



Mango ((Suing as Legal Representative of the Estate of the Late Stehen Mango Rakedo – Deceased a.k.a Mango Rakedo)) v Magoye (Environment and Land Appeal E005 of 2024) [2025] KEELC 5143 (KLR) (10 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5143 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL E005 OF 2024**

**BN OLAO, J
JULY 10, 2025**

BETWEEN

**CORNELIA NABWIRE MANGO APPELLANT
(SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE
STEHEN MANGO RAKEDO – DECEASED A.K.A MANGO RAKEDO)**

AND

MELISA MAGOYE RESPONDENT

(Being an appeal from the Judgment of HON T. A. MADOWO Senior Resident Magistrate delivered on 29th February 2024 in Busia CMCC ELC NO E085 of 2022)

JUDGMENT

1. The litigation leading to this appeal commenced in the subordinate Court where Cornelia Nabwire Mango (the Appellant herein and suing as the legal representative of the Estate of Stephen Mango Rakedo a.k.a Mango Rakedo) impleaded Melisa Magoye (the Respondent) seeking the following remedies with respect to the land parcel no Samia/Baburi/468 (the suit land):
 - 1: “That the Respondent, her agents, employees, servants and/or anybody claiming through her be enjoined from continuing with any developments on the suit land.
 - 2: An Order for the eviction of the Respondent, her servants, employees, agents and any other person claiming through her from the suit land.”
2. The basis of the Appellant’s case was that at all material times, she is the biological daughter and legal representative of the late Stephen Mango Rakedo a.k.a Mango Rakedo (herein Rakedo) who was the registered proprietor of the suit land measuring approximately 5.8 Hectares. However, the Respondent who is the widow to the late Michael Magoye (herein Magoye) and who was the brother to Rakedo



- trespassed onto the suit land where she started constructing a storey building yet Magoye's land is land parcel no Samia/Bururi/417. That necessitated the filing of the suit in the subordinate Court.
3. The Respondent filed a defence denying the allegation of trespass on the suit land and added that since time immemorial, she and her late husband Magoye have been in exclusive use and control of the suit land where they have cultivated without any objection from Rakedo who never occupied the same. The Respondent pleaded further that although Rakedo is the registered proprietor of the suit land, he held the title by dint of a customary trust which is not registrable and is an overriding interest on land.
 4. The Respondent also counter-claimed seeking judgment in the following terms:
 - a. A finding that she is not a trespasser and is in occupation of the suit land as of right since it belonged to her late husband by virtue of a customary trust and the same should be transferred to her late husband.
 - b. An order of permanent injunction restraining the Appellant, her servants, agents, family members or any person working under her instructions from interfering with the Respondent's use of the suit land.
 5. The basis of the Respondent's counter-claim was that by dint of holding the suit land by dint of a customary trust, the said Rakedo was a mere trustee holding the same on behalf of the Estate of his brother Magoye. Particulars of that customary trust were pleaded in paragraph 5(a) to (c) of the defence and counter-claim.
 6. The Appellant filed a reply to the defence and counter-claim in which she reiterated the contents of her plaint and denied that the suit land was registered in the name of Rakedo in trust for Magoye. She added that the counter-claim has no basis since the Respondent has her own land. She urged the Court to dismiss the defence and counter-claim.
 7. The suit was heard by Hon T. A. Madowo Senior Resident Magistrate between 16th May 2023 and 30th november 2023. The Appellant testified and called as her witness her brother Gabriel Wandera. The Respondent also testified and called as her witness Grace Namatsa Magwere, Clement Oduke Malo And Gladys Masuba.
 8. Having heard the parties and their witnesses, the trial magistrate in a reserved judgment delivered on 29th February 2024, found that the Appellant had failed to prove her case and dismissed it without costs. She found that the Respondent had partly succeeded in her counter-claim and was entitled to only a portion measuring 3.9 acres out of the suit land. A decree followed and pursuant to a notice of Motion dated 17th April 2024 filed by the Respondent, the Deputy Registrar was authorized to sign all documents to facilitate the transfer of 3.9 acres out of the suit land in favour of the Respondent. The order should have been addressed to the Senior Resident Magistrate since the matter was heard in the subordinate Court. However, nothing really turns on that as indeed the order issued on 30th August 2024 was signed by the Magistrate not by the Deputy Registrar.
 9. Aggrieved by that judgment, the Appellant has moved to this Court on appeal. In seeking to set aside the impugned judgment, the Appellant has raised the following eight (8) grounds of appeal vide her memorandum of appeal dated 12th March 2024:
 1. The learned trial magistrate's evaluation of the facts and law before her was wanting.
 2. The learned trial magistrate erred in law and in fact in making a finding that there existed a customary trust between the Appellant's father and the Respondent's husband.



3. The learned trial magistrate erred in law and fact in making a finding that land parcel no Samia/Buburi/468 was an ancestral land whereas Samia/Buburi/417 was not.
4. The learned trial magistrate erred in law and facts by overlooking the evidence of the Appellant that the Respondent sold part of land parcel Samia/Buburi/417 and now wants to grab land parcel Samia/Buburi/468.
5. The learned trial magistrate erred in law and in fact by awarding the Respondent 3.9 acres of land without proof of occupation of a surveyor's report.
6. The learned trial magistrate erred in law and in fact by overlooking the issue of occupation by permission from the Appellant's father to only cultivate and not to construct structures.
7. The learned trial magistrate erred in law and in fact by overlooking the Appellant's evidence and submissions thus arriving at an unjust decision.
8. The learned trial magistrate did not adhere to the civil law of balance of probability hence.

The Appellant prays that:

- a. This appeal be allowed.
- b. The order allowing the Respondent's counter-claim be set aside and or be dismissed.
- c. Judgment be entered for the Appellant as prayed in the plaint in the subordinate Court.
- d. Costs of the appeal and in the subordinate Court be awarded to the Appellant.

Directions were issued that the appeal be canvassed by way of written submissions. The submissions were subsequently filed by Mr Juma instructed by the firm of Paul Juma & Company Advocates for the Appellant and by Ms Ngire instructed by the firm of Ngire Aduol & Associates Advocates for the Respondent.

10. I have considered the record of appeal and the submissions by counsel.
11. This being a first appeal, this Court has a duty to re-evaluate the evidence as a whole and make an independent decision. In the case of *Okeno v R* 1972 EA 32, the then Court of Appeal of East Africa identified that duty as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R* 1957 EA 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions *Shantilal M. Ruwala v R* 1975 EA 570. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the trial magistrate's findings, should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* 1958 EA 424.”

That is the route which Courts have continued to take in determining appeals. A first appellate Court is entitled to consider both questions of fact and law and make a conscious decision before deciding whether or not to affirm the judgment of the trial Court. See also the case of *Abok James Odera T/a Aj Odera & Associates v J.p Machira T/a Machira & Company Advocates* 2013 eKLR where it was held



that the Court on a first appeal must re-evaluate, re-assess and re-analyse the record then determine whether the conclusions by the trial Court can stand or not and give reasons either way. And in *Gitobu Imanyara & Others v A-G*, 2016 eKLR, it was stated that an appeal is by way of a retrial by reconsidering and re-evaluating the evidence.

12. In my view and having considered the record and grounds of appeal, they can be collapsed into one ground which is ground no 2 that:

“That the trial magistrate erred in law and facts in making a finding that there existed customary trust between the Appellant’s father and the Respondent’s husband.”

It is common ground that Rakedo (the Appellant’s father) and Magoye (the Respondent’s husband) were siblings. The documentary evidence shows that Rakedo is the registered proprietor of the suit land which measures 5.8 Hectares (14.3 acres) while his younger brother Magoye is the proprietor of the land parcel no Samia/Buburi/417 which measures 2.4 Hectares (5.93 acres). The Appellant is the legal representative of the Estate of Rakedo and her case in the trial Court was that the Respondent had trespassed onto the suit land in 2021 and started constructing a building on a portion thereof. It turned out during the trial that the said portion measures 3.9 acres and that is the portion which the trial magistrate decreed should be registered in the name of the Respondent because she had proved her counter-claim which was that Rakedo held it in trust for Magoye. The trial magistrate therefore dismissed the Appellant’s claim of trespass by the Respondent on the suit land.

13. The trial magistrate at page 5 of her judgment (page 93 of the record of appeal) identified the following issues for her determination:

1. Ownership of the suit property.
2. Whether the claim for customary trust has been established.
3. Whether either party is entitled to the orders sought.

As stated above, there is no doubt that the suit land is registered in the name of Rakedo and the land parcel no Samia/Buburi/417 in the name of Magoye. In considering the Appellant’s case, the trial magistrate at paragraph 23 of the impugned judgment appreciated the rights of a proprietor of land as provided under Sections 25 and 26 of the *Land Registration Act*. She then made reference to Section 28 of the same Act which recognizes trusts as overriding interest. Then at paragraphs 27 to 31 of the judgment, she addressed herself as follows with respect to the parties’ respective claims:

27: “I concur with the defence counsel Ms Ngire that the guiding principles on customary trust were laid down by the Supreme Court in the case of *Isack Kiebia M’inanga v Isaaya Theuri M’lintari & Ano* 2018 eKLR as:-

- 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.



- 28: The Plaintiff confirmed in her testimony that her father and the Defendant's husband were brothers. She conceded that since she was born in 1967, the Defendant's family have been in occupation of the suit land and have been cultivating on the land. There is no distinct boundary between her father's land and Michael Magoye's property. She had been living peacefully with the Defendant and her co-wife who had been cultivating on the land. The only issue arose was when the Defendant erected a structure on 4 acres of the land. PW2 stated in his testimony that Mango Rakedo did not purchase the land but he was given the suit property by his father. That the land was ancestral prior to its distribution.
- 29: I find therefore truth in the Defendant's assertion that she has occupied a portion of the land where she has farmed with her co-wife. This was corroborated by the evidence of DW2, DW3 and DW4. To date and by the Plaintiff's own evidence, the Defendant occupies the land where she cultivates. The Defendant and her co-wife DW2 both confirmed that they were shown where to cultivate by their husband as well as their brother-in-law Mango Rakedo. The Plaintiff confirms that even during the lifetime of her father, the family of Michael Magoye continued to cultivate on the land without issue.
- 30: I have deduced from the testimony of the Plaintiff that the Defendant occupies about 4 acres of the suit property although the defence testimonies point to 3.9 acres. In my view the Defendant has proved that the elder brother Mango Rakedo held a portion of LR no Samia/Buburi/468 under customary trust for his younger brother Michael Magoye.
- 31: I find that the Plaintiff has failed to prove her case against the Defendant on a balance of probabilities. Hence the suit is dismissed without costs. The counter-claim is successful in part and is allowed in terms of prayers (a) and (b) but only to the extent of 3.9 acres of LR. no Samia/Buburi/468."

As is clear from the above, the trial magistrate was principally persuaded that the Respondent had proved her counter-claim to the suit land in trust because the family of Magoye has been cultivating it.

14. The trial magistrate correctly cited the case of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & Another* 2018 eKLR as to what guidelines a Court should follow in determining a claim based on customary trusts. But other than those guidelines, the supreme Court also added the following in paragraph 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 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”. Emphasis mine.

The law is that the party pleading a customary trust must lead evidence to prove it. This is because, the Court will not presume a trust save in only clear cases. In the case of *Peter Ndungu Njenga v Sophia Waitiru Ndungu* 2000 eKLR, the Court of Appeal held that:

“The concept of trust is not new. In case of absolute necessity but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.” Emphasis mine.

See also the cases of *Gichuki v Gichuki* 1982 KLR 285 And *Mbothu & Others v Waitimu & 11 Others* 1986 KLR 171. Finally, In The Case Of *Juletabi African Adventure Limited & Another v Christopher Michael Lockley* C.a. Civil Appeal no 75 of 2016 (MSA) [2017 eKLR] the Court of Appeal stated that:

“It is settled that the onus lies on a party relying on the existence of trust to prove it through evidence.”

15. The above precedents sum up the duty that was cast on the Respondent to prove that Rakedo held the suit land in trust for his younger brother Magoye. The trust pleaded in paragraph 5(a) to (c) of her counter-claim was a customary trust based on the fact that Magoye and his family including the Respondent had been cultivating the suit land which had been registered in the name of Rakedo during the adjudication process to hold in trust for Magoye.
16. As for the Appellant, it was sufficient that she had produced the certificate of search showing that suit land was registered in the name of Rakedo. That was sufficient evidence that Rakedo was the absolute owner of the suit land. Indeed the trial magistrate was alive to the concept of indefeasibility of title and having cited Sections 25(1) and 26(1) of the *Land Registration Act*, she went on to state as follows in paragraph 24 of the impugned judgment:
 - 24: “Section 26(1) of the *Land Registration Act* further outlines that a certificate of title is considered as prima facie evidence that the named proprietor is the absolute and indefeasible owner of the land. There is no dispute in my view that Mango Rakedo is the registered owner of LR no Samia/Buburi/468. That would ideally have put this entire matter to rest. However, the defence line of argument is that Mango Rakedo held the property in trust for his brother. In her counter-claim, the Defendant sought for the entire land to be transferred to her Deceased husband’s Estate.”The trial magistrate then went on to conclude that indeed Rakedo held the suit land in trust for his brother Magoye and as is clear from paragraphs 27 to 31 of the impugned judgment which I have already reproduced above, that finding of a customary trust in favour of the Respondent hinged solely on the fact that the Respondent and her co-wife had been utilizing a portion of the suit land. Was there sufficient evidence to prove a customary trust? That is what I shall now examine.
17. The Appellant’s case in the trial Court was that her father Rakedo had only permitted the Respondent to cultivate on the suit land because it was bigger than Magoye’S land. This is what she stated in



paragraphs 8, 9 and 10 of her statement dated 27th June 2022 and which she adopted as her testimony during the trial:

- 8: “That the said Michael Magoye, the husband to Malisa Magoye has land parcel no Samia/Buburi/417 measuring approximately 2.4 Ha which parcel is distinct from our parcel.”
- 9: “That the said Defendant entered our parcel of land with permission from our late father to till the same as our father’s land was big.”
- 10: “That the Defendant and his family have taken advantage of our family being comprised of daughters to encroach on our parcel of land.”

On her part, the Respondent said as follows in paragraphs 4, 5 and 6 of her statement dated 11th november 2022 and which she also adopted as her testimony during the trial:

- 4: “That the homestead where my husband lived was located in Samia/Buburi/417 where my co-wife and I were shown our respective homes where we occupy now.”
- 5: “That I started my family with my late husband residing in parcel number Samia/Buburi/417 while farming in lower portion of parcel number Samia/Buburi/468.”
- 6: “That there was no dispute between my late husband and his brother over the use and demarcation of parcel number Samia/Buburi/468.”

When she was re-examined by her counsel MR NGIRE on 26th September 2023, the Respondent said:

“I entered the land by consent of registered owner Stephen in 1977. Stephen died in 1982 and I had peacefully ploughed on the land upto his death.”

It is clear therefore that the family of Magoye entered the suit land with the consent of Rakedo who allowed them to cultivate on a portion thereof although Magoye had his own land being land parcel no Samia/Buburi/417. In her submission on behalf of the Respondent, MS NGIRE has stated as follows on the issue of trust:

“Fourth, concerning whether the Respondents could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances, we regurgitate our submission that the late Stephen Mango (the Plaintiff’s father) only got registered to hold title to the suit land by virtue of being the eldest son in the family and having been appointed as the head of family upon the demise of their father in accordance with Samia Customs. That his registration was to the extent that he holds the title to the suit land in trust of his younger brother Michael Magoye (Respondent’s husband) who was by then away on study. Michael Magoye’s family has remained in peaceful possession, occupation and in utility of the suit land todate. The suit land was supposed to have been transferred and registered in the names of the late Michael Magoye but unfortunately, the late Stephen Mango who had initiated the transfer process in the year 1981 passed on in the year 1982 before completing the transfer.”

On his part, Mr Juma on behalf of the Appellant made the following submission on the same issue:

“In this case, the Respondent has pleaded customary trust in the suit land. However, the testimonies are on contrary. The Appellant contents that the suit land is her father’s property and has nothing to do with customary trust as the Respondent then the Defendant during trial alleges. It was the Appellant’s testimonies that the Respondents gained entry



in the suit land upon the Appellant's father permitting them as such. He allowed them to cultivate the same but not make construction thereon. During re-examination of the Respondent at trial who testified as DW1 stated and we quote; "I entered the land by consent of registered owner Stephen in 1977 ... I have continued ploughing on the land from 1982 to 2021." Grace Namatsa Magwere DW2 reiterated the averments during cross-examination and we quote "Mango permitted me to plough on the land" see page 55 of the record of appeal."

18. From the evidence, Rakedo and Magoye were siblings. It was not un-usual during the land adjudication process, for the eldest son to be registered as proprietor of the family land as trustee for the younger children. That was the case which the Respondent and her witnesses put forward in the trial Court citing Samia Customs. It was common ground that prior to the creation of the suit land and the land parcel no Samia/Buburi/417, the original land was ancestral land belonging to the father of Rakedo and Magoye. It is also clear from the certificates of Official Search that both the suit land registered in the name of Rakedo and the land parcel no Samia/Buburi/417 registered in the name of Magoye were both registered in their names of 24th August 1973. And while Rakedo got a bigger portion measuring 5.8 Hectares (14.3 acres), his younger brother Magoye was allocated a smaller portion measuring 2.4 Hectares (5.93 acres). That decision could only have been made by their father and only he knows why he did so. It cannot therefore be correct, for the Respondent's counsel to submit, as she has done, that Rakedo was registered as proprietor of the suit land to hold it "in trust of his younger brother Michael Magoye (the Respondent's husband) who was by then away on study". If their father had wanted Magoye to have a share equal to that of Rakedo, the easiest thing to have done would have been to do so at the time when he was registering the suit land and the land parcel no Samia/Buburi/417 in the respective names of his sons Rakedo and Magoye. It would not make sense, as the Respondent made the trial Court believe, that their fathers would on 24th August 1973 partition his original land (if that is what he did) or share out his parcels of land between his sons on the same day yet at the same time, allocate a bigger share to Rakedo and a smaller share to Magoye but add that Rakedo holds the suit land in trust for Magoye. It cannot be true that Magoye was away studying because the registration of the suit land and the land parcel no Samia/Samia/Buburi/417 in their respective names was done at the same time. The claim of the suit land by the Respondent on the basis of a trust was clearly based on weak testimony.
19. Then there is also the evidence that infact Rakedo only permitted his brother Magoye to cultivate on a portion of the suit land. That has indeed been confirmed by the Respondent herself during her testimony. She even went further to confirm that her house is on the land parcel no Samia/Buburi/417 which is registered in the names of her husband Magoye. That explains why the Respondent only started constructing on the suit land after the demise of Rakedo. The explanation of that can only be that the Respondent and her family were well aware that any attempt to construct on the suit land during the life time of Rakedo would have been repulsed since the permission granted to Magoye was only to cultivate on the suit land. The trial magistrate therefore also erred in law and in fact by over looking that issue of occupation by permission from Rakedo to only cultivate on the suit land as raised in paragraph 6 of the memorandum of appeal.
20. It is also clear from paragraphs 23 to 31 of the impugned judgment, where the trial magistrate set out the issues for determination, that no mention was made therein of the land parcel no Samia/Buburi/417. If the trial magistrate had considered the evidence with regard to the said land parcel no Samia/Buburi/417, it would have become clear to her that Magoye was given this land at the same time when the suit land was registered in the name of Rakedo i.e. 24th August 1973. That, as I have already stated above, would have raised a doubt in the trial magistrate's mind as to the veracity of the



Respondent's counter-claim alleging a trust in favour of Magoye with respect to the suit land. It also transpired during the hearing that the Respondent had in fact already disposed part of the land parcel no Samia/Buburi/417. When she was cross-examined by Mr Juma on 26th September 2023, she said:

“I have not invaded LR no 468 because it is big. The elder brother was a trustee. I was given LR no 468 and that is when I started tilling. I do not have documents to prove I was given the land. I have a tenant known as Mwangi in parcel 417. LR no 417 has been sub-divided to other numbers.”

That should have raised the red flag in the trial Court that the Respondent, having disposed off part of land parcel no Samia/Buburi/417 which was the entitlement of Magoye, was now seeking to encroach onto the suit land by putting up a permanent structure thereon yet the permission granted to her was only for cultivation. There is merit, therefore, in ground no 4 of the memorandum of appeal wherein the Appellant has pleaded thus:

4: “That the trial learned magistrate erred in law and facts by overlooking the evidence of the Appellant that the Respondents sold part of land parcel Samia/Buburi/417 and now wants to grab land parcel Samia/Buburi/468”.

Given all the above, the Appellants claim that the Respondent had trespassed onto the suit land was well merited and proved by cogent evidence. On the other hand, there was no credible evidence to prove the Respondent's counter-claim that Rakedo held the suit land in trust for Magoye. The Appellant's claim was for allowing and the trial magistrate erred in law and in fact by dismissing it and instead allowing the Respondent's counter-claim.

21. The up-shot of all the above is that the appeal is allowed and the following disposal orders are made:
1. The order allowing the Respondent's counter-claim is set aside.
 2. Judgment is entered for the Appellant as prayed in the plaint.
 3. With regard to costs, the parties being family and in order not to antagonize them against each other further, the order that commends itself to make is to direct that each shall meet their own costs both here and in the Court below.

**JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS
10TH DAY OF JULY 2025.**

BOAZ N. OLAO

JUDGE

10TH JULY 2025

Right of Appeal.

BOAZ N. OLAO

JUDGE

10TH JULY 2025

