



**Mwendwa & 3 others v Peter Munyithya (Sued as the Administrator of the Estate of Munyaithianyaga Alias Munyuithia Mwendwa & another (Environment and Land Appeal E014 of 2021) [2022] KEELC 3240 (KLR) (7 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3240 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT AND LAND APPEAL E014 OF 2021**

**CK YANO, J**

**JUNE 7, 2022**

**BETWEEN**

**JENIFFER MUTHIO MWENDWA ..... 1<sup>ST</sup> APPELLANT  
DANIEL MWANZEA MWENDWA ..... 2<sup>ND</sup> APPELLANT  
STEPHEN MBUVI MWENDWA ..... 3<sup>RD</sup> APPELLANT  
CRYMANY MASAI NYAGA ..... 4<sup>TH</sup> APPELLANT**

**AND**

**PETER MUNYITHYA (SUED AS THE ADMINISTRATOR OF THE ESTATE OF MUNYAITHIANYAGA ALIAS MUNYUITHIA MWENDWA . 1<sup>ST</sup> RESPONDENT  
ANNET WANJA KINYUA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgement of the Chief Magistrate  
(Hon.J.M Njoroge) in Chuka CM ELC Case No.160 of 2018)*

**JUDGMENT**

**A. Introduction**

1. The appellants JEniffer Muthio Mwendwa & 3 others filed this appeal against the judgement and decree of the Chief Magistrate (Hon. J.M Njoroge) in Chuka CM ELC Case No. 160 of 2018 delivered on 06/10/2021 and set out the following 4 grounds of appeal:
  - i. The Learned Trial Magistrate erred in Law and in fact by her failure to analyze or isolate all the salient issues for determination as contained in the pleadings of all the parties in the case.



- ii. The learned trial Magistrate erred in law and fact by not making a finding of fact that the appellant had in fact made their case on the required standard of proof being on a preponderance of probability.
  - iii. The Learned Trial Magistrate erred in Law and fact by not making a finding of fact and a finding of law that the Respondents had not produced any evidence to rebut or controvert the Appellants assertions, evidence and theories but the Hon. Trial Magistrate still found in his favor.
  - iv. The Learned Trial Chief Magistrate erred in Law and fact by failing to consider the appellant's submission tendered before the court because had he done so, he would have come to a different conclusion.
2. The Appellants pray for orders:
- a. That this Appeal be allowed and the judgement and decree of the Chief Magistrate's Court delivered on the 6<sup>th</sup> October 2021 at Chuka be set aside with a declaration that Munyuithia Nyaga alias Munyithya Mwendwa, the 1<sup>st</sup> respondents father was registered as the proprietor of land Reg No. L.R No. Magumoni/Mukuuni/465 to hold in trust for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs since it was family land.
  - b. A declaration that Munyuitha Nyaga alias Munyithya Mwendwa (deceased) and the 1<sup>st</sup> respondent who is the administrator of his estate breached the trust bestowed upon them in respect to family land L. R NO. Magumoni/Mukuuni/465 which the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants had beneficial interest of half of 12.30 Acres which is 6.15 Acres.
  - c. A declaration that the alleged sale of one acre from Land Registration NO. Magumoni/Mukuuni/465 by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was fraudulent/illegal and therefore void.
  - d. An order to excise 6.5 Acres from L.R Magumoni/Mukuuni/465 and or from its subdivisions being Land Reg Magumoni/Mukuuni/2975, 2976 and 2977 have it registered in the names of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs in trust of their families.
  - e. Cost of the suit plus interests.

### **Background of the appeal**

- 3. The gist of the case as pleaded in the amended plaint is that the 1<sup>st</sup> Respondent is the Administrator of the estate of Munyuitha Nyaga alias Munyithya Mwendwa (deceased) and is the husband of Crustina Katui Kavita who was sued as the 2<sup>nd</sup> defendant. The 1<sup>st</sup> Appellant is the mother of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants and is a step grandmother of the 1<sup>st</sup> Respondent since the 1<sup>st</sup> Respondent's father Munyuithya Nyaga alias Munyuithya Mwendwa was her step son. The 1<sup>st</sup> Appellant is the widow of Nyaga Mwendwa (deceased) who was the father of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants and the paternal grandfather of the 1<sup>st</sup> Respondent.
- 4. The appellants averred that the said Nyaga Mwendwa had two households which are Molyoki Mwendwa as the 1<sup>st</sup> wife and Jeniffer Mwendwa the 1<sup>st</sup> Appellant as the 2<sup>nd</sup> wife.
- 5. The 1<sup>st</sup> household of Nyaga Mwendwa with Molyoki Mwendwa had the following children:-
  - a. Joseph Munyithya Mwendwa- deceased



- b. Maria Mwendwa
  - c. Kezia Mwebndwa (deceased)
  - d. Jackson Muthamia Nyaga alias Muthengi Nyaga (deceased)
6. The 2<sup>nd</sup> household of Nyaga Mwendwa with Jeniffer Muthio Mwendwa had the following children:-
- a. Daniel Mwanzea Mwendwa
  - b. Stephen Mbuvi Mwendwa
  - c. Joyce Kanyore Mwendwa
  - d. Crymant Masai Mwendwa
7. The Appellants contend that the 1<sup>st</sup> respondent father Munyuithia Nyaga alias Munyithya Mwendwa was registered as the proprietor of Land Reg No. Magumoni/Mukuuni /465 on 21<sup>st</sup> February 1966.
8. The Appellants contention was that during the process of gathering, demarcation, adjudication and registration Nyaga Mwendwa caused Land Registration No. Magumoni/Mukuuni/465 to be registered in the name of Munyuithia Nyaga- (deceased) the 1<sup>st</sup> respondent father being his oldest son from the 1<sup>st</sup> household to hold in trust for the benefit of the entire family including the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants.
9. The Appellants particularized the particulars of trust on the part of Munyuithia Nyaga the 1<sup>ST</sup> respondent's father as follows:-
- i. Being registered as the proprietor of land Reg No. Magumoni/Mukuuni/465
  - ii. Being the oldest son of Nyanga Mwendwa
  - iii. The 1<sup>st</sup> Appellant is the step mother of Munyuithya Nyaga alias Munyithya Mwendwa the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants are his step brothers.
  - iv. That Nyanga Mwenda the 1<sup>st</sup> Appellant 's husband and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicant's father and also the father of the 1<sup>st</sup> respondent had stated his wish before his death that land parcel No. Reg No. Magumoni/Mukuuni/465 be shared equally between the appellants and the 1<sup>st</sup> respondent father.
10. The Appellants averred that the said Munyuithia Nyaga died on the 30<sup>th</sup> July, 2001 before he could transfer Land Registration No. Magumoni/Mukuuni/465 into the names of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants.
11. The Appellants further averred that the 1<sup>st</sup> Respondent being the Administrator of the estate of Munyuithya Nyaga alias Munyithya Mwendwa was expected by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants to fulfil his obligations of the trust relationship which existed between his late father and the Appellants and subdivide half of Land Registration No. Magumoni/Mukuuni/465 into their names but despite constant verbal demands and requests he declined and by his actions he breached the trust. Particulars of trust were also enumerated as follows:
- a. Secretly and stealthily filing Succession Cause No. 170 of 2011 at the Chuka Chief Magistrate's Court without informing or notifying the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants while aware they were beneficiaries of the estate.



- b. Secretly and stealthily filing Succession Cause No. 3 of 2013 at the Chuka Chief Magistrate's Court without informing or notifying the Appellants while aware they were beneficiaries of the estate.
  - c. Fraudulently forging of court order purporting it to be Civil Appeal No. 1016 of 2015 and lifting a court order of inhibition against Land Registration No. Magumoni/Mukuuni/465.
  - d. Illegally transferring Land Registration No. Magumoni/Mukuuni/465 into his names.
  - e. Illegally subdividing Land Registration No. Magumoni/Mukuuni/2977.
  - f. Illegally transferring Land Registration No. Magumoni/Mukuuni/2975 into the name of Annet Wanja Kinyua, land Registration No. Magumoni/Mukuuni/2976 into his names and Land Registration No. Magumoni/Mukuuni/2977 into the name of Crustina Katui Kavita.
  - g. Disinheriting the Appellants.
12. The Appellants also listed particulars of fraud on the part of the Respondents and accused them of the acts complained herein above, adding that the 1<sup>st</sup> Respondent fraudulently and irregularly sold a portion measuring one (1) acre to the 2<sup>nd</sup> Respondent on 26.1.2013 without a certificate of confirmation of grant and while aware that the Appellants had an interest in the land.
13. The Appellants prayed for judgement against the Respondents jointly and severally as follows:
- a. A declaration that Muniyithia Nyaga alias Muniyithya Mwendwa, the 1<sup>st</sup> Respondent 's father was registered as the proprietor of Land Registration No. LR. No. Magumoni/Mukuuni/465 to hold in trust for the Appellants since it was family land.
  - b. A declaration that Muniyithia Nyaga alias Muniyithya Mwendwa (deceased) and the 1<sup>st</sup> Respondent who is the administrator of his estate breached the trust bestowed upon them in respect to family Land LR. NO. Magumoni/Mukuuni/465 which the Appellants had beneficial interest of half of 12.30 Acres which is 6.15 Acres.
  - c. A declaration that the alleged sale of one acre from Land Registration No. Magumoni/Mukuuni/465 by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent was fraudulent/illegal and therefore void.
  - d. An order to excise 6.15 Acres from L.R. MMagumoni/Mukuuni/465 and or from its subdivisions being Land Registration No. Magumoni/Mukuuni/2975, 2976 and 2977 and have it registered in the names of the Appellants in trust of their families.
  - e. Costs of the suit plus interests.
14. The Respondents filed a defence dated 5<sup>th</sup> March, 2021 which they denied the Appellants' claim. The 1<sup>st</sup> Respondent averred that he did not hold land parcel Number Magumoni/Mukuuni/465 in trust of the Appellants or anyone else. The 1<sup>st</sup> Respondent averred that Nyaga Mwendwa alias Muniyithya was solely registered as the owner of the said land as from the year 1966, and wondered why the Appellants did not claim trust during the lifetime of Nyaga Mwendwa from 1966 – 2001 before his demise if at all their claim was legitimate.
15. The 1<sup>st</sup> Respondent averred that there was no existing trust between the Appellants and Nyaga Mwendwa alias Muniyithya Nyaga and that the 1<sup>st</sup> Respondent had no business consulting the Appellants before instituting a Succession Cause in respect to the estate of Nyaga Mwendwa since they



- did not qualify to be the beneficiaries of the estate of the deceased. Further, that the Appellants had been provided for and allocated various parcels of land.
16. The 1<sup>st</sup> Respondent further averred that Land Parcel No. Magumoni/Mukuuni/465 did not form part of the estate of Nyaga Mwendwa alias Muniyithya Mwendwa as at the time of transacting, the said parcel was rightly registered in the name of the 1<sup>st</sup> Respondent.
  17. The 2<sup>nd</sup> Respondent averred that she was not privy to any issue of trust as pleaded by the Appellants, adding that she was an innocent purchaser for value having purchased one acre from the 1<sup>st</sup> Respondent. The Respondents pleaded that there was a pending suit before the High Court in Misc. Succession No. 21 of 2015 over the subject matter.
  18. After hearing evidence from the Appellants and the Respondents, the subordinate court found that the Appellants had not proved their case against the Respondents on a balance of probabilities and dismissed the Appellants' suit with no orders as to costs, hence this appeal.
  19. The appeal was canvassed by way of written submissions which were duly filed by both parties.

### **The Appellants' Submissions**

20. The Appellants submitted on three issues, the first being whether the learned trial magistrate erred in law and in fact by failing to consider the appellants' submissions tendered before the court because had he done so, he would have come to a different conclusion.
21. The Appellants contend that several issues were canvassed in the appellants' submissions on whether the 1<sup>st</sup> Respondent fraudulently and irregularly sold a portion measuring one acre to the 2<sup>nd</sup> Respondent on 26<sup>th</sup> January, 2013 without a certificate of confirmation of grant and while aware that the Appellants had an interest in the suit land. The Appellants submitted that it was clear that the Certificate of confirmation of Grant was issued to the 1<sup>st</sup> Respondent on 6<sup>th</sup> November, 2013 yet he had sold the land to the second Respondent on 26<sup>th</sup> January the same year. That the sale agreement between the two and witnessed by Crostina Katui Kavitu ID No. xxxx and Geoffrey Murithi Muchiri ID No. xxxx was enough evidence to prove that it was fraudulent and irregular since the certificate of confirmation of grant had not been issued to the 1<sup>st</sup> respondent.
22. The Appellants relied on the case of *In re Estate of Kakua Kioko (Deceased)* (2018) eKLR and also relied in the case of *Madison Maroko Nyamweya vs Bernard Ngaramaroko & Another* (2016) eKLR adopted with approval in the case of *Santuzza Billoti alias Mei Santuzza vs Gacanria Balasconi* (2014) eKLR on powers of succession court to order a cancellation of a title deed if the deceased property was being fraudulently taken away by non-beneficiaries such as where the property is being sold before the grant is confirmed.
23. The Appellants submitted that despite submitting the precedents the trial magistrate never considered them in making his judgement.
24. The second issue the Appellants submitted on was whether the learned trial Magistrate erred in Law and in fact by not making a finding of fact that the appellants had in fact made their case on the required standard of proof being on a preponderance of probability.
25. The Appellants submitted inter alia that from the evidence tendered, the pleadings and proceedings, it was clear that the appellants had proved their case on a balance of probabilities against the 1<sup>st</sup> and 2<sup>nd</sup> respondents as prayed in the plaint and were entitled to the prayers sought as per the plaint.



26. The Appellants submitted that the respondent's 2<sup>nd</sup> witness was Daniel Mwanzea Mwendwa who adopted his evidence as per his statement dated on 5<sup>th</sup> June 2018 while the 3<sup>rd</sup> Appellant's witness was Stephen Mbuvi Mwendwa who also adopted his statement dated 5<sup>th</sup> June 2018 and the 4<sup>th</sup> Appellant's witness was Crymant Masai Nyaga who also adopted his statement dated the 5<sup>th</sup> June 2018.
27. The Appellants further submitted that the 1<sup>st</sup> respondent being the Administrator of the estate of Munyuithya Nyaga alias Munyithya Mwendwa was expected by the Appellants to fulfill his obligation of the trust relationship which existed between his late father and the Appellants to subdivide half of land Reg. No. Magumoni/muukuni/465 into their names but despite constant verbal demands and requests he declined and by his actions breached the trust as enumerated by the Appellants.
28. The third issue submitted by the Appellants was whether the Learned Trial Magistrate erred in Law and in fact by not making a finding of fact and law that the respondents had not produced any evidence to rebut or controvert the Appellant's assertions, evidence and theories but still ruled in their favor.
29. The Appellants aver that there were five (5) witnesses called in support of their case. That the 1<sup>st</sup> respondent's evidence which was adopted from her witness statement dated 5<sup>th</sup> June 2018 gave a chronologic breakdown and history of the said parcels of land.
30. The Appellants further averred that during the process of gathering demarcation, adjudication and registration one Nyaga Mwendwa caused L.R No. Magumoni/Mukuuni/456 to be registered in the name of Munyuithia Nyaga (Deceased) who is the first Respondent's father from the first household to hold in trust for the benefit of the entire family including herself and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants. That since by that time her children were young the tradition was that the oldest son to be registered as a trustee on behalf of other children. The Appellants submitted that Section 26 of the [Law of Succession Act](#) makes provision for dependents and clothes the court with jurisdiction to make provision upon the dependants from the estate on application.
31. The Appellants have also cited Section 29 of the Succession Act that defines a dependant. They have also relied on the Muranga ELC Case No.5 of 2017 (Justus Maina Muruku versus Jane Waithira Mwangi (KLR) where the judge stated that section 28 of the [Land Registration Act](#) specifically provides for overriding interest as may subsist on the land and affect it without it being noted on the register such as customary trusts.
32. The Appellants concluded by submitting that Munyuithia Nyaga alias Munyuithia Mwendwa (deceased) was registered as the registered owner of Land Reg. No. Magumoni/Mukuuni 465 as a trustee of the Appellants and therefore the 1<sup>st</sup> respondent who is the administrator of the estate thereof breached the said trust by declining to transfer half of the suit land to the Appellants and that the respondents did not produce any evidence to rebut or controvert the Appellants' assertions, evidence and theories and pray for the appeal to be allowed.

### **The Respondent's Submissions**

33. The respondents have submitted that on 25.01.22 this Honourable Court directed that the appeal be canvassed by way of written submissions.
34. The respondents submitted that the appellants and the 1<sup>st</sup> Respondents are related by blood and the 1<sup>st</sup> Appellant is the mother to all the other appellants. That the 1<sup>st</sup> Appellant is the step grandmother to the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> appellants to 4<sup>th</sup> appellants are uncles to the 1<sup>st</sup> Respondent. That the 2<sup>nd</sup> respondent is a bona fide purchaser for value who bought a portion of land parcel Magumoni/Mukuuni/465 from the 1<sup>st</sup> Respondent after the issuance of confirmation of grant.



35. The respondent submitted that the deceased person Munyithya Mwendwa is the father to the 1<sup>st</sup> Respondent and the grandfather to the 1<sup>st</sup> Respondent and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> Appellants was one Nyaga Kibondo who was a polygamous man and had two wives to wit; the 1<sup>st</sup> appellant Jenifer Muthio and one Mulyoki (deceased).
36. The respondent submissions was that during the trial, the 1<sup>st</sup> Respondent told the court that his grandfather had distributed his estate to all his sons before his demise which fact was not objected to by the appellants as follows:-
- i. Land parcel Magumoni/Mukuuni/464 was bequeathed to Muthengi Nyaga
  - ii. Land parcel Magumoni/Mukuuni/465 was bequeathed to Munyithya Nyaga
  - iii. Land parcel Magumoni/Mukuuni/641 was left in the name of Nyaga Kibondo holding in trust for his 2<sup>nd</sup> wife Muthio Jeniffer and his children and in this case that is the 1<sup>st</sup> appellant.
37. The Respondent identified the following issues that are in contention: -
- i. Whether the land parcel Magumoni/Mukuuni/465 the subject property was registered in the name of Munyithya Nyaga (deceased) to hold in trust for the appellants?
  - ii. Whether the deceased person herein breached that trust if at all it existed?
  - iii. Whether the Appellants have been in occupation and possession of the subject property
  - iv. Whether the 1<sup>st</sup> Respondent filed the Succession Cause No.170 of 2011 at Chuka in concealment of material facts and went ahead to transfer illegally land parcel Magumoni/Mukuuni/465 without a confirmed grant.
38. On the first issue whether the subject property Magumoni/Mukuuni/465 was trust land, the Respondent referred to the case of Kiarie –vs- Kinuthia on the requirements for it to be referred to as trust land. The aforementioned case put forth the requirements to wit; the nature of the holding of the land, the intention of the parties, the relationship of the parties or whether the claimant belongs to such family, clan or group.
39. The respondent submitted that it is not in dispute that the subject property was ancestral land and the same was registered in the name of the deceased herein one Munyithya Nyagaa as alias Mwendwa on first registration in 1966 as per the green card produced before the trial court. That Section 27 & 28 of Registered Land Act, Cap 300 state that the rights of a registered proprietor of registered land under the Act are absolute and indefeasible and only subject to rights and encumbrances noted on the register or overriding interests which are set under section 30 of the Act.
40. On the issue whether the deceased being a member of the family was designated the subject property with the aim of holding the same in trust for the whole family since it had been established that it was ancestral land; the Respondents submitted that the father to the deceased person Nyaga Kibondo transmitted his parcels to him save for land parcel Magumoni/Mukuuni/ 641 which was left registered in his name. That this fact was echoed by the Appellants that indeed a share was given out and therefore it would only be prudent for the appellants being the sons of Nyaga Kibondo to claim a share in land Parcel Magumoni/Mukuuni/641 where their father was holding in trust for them as his family. The Respondents submitted that a copy of the green card on land parcel Magumoni/Mukuuni/641 demonstrating that indeed it was left in the name of Nyaga Kibondo was produced before the trial Court.



41. The respondents aver that that land parcels Magumoni/Mukuuni/464, 465 & 641 formed part of ancestral land in regard to the family herein and that all of them were transmitted to family members during the lifetime of Nyaga Kibondo, would not have been his intention to have land parcel Magumoni/465 as trust land. The respondents submitted that there was no intentions to have ancestral land to be held in trust as guided by the case of Kiarie Vs Kinuthia (supra) which put forth intention as one of the essentials in determining trust land.
42. The respondents contend that it was also noteworthy to note that during trial, the Appellants in verbatim told the court that despite them growing up around the area and the subject property, they had never occupied nor cultivated the same. That the 1<sup>st</sup> Respondent told the court that in 1995, his deceased father called him out from Ukambani because he was elderly and sickly and wanted him to come around and take care of his property being the subject property. That since 1995 the 1<sup>st</sup> Respondent began cultivating and occupying the parcel with his father Munyithya who is now deceased. That this statement wasn't objected to by the appellants.
43. The respondents cited Section 30(g) of the Registered Lands Act that states that; the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation save where inquiry is made of such person and the rights are not disclosed. That that Section offers an overriding interest to the person in possession or in actual occupation of that registered property and that in this scenario the 1st Respondent demonstrated to the Court that he lived and occupied the subject property which fact was not objected to by the appellants during trial. That exceptionally where courts ignore the fact that even where the parties have not lived or occupied the suit property, they would also be warranted to benefit from the trust land but in this case it would be quite different.
44. The respondents further submitted that the subject property 465 and land parcel Maguni/mukuuni/464 border each other and that the appellants and specifically the 2<sup>nd</sup> Appellant told the court that he lives on L.R 464. The Respondents wondered how it would have been possible that the Appellants did not get a chance to cultivate during the lifetime of the deceased if at all the father of the 1st Respondent was holding the parcel in trust for them.
45. The respondents further submitted that the Appellants have never brought a suit claiming trust but only filed a suit after the death of Munyithya Nyaga the deceased herein. That all the appellants are mature adults in their 40s and therefore it is illogical how one could hold the subject property in trust for them for over 40 years.
46. The respondents contend that the Appellants indolently came up to claim trust long after the death of the person alleged to be holding their property in trust. That no efforts have been shown from them demonstrating that they tried to preserve their property if at all the same was trust land. That the appellants did not lodge a caution on the land during the lifetime of the deceased person to avoid further transmissions if they were interested in the land. That the records as per the green card, indicates that the caution was lodged in October, 2011, a few months after the death of the deceased. That it is demonstrative that all the appellants were content with what was left for them, that is Magumoni/Mukuuni/641.
47. The respondents submitted that the appellants lodged the claim of trust to disturb the peace of the 1st Respondent when they realized that his father was long gone. They quoted one of the maxims of equity that states that 'Equity does not aid the indolent but rather the vigilant' because forty years was a long time for one to go silent and only rise from the slumber to come and claim a parcel of land that they had never occupied or lived.



48. The respondents submitted that the subject property was registered in the name of Muniyithya on first registration therefore possessing an absolute and indefeasible title.
49. The respondents cited the case of *Isack M'inanga Kiebia V Isaaya Theuri M'Lintari & another* [2018] in which it was held that in ascertaining trust, 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. That what is essential is the nature of the holding of the land and the intention of the parties.
50. Regarding what was the intention of the parties; the Respondents submitted that it is not in dispute that they are all family members from the lineage of Nyaga Kibondo and that Nyaga distributed his parcels during his lifetime to his sons. That if he wished the property to be held in trust, he would have left the land parcels Magumoni/Mukuuni/464 & 465 untransferred so that they would automatically devolve to other family members.
51. The respondents have also cited the case of *Juletabi African Adventure Limited & another V Christopher Michael Lockley* [2017] eKLR in which it was held; "it is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because 'the law never implies, the court never presumes a trust but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create trust must be clearly determined before a trust will be implied."
52. The respondents submitted inter alia that on the first issue the appellants raised in their submissions as to whether the 1st respondent filed his succession in concealment of material facts, the Respondents stated that the Appellants are step-uncles of the 1st Respondent and under the *Law of Succession Act*, Cap 160, the step-uncles and grandmothers have no right to inherit from the estate of Muniyithya Mwendwa especially when he had children who survived him.
53. The respondent further submitted that Section 38 of the *Law of Succession Act*, Cap 160 provides for where the deceased person dies intestate and leaves behind no spouse but leaves behind children and that it is the children who takes priority in benefiting from that estate which is applicable in this case. That the Appellants are step uncles to the 1<sup>st</sup> respondent and therefore there was no chance for them to have been prioritized in sharing out the estate of the deceased. That it was therefore not prudent for the 1<sup>st</sup> Respondent to inform the appellants who are his uncles of his father's succession cause.
54. Regarding the Appellants allegations that the 1st Respondent sub-divided and transferred out land parcel Magumoni/Mukuuni/465 to the 2nd Respondent without a confirmed grant the 1st Respondent stated that he addressed the claims and stated that it was only by the fact that the 2nd respondent was funding him for the succession cause and that all the rightful beneficiaries were aware. That he transferred the parcel to her after the issuance of confirmation of grant. Additionally, the Respondents submitted that this court is not seized with jurisdiction to determine succession matters because the issue of when the land parcel was transferred is a matter of succession and what is before court is only a claim of trust that the appellants have not adduced enough evidence to be entitled to the share in the subject property.
55. In conclusion the respondents have cited the case of *Muthuita Vs Muthuita* [1982-88] where the Court of Appeal held that customary law trust is proved by leading evidence. That trust is a question of fact which must be proved by whoever is claiming a right under customary trust.

### **Analysis and Determination**

56. I have considered the record of appeal, the grounds of appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-



analyse the evidence on record to determine whether the conclusions reached by the learned magistrate were justified on the basis of the evidence presented and the law. In the case of *Selle and another –vs- Associated Motor Boat Company Ltd and others* (1968) 1 EA 123 it was held:

“...this court must consider 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 this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence...”

57. It was also held in *Mwangi –vs- Wambugu* (1984) KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.

58. The issues for determination in this appeal as I can deduce from the grounds of appeal are:

- i. Whether the trial magistrate rightly held that the existence of a trust had not been proved.
- ii. Whether the trial magistrate rightly found that the appellants had not proved their case on a balance of probabilities and dismissed the suit.
- iii. Whether the decision of the learned trial magistrate was against the weight of the evidence and the law.

59. Regarding the first issue, in this case, the Appellants contention is that during the process of gathering, demarcation, adjudication and registration one Nyaga Mwendwa caused registration of land NO. Magumoni/Mukuuni/465 to be registered in the name of Munyuithia Nyaga (deceased), the 1<sup>st</sup> Respondent’s father because he was his oldest son from the 1<sup>st</sup> household to hold it in trusts for the benefit of the entire family, including the Appellants herein.

60. In the case of *Juletabi African Adventure Limited & another –vs- Christopher Michael Lockley* [2017] eKLR, the Court of Appeal held:

“It is settled law that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because the law never implies, the court never presumes, a trust, but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

61. The elements to be considered for one to qualify to be a trustee were also set out by the Supreme Court in *Isack M’Inanga Kieba –vs- Isaaya Theuri M’Lintari & another* (supra). The burden of proving that the suit parcel herein was ancestral land and that the 1<sup>st</sup> Respondent’s deceased father was registered as proprietor of the suit land in trust squarely lay on the Appellants. In this case, the evidence on record was that Nyaga Kibondo (deceased) had three parcels of land which he distributed during his lifetime. These parcels were Magumoni/Mukuuni/464, 465 and 641. The material on record did not show that the appellants objected to the said distribution. Moreover, the deceased did not leave any parcel intact to devolve after his demise. By distributing the parcels as he did showed that he did not harbour the intention of having the property held in trust. Furthermore, from the evidence on record, there is no evidence that show that the appellants objected to the said distribution. The Appellants in the case did not tender any evidence to demonstrate that the suit parcel was held in trust, and therefore did not



discharge the burden of proving the alleged trust. The trial magistrate therefore rightly held that parcel NO. Magumoni/Mukuuni/465 was not registered to be held in trust for the benefit of the appellants or anyone else. In any event, the Appellants never brought a claim against the deceased claiming trust. It is quite interesting to note that the Appellants only filed suit long after the demise of the deceased.

62. The next issue for consideration is whether the decision of the learned trial magistrate was against the weight of the evidence and the law. In this case, the Appellants were claiming the suit parcel based on alleged trust. The weight of the evidence presented to the trial court did not prove that the property was held in trust. Further, whereas the Appellants alleged that the 1<sup>st</sup> Respondent fraudulently and irregularly sold a portion of the suit parcel to the 2<sup>nd</sup> Respondent, it is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. See the case of *Central Bank of Kenya -vs- Trust Bank Limited & 4 Others* [1996] eKLR; *Gladys Wanjiru Ngacha -vs- Theresa Chepsaat & 4 Others* [2013] eKLR among others. From the evidence presented, I am not persuaded that there was proof of the alleged fraud. In essence, the trial magistrate decided the case on the weight of the evidence brought before him and rightly arrived at the decision he made. The finding and holding of the learned trial magistrate were well founded and I find no basis to upset it.
63. In the result, I find that there is no merit in this appeal and the same is hereby dismissed with costs to the Respondents.
64. Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT CHUKA THIS 7<sup>TH</sup> DAY JUNE, 2022  
IN THE PRESENCE OF:**

**CA: Ann**

N/A for Appellants

N/A for Respondents

**C. K. YANO,**

**JUDGE.**

