



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndwiga & another v Jason & 4 others (Environment and Land Appeal  
6B of 2021) [2025] KEELC 6005 (KLR) (11 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6005 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL 6B OF 2021**

**AK BOR, J**

**SEPTEMBER 11, 2025**

**BETWEEN**

**KENNEDY KINYUA NDWIGA ..... 1<sup>ST</sup> APPELLANT**

**JUANE WAWEIRA NDWIGA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LEAH WACHUKA JASON ..... 1<sup>ST</sup> RESPONDENT**

**BEDAN KINYUA NJOKA ..... 2<sup>ND</sup> RESPONDENT**

**JOSECK NJIRU NJOKA ..... 3<sup>RD</sup> RESPONDENT**

**PIUS MUGENDI NYAGA ..... 4<sup>TH</sup> RESPONDENT**

**TABITHA MUTHONI JASON ..... 5<sup>TH</sup> RESPONDENT**

*(Appeal is against the judgement of Hon. M. N. Gicheru, Chief Magistrate  
delivered on 17/12/2018 in Embu Chief Magistrate Civil Case No. 67 of 2013)*

**JUDGMENT**

1. This appeal is against the judgement of Hon. M. N. Gicheru, Chief Magistrate delivered on 17/12/2018 in Embu Chief Magistrate Civil Case No. 67 of 2013. The trial court found that the Appellant held the land known as Kyeni/Mufu/750 (the suit land) in trust for the joint ownership in equal shares between himself, the Respondents and their families. The court directed the Appellant to sign the necessary documents for the subdivision and transfer to each Respondent of their share of the land. Further, the Appellant was restrained from trespassing onto the Respondent's portions of land or evicting them and their families from their portions of land.
2. The background to this case is that the Respondents filed suit against the Appellant's late husband on 3/11/2012 seeking an order that the Appellant's late husband held the suit land in trust for the joint



- ownership in equal shares between himself and the Respondents. They sought to have the suit land subdivided equally among them. The Appellant's husband's defence in the suit was that the suit land was given to him by the clan in his own right and that the Respondents had no right to the land.
3. Aggrieved by the findings of the trial court, the Appellant filed this appeal in which she contended that the Learned Magistrate ignored her submissions and the evidence of her witnesses to the effect that when Jason Njoka died in 1949, he left behind two children, that is the 2<sup>nd</sup> Respondent and the Appellant's late husband and not five children. Further, that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents were born by Leah Wachuka Jason after the death of Jason Njoka when she remarried.
  4. The Appellant faulted the trial court for accepting the averment that although the suit land was registered in the name of the Appellant's late husband, it was meant for his father who had died yet the land was given to the Appellant's husband by the clan in his own right and not as a trustee because he was the eldest son.
  5. The other point taken up in the appeal was that it was untrue that the Respondents would be rendered destitute if the orders sought were not granted yet the truth is that they all have properties elsewhere, the 2<sup>nd</sup> Respondent was given a plot by the clan and that the Appellant's late husband did not have any other property other than the suit land. The Appellant contended that the Respondents do not live on the suit land.
  6. The Appellant faulted the Learned Magistrate for taking into account extraneous and unsubstantiated information that her late husband beat up his mother and harassed his siblings and for inferring that the other children born by Leah Wachuka Jason after the death of her husband were accepted by the clan and that they should therefore get a share of the suit land, which is registered in the name of the Appellant's late husband. The Appellant faulted the trial court for finding that her late husband held the suit land in trust for his mother and the Respondents without giving reasons for arriving at that decision.
  7. Further, the Appellant contended that the trial court erred in finding that a customary trust had been proved on a balance of probabilities yet according to irrefutable evidence, by the time the Appellant's late husband was allocated the suit land by the clan, the 1<sup>st</sup> Respondent had already remarried and could not legally and customarily claim a share of the land registered in the name of the Appellant's late husband.
  8. The trial court was also faulted for failing to find that since the 3<sup>rd</sup> to 5<sup>th</sup> Respondents were born after the death of Jason Njoka and after the Appellant's late husband had been given land as was the 2<sup>nd</sup> Respondent, none of them could be said to be entitled to a share of the suit land registered in the name of the Appellant's late husband.
  9. The Appellant sought to have the judgment delivered by the Learned Chief Magistrate on 17/12/2018 and the consequential orders made in Embu CMCC No. 67 of 2013 set aside and to have that suit dismissed as lacking merit. In addition, the Appellant sought the costs of the appeal and of the suit before the trial court.
  10. The appeal was canvassed through written submissions. The Appellant rehashed the grounds of appeal and faulted the Learned Magistrate for overlooking the fact that when Jason Njoka died in 1949, he had two children, that is the Appellant's late husband and the 2<sup>nd</sup> Respondent from his marriage to the 1<sup>st</sup> Respondent. That when he died, he did not leave the family with any land and the Appellant's husband and his brother were given land by the clan. She reiterated that her late husband was given the suit land by the clan in his own right and did not hold it in trust for the Respondents.



11. The Appellant relied on Section 26 of the *Land Registration Act* on the protection afforded by the law to a registered proprietor of land and the instances in which the title can be challenged. She was emphatic that her late husband acquired the suit land legally in his own right and that it was registered in his name and was not acquired by fraud, representation or unprocedurally. The Appellant relied on *Joseph Muchiri Ngatia v Sigma Feeds Limited* [2015] KEHC 6168 (KLR) on the point that a certificate of title was conclusive evidence of proprietorship. She maintained that the suit land was not held under a customarily trust.
12. The other point taken up by the Appellant was that the 2<sup>nd</sup> Respondent and the Appellant's half siblings did not have a right to claim property from the Appellant because the land was not jointly owned. The Appellant reiterated that enforcing the decree would be detrimental to her as she did not have any other land for her children and that the subdivision of the suit land and its allocation to the Respondents would be unjust since they own land elsewhere and have no legal entitlement to the suit land. She urged the court to allow the appeal.
13. The Respondents in their submissions clarified that the Appellant stood in the shoes of Ernest Ndwiga Jason who is dead but was the registered owner of the suit land. According to them, the issue for determination in this appeal is whether the trial court was justified in finding that a customary trust existed in favour of the Respondents over the suit land. They urged that although the Appellant relied on Section 26 of the *Land Registration Act* regarding a title being conclusive evidence of ownership, however, the Appellant failed to address the issue of the import of Section 28(b), which the trial court relied on as an overriding interest, which need not be noted on the land register.
14. The Respondents submitted that the trial court properly addressed its mind to the evidence they tendered being the siblings and mother of the Appellant's late husband. They went further to argue that no evidence was adduced to show that some of the Respondents were not the children of the late Jason Njoka.
15. In any event, they submitted that they had all been in occupation of the suit land since birth and that there was similarity in their surnames to that of their deceased brother and their mother. They added that the 1<sup>st</sup> Respondent's remarriage was not proved and that there was concrete evidence that prior to her demise she lived on the suit land with her children but was constantly harassed by the Appellant, which led to various cases or complaints between them.
16. The Respondents maintained that the Appellant could not rely on the fact that he was given the suit land as of right because he was the first born son and their father had passed on before land demarcation. The Respondents submitted that they had met the requirements to show the existence of a customary trust set out in *Isack M'inanga Kiebia v Isaaya Theuri M'Iintari & another* [2018] eKLR where the court noted that if the land was held 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 were in actual occupation of the land.
17. The Respondents maintained that they were in occupation of the land and urged that Appellant held the suit land for the benefit of his family members who are the Respondents and who had resided on the suit land for their lifetime.
18. The Respondent relied on *Justus Maina Muruku v Jane Waithira Mwangi* [2018] eKLR in which the registered owner had been given land by the clan after the death of their father and the court took note of the fact that the plaintiff had admitted that he did not buy the land and that it was therefore family land by virtue of ancestry. In that case, the court noted that the land was registered in the name of the eldest son to hold in trust for the son of Romano who died before demarcation. The Respondents



submitted that the trial court was very lenient in its decision that the land should be divided into two equal portions with one portion going to all the Respondents and the Appellant getting the other portion.

19. The issue for determination is whether the court should allow the appeal and set aside the judgment of the Learned Chief Magistrate who found that the land given to the 2<sup>nd</sup> Respondent was only a plot and that it was not equivalent to the 6 acres allocated to the Appellant. The court also found that since the other Respondents had grown up on the suit land and had been taken up by the clan as clan members, they were entitled to a share of the land.
20. The trial court noted that it was immaterial that the Respondents had acquired other land elsewhere and that if such land existed, it was not the subject of the case before the trial court. The court found that a customary trust had been proved under Section 28(b) of the Land Registration Act and entered judgement in favour of the Respondents for half share of the suit land that is, 3 acres.
21. The ingredients of a trust set out in the Isack M’Inanga Kiebia case were satisfied in that the suit land was previously clan land and the Respondents belonged to the same clan as the Appellant’s late husband. The relationship between the Appellant’s late husband and the Respondents who were his mother and siblings is not so remote or tenuous as to make the Respondents’ claim adventurous or idle and lastly, the claim was directed against the Appellant’s late husband who was the registered proprietor and the eldest son of the late Jason.
22. The Supreme Court also noted that the rights of a person in possession of land under section 30 (g) of the repealed Registered Land Act were customary rights and that once it was concluded that such rights subsisted, then a court did not need to fall back upon a customary trust to accord them legal sanctity since they were already recognised by statute as overriding interests.
23. The Supreme Court observed that to prove a trust in land one did not have to be in actual physical possession. Further, that Section 30 of the repealed Registered Land Act was re-enacted as Section 28 of the Land Registration Act and that Parliament introduced two categories of overriding interests, that is, spousal rights over matrimonial property and trusts including customary trusts.
24. It is apparent that the Appellant’s late husband was allocated the suit land by the clan and was registered as the owner of the disputed land in his capacity as the eldest son to hold in trust in place of his own father who died before demarcation. The Appellant did not adduce evidence to support his assertion that the Respondents and his late mother were not entitled to the suit land. The suit land was allocated to the Appellant’s late husband by the clan, he did not purchase the suit land. The fact that the Respondents had lived on the suit land all their lifetime, as did their late mother was not controverted.
25. The court finds no merit in the appeal and dismisses it. Each party will bear its costs since they are all members of one family.

**DELIVERED VIRTUALLY AT NAIROBI THIS 11<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**K. BOR**

**JUDGE**

In the presence of: -

Ms. Cynthia Wanjiku for the Appellant

Mr. Victor Andande for the Respondent

