



**Wafula v Khaemba & 4 others (Environment and Land Appeal
E034 of 2024) [2025] KEELC 6069 (KLR) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6069 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E034 OF 2024
EC CHERONO, J
SEPTEMBER 18, 2025**

BETWEEN

JARED MAKHAKHA WAFULA APPELLANT

AND

SREPHEN WANJA KHAEMBA 1ST RESPONDENT

NORAH KHAEMBA 2ND RESPONDENT

TIMOTHY WANYONYI KHAEMBA 3RD RESPONDENT

BENARD MAKHAKHA KHAEMBA 4TH RESPONDENT

JOSEPH KSUYA WABICHO 5TH RESPONDENT

JUDGMENT

Introduction.

1. Vide a Memorandum of Appeal dated 22/07/2024, the Appellant who was the Defendant before the trial court (hereinafter referred to as 'the former suit') preferred this appeal challenging the judgment of Hon. V.Yator (SPM) in Webuye SPM-ELC NO. 28 of 2018 delivered on 28/06/2024 wherein the trial court allowed the Plaintiff/Respondent's claim with costs.
2. The Respondents herein had instituted the former suit before the trial Court vide a plaint dated 08/05/2017 in which they averred that their father, the late Khaemba Makhakha who died on 25/05/1998 had bought a portion of the suit land from one Wilberforce Wafula Barasa measuring 20 acres to be carved out of L.R. No. Ndivisi/Khalumuli/740. They averred that their late father died before the transaction was completed and that the Appellant herein took it up and completed the same by obtaining title no. L.R. No. Ndivisi/Khalumuli/3090 (hereinafter referred to as "the suit land").



3. That prior to his death, Khaemba Makhakha had written down how the said land would be shared. He stated that Jafred Makhakha Wafula would get 3 acres since he had a shamba in Siplala, Stephen Wanjala Khaemba-6 acres, Norah N. Khaemba-2 acres, Timothy Wanyonyi Khaemba-6 acres, Benard Makhakha Khaemba-1 acre and Joseph Kisuya Wabicho (a purchaser-2) acres. That the Appellant has insisted on keeping the entire suit land to himself. They sought for the following prayers;
 - a. As per paragraph 6 of the plaint.
The plaintiffs claim against the defendant is for distribution of the title among the six with costs and interests at court rates.
 - b. Costs
 - c. Interests at court rates.
4. The Defendant/Appellant herein filed a statement of defence dated 14/08/2017 wherein he denied the claim by the Plaintiffs/Respondents in the plaint and sought to have the suit dismissed with costs for being defective.
5. When the former suit came for directions, the parties agreed to proceed by way of viva voce evidence with each party calling one witness.
6. PW1 Stephen Wanjala Khaemba adopted his witness statement dated 08/05/2016 as his evidence-in-chief and stated that the 1st Defendant/Appellant was his step brother while the 2nd Respondent was his mother, the 3rd and 4th Respondents were his brothers while the 5th Respondent was a purchaser of the suit land. He produced in evidence a letter dated 10/09/2010 P-Exhibit 1, certificate of official search dated 06/11/2015 P-Exhibit 2, Mutation form dated 09/03/2009 P-Exhibit 3, Notes from Makhakha P-Exhibit 4, certificate of death P-Exhibit 5, certificate of search dated 26/11/2010 P-Exhibit 6, certificate of search in the name of the Appellant dated 26/11/2010 P-Exhibit 7, letter from Nkhone & Co Advocates dated 11/02/1988 P-Exhibit 8, defence dated 17/02/2005 by the Appellant P-Exhibit 9, a sketch plan of houses belonging to Khaemba Makhakha P-Exhibit 10, minutes of a meeting held on 24/10/1998 P-Exhibit 11, Bond of Khaemba Makhakha P-Exhibit 12, Provincial Land Disputes dated 24/04/2006 P-Exhibit 13, confirmation of grant of plot no. 740 P-Exhibit 14 and LDT Case No. 41/2006 dated 05/12/2006 P-Exhibit 15.
7. He testified that none of the parties reside in the suit land and that the Appellant had sold his share of 3 acres and gave his children the rest. On cross-examination, the witness testified that their father was allocated 20 acres from the estate of Khwatenge pursuant to a grant issued in Kitale Succession Cause No. 364 of 1998. That there was a dispute between the Appellant and Wilberforce Barasa before the LDT concerning L.R. No. Ndivisi/Khalumuli/740 which was sub-divided into two plots, to wit; parcel NO.3090 and another.
8. DW1 Jafred Makhokha Wafula adopted his witness statement dated 05/07/2018 as his evidence-in-chief. He testified that his father Khaemba Makhakha purchased 20 acres from one Steven Barasa and his wife Berita vide an agreement dated 20/02/1976. That the said agreement omitted the National ID details of the parties therein and to him, the agreement was therefore fraudulent. That his father was not included in the succession cause of the alleged seller and he went to one Wilberforce Barasa who was the seller's son and they entered into another agreement dated 17/11/1998. That thereafter, he filed an objection to the above-mentioned succession cause. That he sued the said Wilberforce Barasa before the Webuye LDT for the removal of boundaries and thereafter filed an appeal at the Provincial Appeals Tribunal. He argued that the 1st Respondent had not filed an authority to testify on behalf of the Respondents.



9. After hearing the parties and upon considering the evidence and the documents produced, the trial court entered judgment in favour of the Respondents and condemned the Appellant to bear the costs of the suit.
10. Aggrieved by the impugned judgment of the trial court, the Appellant preferred the current appeal on the following grounds;
 - a. The trial magistrate erred in law and fact in holding that the appellant do share L.r.no. Ndivisi/Khalumuli/3090 when the said land was not in existence (Non-Existent) at the time of filing the suit.
 - b. The trial magistrate erred in law and fact in holding that the appellant and the Respondents late father purchased the land in question when the agreement produced do not tally with the court findings.
 - c. The trial magistrate erred in law and fact in entering judgment in favor of the plaintiffs who had died and there was no substitution by a legal representative contrary to the evidence on record.
 - d. The Respondent herein had no capacity to represent the deceased plaintiffs and the case should not have proceeded as the Respondent purported to have filed the suit on behalf of Norah N Khaemba and Timothy Khaemba who died before the suit was filed and therefore incapable of suing.
 - e. The trial court erred in law and fact in holding that the Appellant was holding the land in trust of the Respondent and others, when it was clear that the Appellant purchased the land on his own behalf and not that of Respondent or any other person.
 - f. The trial Magistrate erred in law and fact in holding that the Appellant held the land in trust when the Respondent had not pleaded the same and hence the court entered the arena of litigation thus losing its position as an arbiter.
 - g. The trial Magistrate erred in law and fact by failing to find that the 5th plaintiff, Joseph Kisuya Wabicho, as a buyer did not file any land sale agreement between himself and our late father Khaemba Makhakha Munuya.
 - h. The trial Magistrate erred in law and fact by failing to find that the Land Sale agreement dated 20/2/1976 between our late father Khaemba Makhakha Munuya and Stephen Barasa and Peritah wife of Barasa was fraudulent.
 - i. the trial magistrate erred in law and in fact by failing to find that Wilberforce wafula Barasa about 11years old in 1976. When we refer to the Plaintiff's exhibit no. 13(Provincial Land Dispute Appeal Tribunal), he could not have sold land to our late father KhaembaMakhakha as pleaded in paragraph 3 of the plaint.
 - j. The trial Magistrate erred in law and fact by failing to find that in her own ruling delivered on 20/12/2023 ono my notice of motion (Application) dated 20/7/2023, she ordered that I pay costs to the SURVIVING Plaintiffs and the only surviving plaintiff is the 1s plaintiff, Stephen Wanjala Khaemba. The other 4 plaintiffs were dead. In her judgment delivered on 28/6/2024, the Principal Magistrate ordered me to pay costs to plaintiffs including the 4 plaintiffs who had died. This contradicts her ruling.
 - k. The trial Magistrate erred in law and fact by failing to find that there was no documentary evidence filed in court to prove that my father bought land for me at Sipala.



- l. The trial Magistrate erred in law and fact by failing to find that there were only two buyers and two land sale agreements that were filed in court. These being the agreement between my Late father Khaemba Makhakha Munuya and Stephen Barasa and Peritah wife of Barasa dated 20/2/1976 and that one between myself, Jafred Makhakha Wafula and Wilberforce Wafula Barasa dated 17/11/1998 concerning the estate of John Nyongesa Khwatenge plot No Ndivisi /Khalumuli 740.
- m. The trial magistrate erred in law and fact by failing to find that the ruling of the High court at Kitale concerning probate and administration cause No 364 of 1998 of the estate of John Nyongesa Kwatenge was that I should be among the beneficiaries of the estate of John Nyongesa Khwatenge.
- n. The trial magistrate erred in law and fact by failing to find that the certificate of confirmation of grant of plot No 740 PMF/14 DATED 9/12/2004 filed in court comprised 6 beneficiaries, my late father Khaemba Makhakha Munuya who died on 24/05/1998 was among them. The 6 beneficiaries were not parties to the succession cause.
- o. The trial magistrate erred in law and fact by failing to find that the six (6) beneficiaries did not seek the consent of the Land Control Board to subdivide the plot No Ndivisi/Khamuli 740 into 6 new created numbers because this confirmation of grant was FAKE.
- p. The trial magistrate erred in law and fact by failing to find that the Plot No Ndivisi/Khalumuli 740 was subdivided between two beneficiaries, Wilberforce Wafula Barasa new plot no Ndivisi/ Khalumuli 3089 and I, Jafred Makhakha Wafula plot No 3090. The transfer to these two new numbers was based on the consent of the Webuye Land Control Board.
- q. The trial magistrate erred in law and fact by failing to find that Nanzushi the advocate for the plaintiffs told the court that the 2nd plaintiff, Norah N. Khaemba was deceased (on page one of the proceedings). On 8/5/2019 page 3 the 2nd and 1 plaintiff were present in court. On 9/03/2022 page 6 the 2d and 1st plaintiffs were present in the court. The death certificates of the 2nd and 3rd plaintiffs were filed in court.
- r. The trial magistrate erred in law and fact by failing to find that on 15/03/2024 the 1* plaintiff during cross examination agreed that he did not indicate in his pleadings that I held the land in trust (see page 14 of the proceedings).
- s. The trial magistrate erred in law and fact by failing to find that I was not aware of the application dated 14/02/2024 and the magistrate gave direction/order on 24/2/2024 when the file was placed before her on 26/02/2024 she gave direction/order on an application that she had not seen and perused.
- t. The trial magistrate erred in law and in fact by failing to find that the defence hearing on 15/03/2024 was online and what was recorded by her was different from what I told the court, I wrote a letter to the court dated 19/07/2024 asking the court to play the clip and also to avail my defence evidence as stored by the court. For the sake of justice, what I asked the court to do should be part of what should be considered by the honourable court in my appeal.
- u. The trial magistrate erred in law and in fact by failing to find that most parts of my defence, statements, documents, submissions filed in court were not considered while writing the judgment dated 28/06/2024.
- v. The magistrate was against the weight of evidence on record.



11. The Appellant sought to have the appeal allowed with costs and for the trial court's judgment/Decree to be substituted with an order dismissing the Respondents' suit with costs.
12. When this appeal came up for directions, the parties agreed that the same be canvassed by way of written submissions.
13. The Appellant filed submissions dated 05/03/2025 where he submitted that there is no documentary evidence that was filed to prove that the plot number did exist at the time of filing the former suit. He submitted that the 2nd and 3rd Respondents had died at the time the former suit was filed while the 5th and 4th Respondents died during the pendency of the former suit yet the court entered judgment in their favour. That he bought the suit land for himself and that the Respondents did not plead that he held the land in trust for them.
14. He submitted that his late father, Khaemba Makhakha Munuya bought 20 acres of land parcel NO. NDIVISI/KHALUMULI registered in the name of John Nyongesa Khwatenge (deceased) from Stephen Barasa and his wife Peritah registered as Ndivisi/Khalumuli No.740 on the 20/2/1976. He stated that the said John Nyongesa Khwatenge (deceased) died in 1971 and that Stephen Barasa who sold the 20acres of land to their late father, Khaemba Makhakha Munuya was a brother to John Nyongesa Khwatenge, the registered owner of land parcel No. Ndivisi/Khalumuli 740. It was his submission that the purported land sale agreement was fraudulent and that his later land sale agreement was proper as he paid the consideration and incidental fees. He contested the authenticity of the confirmed grant in Succession cause No 364 of 1998. The Appellant further submitted that his statement of defence was distorted by the trial court to defeat justice.
15. The 2nd, 3rd and 5th Respondents filed submissions dated 19/06/2025 and submitted that the Appellant herein had alleged in Kitale high court succession cause that he was a purchaser of the said land but he was dismissed on ground that by then, he was still young and it was unbelievable that he would acquire land under purchase. They argued that the Appellant's action upon the death of their father were unlawful and he should not be allowed to benefit from it. They submitted that the deceased parties have been substituted by their legal representatives and that the delay was occasioned by lack of funds and understanding of the procedures of law. They urged the court to direct that the parties herein to abide by the judgement of the high court in Kitale succession cause NO.364 of 1998 and order the parties to take directions in the pending succession cause No. Webuye E048 of 2024 in respect of the estate of Khaemba Makhakha Munuya (deceased) and by so doing will bring to a close the endless disputes between the parties.

Analysis and determination.

16. This being a first appellate court, this Court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. This is what section 78 of the *Civil Procedure Act* dictates as held in numerous precedents. This court must also bear in mind that it neither saw nor heard the witnesses as they testified hence, it must give an allowance for that. This position was emphasized in the case of *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR (Civil Appeal No. 161 of 1999) where the held: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”



17. Having carefully considered the evidence as contained in the record of appeal, the rival written submissions, cited authorities and the relevant provisions of law and the numerous grounds of appeal which in my view are unnecessarily verbose, this court being an appellate court combines the issues into two as follows;
- a. Whether the trial court entered judgment in favour of deceased parties.(grounds 3,10 & 17).
 - b. Whether the trial court erred in determining that the Appellant held the suit land in trust.
18. I shall now proceed to discuss the two consolidated issues below.

a) Whether the trial court entered judgment in favour of deceased parties. (Ground 3,10 & 17)

19. The Appellant herein alleged that the trial court in its final judgment proceeded to enter a judgment in favour of all the Respondents for avoidance of doubt Stephen Wanjala Khaemba, Norah Khaemba, Timothy Wanyonyi Khaemba, Benard Makjakha Khaemba and Joseph Kisyua Wabicho yet at the time of the said judgement, only Stephen Wanjala Khaemba was alive. I have looked at the trial court's judgment and I note that the court took note of the fact that some of the Respondents were deceased prior to the institution of the suit and that others died during the pendency of the suit. The trial court in its judgment directed itself on the applicable law in such an instance and referred to the provisions of Order 1 Rule 9 & Rule 10(1) (2) of the Civil Procedure Rules. The trial court also relied on the provisions of Section 1A of the *Civil Procedure Act* and found (in paragraph 13 of the judgment) that the demise of some of the Respondents was not fatal to the suit. The trial court also stated that the suit could not abate simply because some of the Respondents had died.
20. This Court takes judicial notice that the learned trial magistrate properly directed herself to the relevant principles of law and arrived at a sound and reasoned determination regarding the status of the suit. It is settled law that a suit cannot be defeated merely on account of misjoinder or non-joinder of parties. Additionally, it is trite that a deceased person lacks the legal capacity to either institute or continue with proceedings in his or her own name, and any interest in such proceedings can only be advanced through a legally appointed personal representative. Furthermore, where a party to a suit dies during its pendency, his/her legal representative may move the court for substitution in accordance with Order 24 Rule 3 of the Civil Procedure Rules. However, such an application must be made within one year of the death of the party, failing which the suit stands abated by operation of law.
21. In the process of reviewing the record of appeal, I came across the death certificates of Norah Khaemba who died on 13/08/2016, Timothy Wanyonyi Khaemba died on 18/09/1996 and Benard Makjakha Joseph Kisyua Wabicho who died on 29/1/2020. From the foregoing, it appears that the 2nd and 3rd Respondents in this appeal died prior to the institution of the former suit on 28/05/2017 while the 5th Respondent died during the pendency of the suit and was not substituted. As for the 1st and 4th Respondents, there is no evidence that they are deceased.
22. Further, this court notes that the nature of the cause of action, as pleaded in the plaint, was severable and not dependent on the continued presence of all the original Plaintiffs. As such, the death of some of the Respondents did not extinguish the suit. The surviving Respondents retained the legal capacity to pursue the claim in its entirety, including the common interests they shared with the deceased Plaintiffs. In the absence of substitution, a suit would only abate in respect of the deceased Respondents, but it remained alive and properly before the court as far as the surviving Respondents were concerned.



**b) Whether the trial court erred in determining that the Appellant held the suit land in trust.
(Ground 1-2, 4-9, 11-16, 18-22)**

23. The Appellant in the aforementioned grounds faulted the trial court in finding that the Respondents had proved the existence of a trust. The Appellant argued that the Respondents suit was in relation to Land Parcel no. Ndivisi/ Khalumuli/3090 which he claimed was non-existent at the time the former suit was filed. However, the evidence presented more so, P-Exhibit 2 which is a copy of certificate of search shows that the said suit land was created/registered on 08/09/2008 when the original land was sub-divided. No further evidence was placed before this court to demonstrate that the suit land was non-existent at the time this suit was filed.
24. The Appellant also argued that the trial court erred in finding that the late Khaemba Makhakha had purchased the suit land. As can be seen from D-Exhibit 2 which is a sale agreement dated 20/02/1976, their said father Khaemba Makhakha purchased 20 acres of Land Parcel no. Ndivisi/ Khalumuli/740 from Stephen Barasa and Peritah Barasa and not Wilberforce Barasa as alleged by the Appellant in ground 8 & 9 of the appeal. The said agreement is proper and in accordance with Section 3(3) of the Law of Contract Act, CAP 23 which provides as follows :-
- (3) No suit shall be brought upon a contract for the disposition of an interest in land unless-
- (a) the contract upon which the suit is founded-
- (i) is in writing;
- (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
25. The assertion by the Appellant that the said agreement was fraudulent for the lack of the party's agreement and that his father was cheated is clearly misplaced. As a matter of fact, it was the subsequent agreement that he entered into with one Wilberforce Wafula Barasa dated 17/11/1998 that was unlawful and unenforceable for the reasons that the alleged vendor purported to be the legal representative of the estate of Stephen Barasa while the evidence on record shows that he i.e Wilberforce Barasa was issued with a confirmation of grant on 09/12/2024 in Kitale HC Succ. Cause No. 364 of 1998. Therefore, as at the time of entering the alleged agreement, the said vendor was not seized with the legal authority to transact on behalf of the said estate. Simply put, his actions amounted to intermeddling with the estate of a deceased person and the said agreement was therefore illegal.
26. Further and of major concern is whether the trial court erred in finding that a trust had been proved. It is not in contention that the parties herein are related and that their father Khaemba Makahaha(deceased) entered into an agreement for the purchase of 20 acres of land to be hived out of Land Parcel no. Ndivisi/Khalumuli/740 in the year 1976. The Appellant who alleges that the said agreement was fraudulent entered into a subsequent agreement with one Wiberforce Barasa. Notably, this court has already pronounced itself on the legality of the said agreements. It also emerges that the Appellant who was chosen to take up succession for the estate of their father filed an objection before the court determining the succession cause for the estate of John Nyongesa Khwatenge in Kitale HC Succ. Cause No. 364/1998.
27. The trial court in determining the said objection stated that the objector who was the Appellant herein ought to be included in the list of beneficiaries for the estate of John Nyongesa Khwatenge to enable



- the real issues in controversy and the interests of the estate of the late Khaemba Makhakha Munuya to be determined before the confirmation of grant in the succession cause for John Nyongesa Khwatenge.
28. Upon careful consideration of the ruling of the succession court, it is evident that the Appellant anchors his claim to exclusive entitlement to the suit land on the basis of his inclusion in the said succession proceedings. However, that assertion is wholly misconceived. A plain reading of the ruling delivered on 09/07/2004 and produced in evidence as D-Exhibit 3 reveals that the Appellant's inclusion was intended for the benefit of the estate of the deceased, Khaemba Makhakha Munuya, whose beneficiaries include the Respondents herein. The court did not confer exclusive interest/ownership upon the Appellant, and any suggestion to the contrary is inconsistent with the express findings of the succession court.
 29. Further, the parties produced proceedings of the Webuye LDT Case No. 11/2005 D-Exhibit 4 and P-Exhibit 15, decree in Bungoma LDT Case no. 41 of 2006 D-Exhibit 5, vesting order in Bungoma LDT Case no. 41 of 2006 D-Exhibit 6, a confirmation of grant in Kitale Succ. Cause No. 364 of 1998 P-Exhibit 14 and an award of the Kakamega Land Disputes Appeals Tribunal P-Exhibit 13. From my evaluation of these documents, it is clear that there is a confirmed grant issued which addresses the distribution of Land Parcel No. Ndivisi/Khalumuli/740. There is no evidence on the court record that the said grant was revoked. Notably, the said grant was issued on 09/12/2024 after the ruling relied upon by the Appellant dated 09/07/2004.
 30. The said documents also reveal that the Appellant instituted proceedings against Wilberforce Wafula Barasa in Webuye LDT Case No. 11/2005, after the succession court mentioned above issued the said confirmation of grant. The tribunal shared the land between the family members of Khaemba Makhakha. Wilberforce Wafula Barasa being aggrieved by the award of the LDT appealed at the Kakamega Provincial Disputes Appeals Tribunal and the said tribunal nullified the earlier findings of the LDT and ordered for the compliance of the outcome of the succession cause which awarded Khaemba Mukhakha 20 acres of Land Parcel no. Ndivisi/Khalumuli/740 and directed that the administrator facilitates the sub-division accordingly. This award was subsequently adopted by the court and a decree issued.
 31. Consequently, and as clearly borne out by the evidence on record, the estate of Khaemba Makhakha is entitled to 20 acres out of Land Parcel No. Ndivisi/Khalumuli/740. As demonstrated in P-Exhibits 2 and 3, the said portion was excised and subsequently registered in the name of the Appellant. It therefore follows that the said registration is not absolute or for the Appellant's sole benefit, but is in fact encumbered in the sense that the Appellant holds the land in trust for the benefit of the estate of Khaemba Makhakha.
 32. It is trite that, where land is registered in the name of a person not as the absolute owner but for the benefit of others, whether expressly or impliedly, a trust is deemed to have been created. The concept of a constructive trust arises where a person obtains property under circumstances that indicate an intention to benefit another party or to act as a custodian for the rights of others. This doctrine operates to prevent unjust enrichment and to protect equitable interests in property. The Court of Appeal in *Mwangi & Another v Mwangi* [1986] KLR 328 held that:

“The registration of a party as the proprietor of land under the Registered *Land Act* does not by itself negate the existence of a trust. The court is entitled to look behind the registration to determine the true ownership or the beneficial interest in the land.”
 33. Similarly, in *Kanyi v Muthiora* [1984] KLR 712, the Court reaffirmed that registration under the Registered *Land Act* does not relieve a trustee of the obligation to honour the interests of beneficiaries.



In the present case, the evidence adduced points to the fact that the Appellant's registration was not for his exclusive benefit. Rather, he holds the land in trust for the beneficiaries of the estate of Khaemba Makhakha. Failure by the Appellant to distribute the 20 acres among the rightful beneficiaries does not extinguish their equitable right/interest in the suit land.

34. This Court further observes that although the Respondents did not expressly plead the existence of a trust in their pleadings, the law is clear that a constructive or resulting trust may be inferred from the facts and circumstances of the case, even where it is not specifically pleaded. The Court is entitled to examine the totality of the evidence and determine whether the conduct of the parties and the nature of the transaction give rise to a trust. In *Wambugu v Njuguna* [1983] KLR 172, the Court of Appeal held as follows:

“A constructive trust is not necessarily based on the intention of the parties, but is imposed by law where it would be unconscionable for a person to deny the beneficial interest of another. Such a trust may be implied even if not pleaded.”

35. Similarly, in *Mukiri v Njoroge & Another* [2007] eKLR, the High Court observed:

“The court is enjoined to do justice in every matter before it. It has jurisdiction to infer and declare the existence of a trust from the facts before it, regardless of whether the trust was expressly pleaded.”

36. It is therefore the finding of this Court that the Appellant, though the registered proprietor of the 20 acres excised from Land Parcel No. Ndivisi/Khalumuli/740, holds the same in trust (constructive) for the benefit of the estate of Khaemba Makhakha(deceased) and cannot validly assert exclusive ownership rights to the detriment of the Respondents, who are acknowledged beneficiaries of the estate of Khaemba Makhakha.

37. On how the said 20 acres should be distributed, the Respondents in their plaint specified how the same ought to be divided, and even attached note dated 20/1/1998 as P-Exhibit 4 as well as minutes of a meeting held on 24/10/1998 as P-Exhibit 6. This court notes that the mode of distribution in the three documents varies. Faced with the said varying evidence, this court's mind is drawn to its mandate which is limited to determining questions of title, occupation, use, and environmental regulation of land.

38. In light of this, and to avoid travelling beyond its borders, this Court confines itself to making a finding on the status of the land in question that is, that the Appellant holds Land Parcel no. Ndivisi/Khalumuli/3090 in trust for the estate of Khaemba Makhakha.

39. In view of the foregoing, I find this appeal merited and the judgment of the trial court is hereby set aside and substituted with an order that the Appellant holds 20 acres in trust for the estate of Khaemba Makhakha. The Respondents' claim for distribution is hereby declined for want of jurisdiction.

40. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 18TH DAY OF SEPTEMBER, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Appellant-present



2. M/S Nekesa H/B for Masiga for the 2nd, 3rd and 5th Defendants.

3. 1st Respondent-present

