*[now repealed] as overriding interest. It was submitted that the strength of their case lies more on the aspect of occupation, cultivation and possession and it is undisputed fact that the Appellants were born on the suit land, raised on this land and they are raising their own children on this land as such, it was prudent for the trial court to come to logical conclusion that the Respondent held part of the land in trust for the Appellants.
20. The Respondent on his part filed submissions dated 25/05/2025 where he submitted that the Appellants have not demonstrated how the trial court misdirected itself as alleged in the appeal. That the evidence of DW2 was not controverted in that no evidence was presented to demonstrate that the Appellants' father was entitled to any portion of LR No. Elgon/Namorio/545. It was their submission that the Appellants in the lower court did not plead that their father was entitled to any portion of land and that the said claim had only been raised at the appeal stage. Reliance was placed in the provisions of Section 28 of the *land Registration Act* 2012 and in the case of *Juletabi Africa Adventure Limited and Another v Christopher Micharl Lockley* [2017] eKLR and *Isack M'inanga Kieba v Isaava Theuri M'Lintari & Another* [2018] eKLR [Supreme court]. They urged the court to dismiss the Appellants appeal with costs.

Analysis and Detemination.

21. I have considered the evidence adduced before the trial Court as well as the rival written submissions by parties. It is not in contention that this Court neither saw nor heard the witnesses before the trial court and must therefore give allowance for that.



22. This being a first Appeal, it is my duty to analyze and re-assess the evidence on record and reach my own independent decision in the matter as provided under Section 78 of the *Civil Procedure Act*. In the case of *Kenya Ports Authority v Kusthon [Kenya] Limited* [2009] 2EA 212, the Court of Appeal held inter alia, 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”
23. This Court is under a duty to delve at some length into factual details and revisit the facts as presented before the trial Court, analyze the same, evaluate it and arrive at an independent conclusion, but always remembering and giving allowance that the trial Court had the advantage of seeing and hearing the witnesses first hand.
24. Having carefully read and considered the Record of Appeal, the Memorandum of Appeal, the written submissions by the parties, and the Judgment by the trial Court, it is my view that the issues that commend for determination are: -
- a. Whether the Appellant’s [Plaintiff’s] made a case for existence of a trust over the suit land.
 - b. Whether the Appeal is merited.
25. On the first issue, it is not in contention that the parties herein are step-brothers who share a biological mother. The Respondent is the eldest and his father was Tomas Kishangan who died sometime in the year 1965 and his wife, one maned Sussana was ‘inherited’ by one Andrew Mekii Chemlany who is the father of the Appellants.
26. The Appellants contend that they are entitled to land parcel No. Elgon/Namorio/2614 which measures approximately 14 acres [hereinafter referred to as “the suit land”], which is a sub-division of land parcel No. Elgon/Namorio/545. They argue that the Respondent, though registered as the proprietor of the suit land, holds it in trust for them, as the land forms part of their rightful entitlement. It is averred that the Appellants occupy 5 acres, 4½ acres, and 4½ acres of the suit land, respectively. It is also alleged that the aforementioned portions were allocated following a clan meeting which resolved to subdivide land parcel No. Elgon/Namorio/545. That the said parcel was held by one Simeon Chemlany who is brother to the Appellants’ father, who is said to have acted as caretaker of the land on behalf of himself and his brothers, including the Appellants’ father, Andrew Mekii Chemlany, and the Respondent’s father, Tomas Kishangan.
27. They argued that after the sub-division of land parcel No. Elgon/Namorio/545, the said Simeon Chemlany was in-charge of obtaining the relevant transfer documents, survey works and ultimately to cause registration of the suit land in their names. It is on this basis that they contend that the registration of the Respondent as the proprietor of the suit land was in trust for them. The Appellants further averred that they have been in continuous occupation of the suit land and are now facing imminent and forceful eviction by the Respondent.
28. The Respondent on his part averred that the suit land is registered in his name as an absolute owner and that the Appellants were neither using nor occupying the same and that each one of them has settled on their own respective parcels. The Respondent further contend that land parcel No. Elgon/Namorio/545 was handed down by his grandfather, one Barrack Chemlany, to his uncle, Simeon Chemlany, to hold in trust for himself and his three brothers namely Reuben Chemlany, Tomas



Chemlany, and Joel Chemlany. He contends that the Appellants' father, Andrew Mekii Chemlany, was instead allocated plot No. 544 and as such, had no entitlement to land parcel No. Elgon/Namorio/545 that could devolve to the Appellants. According to the Respondent, following the subdivision of land parcel No. 545 into approximately 44 plots namely plots No. 2571 to 2614, the resultant plots were distributed to the rightful beneficiaries, including third parties. He asserted that he lawfully acquired two of the resulting plots, namely plot No. 2571 and plot No. 2614. He stated that none of the Appellants reside in the suit land which is only occupied by their mother and her grandchildren.

29. Sections 24, 25 and 26 of the [Land Registration Act](#), 2012 clearly set out the rights of a registered owner of property. Section 24[a] provides:

24. Subject to this Act

The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

30. Section 25[1] provides that such a registered owner's rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. These rights are however subject to overriding interests declared by section 28 of the [Land Registration Act](#) which does not require noting in the register. The said section provides as follows;

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

[a]

[b] trusts including customary trusts;”

31. The Supreme Court discussed the issue of a customary trust in the case of [Isack Kieba M'inanga v Isaaya Theuri M'Lintari & another](#) [2018] eKLR and held as follows:

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land.
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”



32. In considering the evidence on record and guided by the principles in the cited case, this court notes that the Appellant produced as P-Exhibit 1 a letter of consent dated 09/04/2017 which indicates that Simeon Chemlany was to transfer to Mekii Henry Bunusei [the 1st Appellant] the suit land. The said Appellants claimed that after the sub-division, survey works and approvals of consents by the Land Control Board, he was to be issued with a title for the suit land. However, Simeon Chemlany who testified as DW 2 stated that the Appellants were not entitled to any portion and that he did not attend the Land Control Board or sign off for the transfer of any portion of land to the Appellants. It was his testimony that he however did sign the relevant transfer documents in favour of the Respondent.
33. Faced with this two conflicting positions, It is my view that the Appellants who bore the burden of proof had the duty to go a step further in support of the claim. It is also my view that the Appellant ought to have called the maker of the said document or a public officer working in the same capacity as the maker of the document to produce a signed, sealed and certified copy of the same. Under the provisions of section 38 of the *Evidence Act*, entries in a public book, register or record and other public documents are admissible in evidence but the entries therein must be made by a public servant in the course of their duties and that must be made clear. A further reading of the law shows that certified copies of public documents are admissible but it must be shown that the document is signed, sealed, and certified by an authorized officer. The copy of the letter of consent [P-Exhibit 1] tendered by the Appellants was not certified as stipulated under section 80 of the *Evidence Act*. Failure by the Appellants to produce a certified copy of the said letter of consent significantly weakened their case and undermined their ability to discharge the burden of proof on a balance of probabilities.
34. In the case of *Mbui Mukangu v Gerald Mutwiri Mbui* CA No. 281 of 2000 the Court of Appeal stated that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. The Court also held that possession and occupation are key elements in determining the existence of a customary trust. In this regard, the Appellants' testimony is riddled with contradictions. On one hand, they claim to be in occupation of the suit land, yet on the other, they concede that the only homestead on the suit land belongs to their mother. They also admitted to having individually purchased and settled on separate parcels of land elsewhere as demonstrated by P-Exhibit 4,5, & 6. In light of these inconsistencies, this Court finds it difficult to infer the existence of a trust based on occupation, as the Appellants' evidence in that regard is not credible and raises serious doubt.
35. Upon considering the factors outlined by the Supreme Court as guiding principles in determining the existence of a customary trust, this Court finds that the requisite elements have not been substantially satisfied. The Respondent's case and evidence were clear and consistent in demonstrating that the Appellants do not reside on the suit land, and further, that there was no intention, express or implied to confer any proprietary rights upon them. In the absence of such intention, the inference of a customary trust cannot be sustained.
36. As for ground no. 6 which challenged the trial court's decision ordering the Appellants to pay costs of the suit, Section 27 of the *Civil Procedure Act* requires that costs follow the event, but the Court for goods reasons has the discretion to decide otherwise. In this case, the Appellants and the Respondent are close relatives. I find this close relations sufficient reason to tamper with the trial court's decision on costs. Consequently, I order each party to bear their own costs of this Appeal and the costs before the trial court.
37. The upshot of the foregoing is that this Appeal is devoid of merit and the same is hereby dismissed save for costs which I hereby order each party to bear their own costs, both of this appeal and before the trial Court



38. It is so ordered.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 10TH DAY OF JULY, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. M/S Kibonei for the Respondent.
2. Appellants-all present.
3. Bett C/A.

