



**Oichoe v Oisebe & 2 others (Environment and Land Appeal  
E016 of 2023) [2025] KEELC 5242 (KLR) (8 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5242 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL E016 OF 2023**

**M SILA, J**

**JULY 8, 2025**

**BETWEEN**

**FLORENCE MOGITI OICHOE ..... APPELLANT**

**AND**

**BILLIAH BOSIBORI OISEBE ..... 1<sup>ST</sup> RESPONDENT**

**JANE KERUBO OISEBE ..... 2<sup>ND</sup> RESPONDENT**

**JAMES BOSIRE OISEBE ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the judgment of Hon. P.K Mutai delivered  
on 11 January 2023 in the suit Kisii CMELC No.E016 of 2023)*

**JUDGMENT**

1. The suit before the lower court was commenced through a plaint filed by the respondents on 27 February 2019. The 1<sup>st</sup> respondent is wife to one Manasseh Oisebe (deceased) whereas the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are her children. The appellant is a step-sister to Manasseh from the 2<sup>nd</sup> house. The respondents pleaded that the land parcel Wanjare/Bogiakumu/1XX3 (the suit land) was registered in the name of Manasseh and when he died, they filed a succession cause and the suit land was transmitted to them. They pleaded that in April/May 2018, the appellant trespassed into the suit land, commenced activities on the land, and even demolished a building on it. In the plaint, they asked for a declaration that they are the proprietors of the suit land, eviction of the appellant, a permanent injunction against her, general damages for trespass/mesne profits, and costs.
2. The appellant filed a defence whereupon she averred that she is a step-sister of Manasseh from the 2<sup>nd</sup> house. Their father was one Shadrack Oisebe who had two wives. The first wife was Prisca (mother to Manasseh) and the 2<sup>nd</sup> wife was Nereah (mother to the appellant). The appellant pleaded that the suit land was registered in name of Manasseh for him to hold in trust for the two houses. She pleaded that



the suit land is divided into two distinct portions, i.e one for each house, and that the boundaries have been intact since time immemorial, long before adjudication. She averred that she is in possession of the portion for the 2<sup>nd</sup> house. She further pleaded that her parents were interred on the portion that she occupies whereas Manasseh's mother was interred on the portion of the first house. She further pleaded that the late Manasseh allowed his sister, Mary Maiko, and herself (defendant), to cultivate the portion belonging to him (Manasseh) since he did not live on the suit land and had settled in Gesima Settlement Scheme. She pleaded that Mary kept possession until December 2020 when the respondents chased her away. On the issue of demolition of a house, she pleaded that it fell apart due to natural forces of nature. She asked that the suit be dismissed.

3. A date for hearing of the suit for 3 January 2023 was taken by consent but on this day, only counsel for the respondents (as plaintiffs) appeared. The court was satisfied that the date had been taken by consent and allowed the matter to proceed. The 2<sup>nd</sup> respondent testified on behalf of all the respondents. Her evidence was that they obtained a confirmation of grant and the suit land was transferred to them. She testified that it was in April 2018 when the appellant moved into the suit land, started cultivating, and put up a toilet. They asked her to vacate but she did not heed to their demands. She did mention that there was a parcel No. 1001 which was the ancestral land. With this evidence the respondents closed their case.
4. The court on its own motion adjourned the matter so as to allow the appellant (as defendant) an opportunity to present her defence. The defence hearing was fixed for 5 July 2023. On this date, counsel for the appellant applied to have the respondents' witness recalled but the court directed that a formal application be made. No such application was made meaning that the appellant waived her opportunity to cross-examine the respondents' witness.
5. On her part, the appellant testified as the sole witness for her defence. She had a witness statement which more or less depicted what was pleaded in her defence. She elaborated that Priscah (the first wife of her father Shadrack) had 5 children namely, Manasseh, Bathsheba (deceased), Yunis (deceased), Puline (deceased), and Mary Maiko. Manasseh was the only son. For the second house, that of Nereah, they had four children, being Margaret Oichoe, Joel Oichoe, Tom Oichoe, and herself. She stated that they have been living in her mother's house on their portion of the suit land. She further stated that Priscah died in 1945, Shadrack in 1991 and her mother Nereah, in May 1992. She claimed that the respondents attempted to remove the boundary in July 2021 but she protested and returned it. She closed her case with this evidence.
6. Counsel were invited to file submissions, which they did, culminating in the impugned judgment. In his judgment, the trial Magistrate acknowledged that the appellant's defence was that the land was held under customary trust by the late Manasseh but held that trust needs to be proved through evidence. He thus held that it was the burden of the appellant to prove such trust. He was not persuaded that the appellant had provided evidence to prove the existence of a trust. He pointed out that the appellant never called Mary Maiko or any family member to testify on the alleged trust. He found that it was not sufficient for the appellant to state that the suit land belonged to her father and that her step-brother held it in trust, but she was duty bound to adduce evidence, and what she produced was not sufficient. He thus entered judgment for the respondents. He ordered the appellant to vacate the suit land within 60 days of the judgment and in default an eviction order to issue. He also granted the declaration that the respondents are bona fide owners of the suit land and issued the order of permanent injunction. I have not seen any mention of the prayer for general damages but he did grant costs to the respondents.
7. Aggrieved, the appellant has now filed this appeal on the following grounds (paraphrased to cure some obvious errors in drafting) :



1. That the learned trial magistrate erred in fact and in law and fundamentally misdirected himself in holding that the appellant failed to prove the existence of trust.
2. That the learned trial magistrate erred in fact and in law and misdirected himself in not holding that the registration of the respondents as owners of the suit land through succession does not affect the creation and operation of a resulting, implied, or constructive trust and/or proprietary estoppel.
3. That the learned trial magistrate erred in not holding that a customary trust subsisted before first registration which subjected the original proprietor to Section 28 of the [Land Registration Act](#).
4. That the learned trial magistrate erred in holding that the appellant's occupation amounts to trespass on private property.
5. That the learned trial magistrate made a decision against the weight of evidence.
8. The appellant proposes that the judgment be set aside and she be awarded the costs of the appeal and of the lower court.
9. The appeal was argued through written submissions and I have taken note of the submissions filed by Mr. Bosire Gichana, learned counsel for the appellant, and Mr. Oduk, learned counsel for the respondents.
10. The case of the respondents was simple; that they are the registered proprietors of the suit land, and the appellant had illegally trespassed into the land around about the months of April/May 2018. They thus wished to have the appellant evicted and permanently restrained from the suit land. The defence of the appellant was one of trust. She of course claimed that Manasseh held the land in trust for the two houses of his father, and that she is thus entitled to be in occupation of the portion that belonged to her mother.
11. In his submissions, Mr. Bosire did refer me to the Supreme Court decision in the case of *Isack M'inanga Kiebia vs Isaaya Theuri M'Lintari & Another (2018)Eklr* and urged that nothing precluded the declaration of a trust upon the suit land. He submitted that the appellant established the existence of a trust as she established that the suit land was ancestral land; that during adjudication the late Manasseh was designated to hold the land on behalf of the family. Mr. Oduk's rejoinder was that the test laid down in the case of *Kiebia v M'lintari* was sourly lacking.
12. I do not think that there is any contest that land may be held under trust including a customary trust. It is not odd in our society to find a member of a family being registered as proprietor of land on behalf of other persons in the family. The only issue is that such trust must be proved and it must be proved through concrete evidence. This is indeed what the Supreme Court held in the case of *Kiebia v M'lintari* which has been cited by both Mr. Gichana and Mr. Oduk. In that case the Supreme Court 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 favor 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.
13. As the Supreme Court pointed out in the above case, it all boils down to the quality of the evidence adduced to prove such trust.
  14. In our case, the appellant did not bother to cross-examine the 2<sup>nd</sup> respondent who testified on behalf of the respondents. This was her opportunity to eke out evidence from the respondents that would support her contention of a trust. On her defence, she was the only person who testified. In her pleadings, she had mentioned that Mary Maiko, a sister of the late Manasseh was indeed on the suit land on the permission of the late Manasseh and was aware of the issues. The appellant did not call Mary Maiko as her witness. She also stated that she has other brothers and sisters from the second house. You would in fact think that she would tap from them to provide evidence that Manasseh was holding the land on behalf of the second house. She never called any of her siblings from this second house to testify.
  15. She also never gave any elaboration of where her siblings live. She never stated where her brothers Joel Oichoe and Tom Oichoe lived. You would imagine that if this is land held under a customary trust, then Joel Oichoe and Tom Oichoe, would have some residence or at least some sort of presence here. There was no evidence that Joel or Tom Oichoe have any residence or use the suit land in any way. There was also no evidence of the whereabouts of Margaret Oichoe, another sibling of the appellant. How come these people do not appear to be on the suit land if indeed the land was held in trust for them ? And how come there is no evidence of them raising any complaint regarding the activities of the respondents on the suit land ? These were critical points that the appellant needed to cover in establishing any customary trust and she hopelessly failed to do so.
  16. It cannot be said, in the circumstances of this case, that trust was proved by the sole oral evidence of the appellant. That evidence could not tilt the balance in her favour and I find it far-fetched for the appellant to contend that the judgment was against the weight of evidence. There was absolutely nothing that she provided to prove trust save for her word of mouth. If we were to weigh the evidence, the appellant's was pretty much lightweight and could not tilt the scales in her favour, given that the respondents weighed in with the fact that they were the registered proprietors and fully entitled to the suit land on the basis of that status. Much more than a mere word of mouth that the land was held in trust was required in order to tilt the scales in favour of the appellant. The title that they held weighed a ton in favour of the respondents; the appellant came with nothing more than a feather. With that featherweight evidence, she could not succeed in proving that the land was held under a trust.
  17. I cannot fault the trial Magistrate for finding that the appellant failed to prove the trust that she was alleging. Apart from the above, the appellant did not even have a counterclaim seeking a declaration that the suit land is held in trust.
  18. From the foregoing, it will be seen that I find no merit in this appeal and I hereby proceed to dismiss it with costs to the respondents.



19. I observe that the appellant had been given 60 days from the date of the judgment of the trial court to give vacant possession. I see that she applied for an order of stay of execution pending appeal before the lower court and she was granted stay subject to deposit of Kshs. 30,000/= in a joint interest earning account. It is not clear to me if she complied with these orders. If she did, then this amount of Kshs. 30,000/= be released to the respondents. Whatever the case, she has lost this appeal and she now needs to give vacant possession to the respondents. I give her 14 days to do so. In default the respondents are at liberty to proceed to evict her. The judgment of the lower court is otherwise sustained.

20. Judgment accordingly.

**DATED AND DELIVERED THIS 8 DAY OF JULY 2025**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT AT KISII**

Delivered in the presence of :

Ms. Bosire for the appellant

Ms. Theuri h/b for Mr. Oduk for the respondents

Court Assistant – Michael Oyuko.

