



**Ongalo v Ang’iyo (Environment and Land Appeal E009 of 2023)
[2025] KEELC 4354 (KLR) (21 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4354 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E009 OF 2023**

**A NYUKURI, J
MAY 21, 2025**

BETWEEN

GIDEON OKATCH ONGALO APPELLANT

AND

HARRISON NAMUTENDA ANG’IYO RESPONDENT

JUDGMENT

Introduction

1. This appeal by Gideon Okatch Ongalo the administrator of the estate of Hezekiah Malika challenges the judgment of Honourable E. Wasike, (SPM) delivered on 25th July, 2023 in Butere MCLE Case No. 17 of 2020. In the impugned judgment, the learned trial magistrate found that the appellant held the parcel of land known as Kisa/Khushiku/175 in customary trust for the respondent and consequently allowed the respondent’s claim.

Background

2. By a plaint dated 3rd August, 2020, the respondent herein who was the plaintiff in Butere MCLE Case No. 17 of 2020 sought against the defendant (the appellant herein) the following orders;
 - a. A declaration that the defendant or the estate of the deceased Hezekiah Malika holds 0.16 Hectares out of L.R No. Kisa/Khushiku/175 in trust for the plaintiff.
 - b. An order be issued to the defendant in person or as administrator of the estate of deceased Hezekiah Malika to transfer 0.16 ha out of L.R No. Kisa/Khushiku/175 to the plaintiff and in default thereof the executive officer of Butere Principal Magistrate’s court to effect the said transfer.
 - c. An order of permanent injunction be issued restraining the defendant, his assignees, agents or whomsoever claims from him or successors of the estate of deceased. Hezekiah Malika from



dealing in any manner with 0.16 hectares out of L.R No. Kisa/Khushiku/175 in possession of the plaintiff.

- d. Costs of this suit.
3. The plaintiff averred that parcel of land known as L.R No. Kisa/Khushiku/175 (hereinafter referred to as the suit property) originally belonged to his father the late Japheth Angiyo Ongalo was registered in the name of his younger brother Hezekiah Malika in 1966 when the latter was still a minor to hold it in his trust for both himself and the plaintiff. He averred that he has lived on the suit property for over 70 years and that there exists a trust in his favour.
4. The plaintiff complained that despite being aware of the trust, the defendant who is a son and administrator of the estate of the late Hezekiah Malika went ahead to register himself as proprietor of the suit property and or as administrator of the deceased after secretly filing Succession Cause No. 202 of 2019, yet the plaintiff has been in possession of a portion thereof measuring 0.16 hectares. He maintained that despite the aforesaid registration, his interest is an overriding interest on the title of the suit property.
5. In a defence dated 26th July, 2022, the defendant denied the plaintiff's claim and stated that there was no evidence to show that the suit property belonged to Japheth Angiyo Ongalo and that since the plaintiff was older than Hezekiah Malika the latter could not have held the land in trust for him.
6. He further stated that the plaintiff had been allocated other parcels of land by his late father including L.R No. Kisa/Mushangubu/975. Further that the suit property which measures 0.32ha is the sole inheritance for the defendant from his father. That the plaintiff holds the aforesaid parcel of land in trust for other family members. He argued that the plaintiff ought to have raised his claim in the succession cause as a dependant of his brother's estate and that Hezekiah Malika is the first registered owner of the suit property.
7. The matter proceeding to hearing by way of oral testimony. The plaintiff presented two witnesses while the defendant presented one witness. In giving their evidence, witnesses adopted contents of their respective witness statements as their evidence in chief before being subjected to cross-examination.

Plaintiff's evidence

8. PW1 was Harrison Namtenda Angiyo the plaintiff. His testimony was that the defendant was his nephew and a son of his late brother Hezekiah Malika a.k.a Readon Malika Ongalo, who is the registered proprietor of the suit property. He accused the defendant of secretly carrying out succession being succession cause at Butere Case No. 202 of 2019 whereof he registered himself as proprietor of the suit property. He stated that he had been in possession of 0.16 hectares of the suit property for over seventy years as the same was ancestral land owned by his late father Japheth Ang'yo Ongalo. He stated that he had buried his deceased family members on the suit property including his two wives and two sons without any objections from the late Hezekiah Malika. That Hezekiah Malika in his lifetime knew that the land belonged to him and the plaintiff. He maintained that there existed a trust between the estate of Hezekiah Malika and himself, hence the defendant holds 0.16 hectares of the suit property in trust for him.
9. In cross-examination, he stated that the defendant did not involve the family in the succession cause. He averred that in 1974 the suit property was in the name of Japheth Ongalo. Further that Hezekiah Malika was not the original owner of the suit property. He claimed that the defendant got himself registered as proprietor of the suit property through fraud. Further that his father died in 1967, and that in 1966 his father although still alive was ailing. He conceded that he had no proof to show that



the land was in the name of his late father before being registered in the name of Hezekiah Malika. He stated that in 1967 he was 24 years and Hezekiah was 17 years. He averred that he built his house on the suit property in 1980's and put up his house where his parents had shown him and that in 2005, the family agreed on how to share the land.

10. He further stated that his older brother called Daniel Aswani was the administrator of his father's estate and that he had three parcels, namely Nos. 975, 171 and the one occupied by Daniel. That Hezekiah was given half of No. 975. He also informed court that Hezekiah died in 1993. That he had not provided evidence that he had a home on the suit property. He stated that when adjudication was done in 1966 he was away in college. That parcel no. 975 is in the names of his father and the defendant was to get that whole parcel. That the land is occupied by the defendant's mother who was the wife of Hezekiah and who had served him with an eviction order. He stated that he bought parcel Kisa/Mushangubu/157 in 1981.
11. PW2 was Daniel Aswani Ongalo the plaintiff's elder brother. He testified that he was the eldest son in the family of Angiyo and had the responsibility of taking care of his younger siblings and family property. He stated that the suit property originally belonged to his late father Japheth Ang'iyo Ongalo who passed on in 1967 leaving four sons and daughters from different mothers. That together with his brothers, they have been occupying the suit property peacefully without any dispute. That Reardon Malika Ongalo aka Hezekiah Malika married a lady named Ruth and they were blessed with a child named Japheth Angiyo before she left and remarried one Nyende Osundwa where she lives with her family. That Ruth came back when Hezekiah Malika was sick and on 17th September, 2005 and it was resolved that the witness, the plaintiff and Ruth should stay in the suit property. That Hezekiah had another wife called Silber the mother of the defendant.
12. That the plaintiff buried his deceased family members of two wives, a son and grand child on the suit property without protest from anyone and that the witness late father and mother were also buried on the suit property. He maintained that the suit property was their ancestral home and that the plaintiff has known the same as his home as he was born, raised and still reside thereon, and now 70 years. He denied knowledge of how the suit property was registered in the defendant's name.
13. That on 7th August, 2020, the County Surveyor visited the suit property and in the presence of all the parties and neighbours confirmed the acreage of each occupant, prepared a report and filed it in court.
14. On cross-examination, he stated that Reardon Malika Ongalo and Hezekiah Malika is one and he same person, the father of the defendant, and that he was their last born brother. That when his father died he was an adult and that the plaintiff was in a Teachers college while Hezekiah was still a minor. That is 1974 when he searched the property Nos. 175 and 975 the same, were in his father's name and that in 1966 their father was bed ridden and could not have made a transfer to Hezekiah. He stated that the suit property was in Hezekiah's name as of 1974.
15. The witness stated that he was not aware that the defendant had filed succession in regard to Hezekiah's estate. He stated that although he lives on the suit property, by the resolution made in 2005, he has no claim over the same as he has his own parcel no 174 where he has a home. He also stated that he does not use the suit property.
16. Further, he stated that the shop on the suit property was in the plaintiff's portion. That marked the close of the plaintiff's case.



Defendant's evidence

17. DW1 was Gideon Okatch Ongalo the defendant. His testimony was that the suit property is registered in the name of his father the late Hezekiah Malika. That in 2019, he filed a succession cause vide Butere Succession Case No. 202 of 2021 and subsequently obtained certificate of confirmation of grant. He stated that he holds the suit property in trust for Zipporah Ongayo Khakwala, Stalin Okooli Ongalo, Martin Ahono Ongalo, Sharon Malika Ongalo, Bennah Ndanyi Ongalo and Ruth Andayi Keya. That his father was the first registered owner of the suit property and that he is not aware of family elder resolutions over the same.
18. The witness conceded to the fact that the plaintiff was using a portion of the suit property but stated that the land is registered in the name of Hezekiah Malika and that the same has never registered in the name of Japheth Angiyo Ongalo as Hezekiah was the first registered owner.
19. He argued that the register of the suit property shows that the suit property was not owned in common tenancy with the plaintiff and maintained that there was no evidence of trust.
20. In cross-examination, he stated that he was born in 1982 and as of that date the plaintiff was residing on the suit property. That the plaintiff did not farm on the suit property and that he buried his first wife and child on the suit property. Further that his grandfather Japheth Ongalo was buried on the suit property. He stated that his father was 13 years when he was bequeathed the land and that his father held the suit property in trust for the plaintiff. In cross-examination, he stated that both parcel Nos. 975 and 175 originally belonged to his grandfather and that the plaintiff constructed a shop on the suit property. That marked the close of the defence case.
21. Upon considering the pleadings, evidence and submissions, the trial court found that there was no proof of fraud in the registration of the suit property in the name of Hezekiah Malika. The trial court further found that the plaintiff's claim that he had been living on the suit property for over 70 years was not controverted as the defence evidence led credence to that claim as the defendant confirmed in his evidence that the suit property originally belonged to his grandfather Japheth Onyiyo Ongalo, that the plaintiff is his uncle and that the land was bequeathed to his father while he was still a minor. The court also observed that the defendant confirmed that upon birth he found the plaintiff residing on the suit property and stated that his father held the land in trust for the plaintiff. The trial court therefore concluded that the suit property was family land, both parties are family members and therefore there is a customary trust in respect of the same. On that basis, the trial court allowed the plaintiff's claim.
22. Aggrieved with the judgment of the trial court, the appellant herein who was the defendant in the lower court challenged the same vide a Memorandum of Appeal dated 3rd August, 2023 citing the following five grounds.;

 - a. That the trial magistrate erred in law in finding that the Appellant holds a portion of land parcel registration no. Kisa/khushiku/175 in trust for the respondent when there was no proof of trust.
 - b. That the trial court erred in finding that the plaintiff had proved his case on balance of probability.
 - c. That the trial court erred in law by relying on uncorroborated and contradicting evidence by the respondent and his witnesses which evidence did not support the claim by the respondent.



- d. That the trial court erred in holding that the respondent was entitled to land parcel registration no. Kisa/khushiku/175 when the respondent has alternative land which he succeeded from his father.
 - e. That the trial magistrate erred in holding that the estate of the deceased does not transfer the land parcel registration no. Kisa/khushiku/175 to respondent when the estate of the deceased had already been distributed to the rightful heirs.
23. Consequently, the appellant sought that the appeal be allowed with costs and that the trial court's decision be set aside.
24. The appeal was disposed by way of written submissions. On record are the appellant's submissions dated 20th April, 2024 and the respondent's submissions dated 16th September, 2024.

Appellant's submissions

25. Counsel for the appellant submitted in regard to grounds one and two of the Memorandum of Appeal that the respondent failed to prove the existence of any form of trust. Counsel argued that PW2 admitted vacating the suit property to his parcel but that the respondent had refused to vacate to his land. Reliance was placed on the cases of *Domnic Otieno Ogonyo & 2 Others –vs- Helida Akoth Walori(2022)eKLR* and *Mumo –vs- Makau(2002)EA 170* and Section 107 of the *Evidence Act* for the proposition that whoever alleges the existence of customary trust must prove it.
26. Counsel pointed out that the respondent was obligated to demonstrate that the suit property is family, clan or group land, that he belonged to such family, that his relationship to such family was not remote, that he could have been entitled to be the registered as owner or beneficiary but for some intervening circumstances and that the claim was against the registered owner who is a member of the family.
27. It was submitted for the appellant that the suit property was never registered in the name of Japheth Angiyo the grandfather of the appellant and that since Hezekiah Malika was the 1st registered owner thereof his title is indefeasible. Counsel argued that the respondent had trespassed on his brother's land.
28. Concerning evidence, counsel contended that the trial court erred in relying on uncorroborated and contradictory evidence as the respondent witness stated that the respondent had another parcel of land.
29. While elaborating ground four of the appeal, counsel maintained that the trial court was wrong in ordering the transfer of the suit property to the respondent when the same had already been distributed to the rightful heirs by the succession court. Section 24 of the *Land Registration Act* was referred to, for the proposition that title is protected under the law and a registered proprietor has absolute ownership.

Respondent's submissions

30. Counsel for the respondent submitted that the trial court was right in finding that there was a trust as the appellant confirmed that when he was born in 1982, he found the respondent residing on the suit property and that he buried his wife and child thereon. Further that the appellants grandfather had been buried on the suit property and that he was the one that bequeathed the suit property to the appellant's father who was still a minor aged 13 years.
31. It was further submitted for the respondent in reliance of the case of *Isack Minanga Kiebia –vs- Isaya Theuri Mlintari & Another (2018) e KLR* that the Supreme court has settled what constitute elements for proof of customary trust. Counsel argued that the trial court rightly applied the reasoning in the above decision to arrive at its decision. They contended that the parties herein are family members and residing on the suit property. Counsel also argued that as sections 25 and 26 of the Registered *Land*



Act refer to rights of a proprietor, section 28 thereof refers to overriding interests on title and that as the respondent had demonstrated occupation of the suit property for over 70 years, he had an overriding interest therein.

32. Regarding the fourth ground of appeal that the suit property had been distributed in the succession cause and no order could be made in regard thereto, counsel argued that the trial court was right in finding that a succession court cannot make a determination on the question of trust. Reliance was placed on the case of *Re estate of Mbai Wainaina (deceased)* Nairobi High Court Succession Cause no. 864 of 1996 for the proposition that a probate and administration court has no power to make a finding on trusts and the only court with such power is the Environment and Land Court. Counsel argued that at the hearing before the trial court, the succession case had not been determined and no confirmed grant was produced in evidence in support of ground five of the appeal. Counsel also argued that the record of appeal was incompetent as there was no decree, respondent submissions and certificate of confirmation of grant.

Analysis and determination

33. This court has carefully considered the appeal, parties' rival submissions and the entire record. This being a first appeal, the duty of this court is to re-evaluate, re-analyze and re-assess the evidence tendered before the trial court and make its own independent conclusions bearing in mind that it had no advantage of seeing or hearing witnesses and therefore make due allowance for that.

34. The role of the first appellate court was discussed in the case of *Gitobu Imanyara & 2 Others v. Attorney General* [2016] eKLR, by the Court of Appeal as follows;

“An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

35. Having considered the grounds of appeal raised in the Memorandum of Appeal, my view is that the same raises two main issues for this court's determination;

- a. Whether the trial court was wrong in finding that there existed a customary trust between the appellant and the respondent.
- b. Whether a confirmed grant from a family court is a bar to a claim of land based on trust.

36. It is not disputed that the suit property herein was first registered in the name of Hezekiah Malukah the appellant's deceased father and that the respondent had been in occupation of a portion thereof before the appellant was born to date. Section 26 of the Land Registration Act provides for conclusiveness of title as follows;

Certificate of title to be held as conclusive evidence of proprietorship

1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or



- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

37. Therefore, registration vests in a proprietor of land, absolute and indefeasible rights, unless there is evidence that the acquisition of such title was by fraud, misrepresentation, want of procedure, illegality or corruption, whether or not the registered proprietor was party thereto.

38. The respondent's claim was that the suit property had been held by the appellant in trust for him.

39. Section 28 (b) of the [Land Registration Act](#) which is a reflection of Section 30 of Registered [Land Act](#) Cap 300(repealed)provides for overriding interests on registered land which includes trusts, as follows:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

a

b. Trusts including customary trusts;”

40. Therefore, trusts including customary trusts are overriding interests on registered land, which, although not noted in the register, all registered land is subject to. Allegations of a trust including customary trust must be proved by the person asserting existence thereof.

41. In the case of *Kanyi v Muthiora* (1984) KLR 712 CA the Court of Appeal held that registration of land in the name of a registered proprietor under the Registered [Land Act](#) did not extinguish right under Kikuyu Customary law or relieve a proprietor of her obligations as a trustee. In the case of *Kamau v Thiga* (Environment and Land Appeal 5 of 2021) [2022] KEELC 2839 (KLR) (21 July 2022) (Judgment) the court sated as follows;

The legal burden of proving existence of trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person claiming must prove that;

The suit properties were ancestral land;During adjudication and consolidation, one member of the family was designated to hold on behalf of the family;The registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. In essence he had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.

42. Similarly, in the case of *Isack Kieba M'ninga v Isaaya Theuri M'Lintari & Another* [2018] e KLR, the Supreme Court of Kenya explained customary trust 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 favour 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: are:1.The land in question was before registration, family, clan or group land.2.The claimant belongs to such family, clan, or group3.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.”

43. Therefore, to prove customary trust, a claimant must show that;
- a. The land in question was before registration, family, clan or group land.
 - b. The claimant belongs to such family, clan, or group.
 - c. 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.
 - d. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and
 - e. The claim is directed against the registered proprietor who is a member of the family, clan or group.
44. From the evidence on record, it is clear that on 30th September 1966, the suit property was registered in the name of Hezekiah Malika and on 13th February 2020 the same was registered in the name of the appellant pursuant to proceedings in Butere Succession Cause No. 202 of 2019. It is also not disputed that Hezekiah Malika was brother of the respondent and they were both sons of Japheth Angiyo Ongalo. Although the suit property was first registered in the name of Hezekiah, the appellant conceded in evidence that the land originally belonged to his grandfather Japheth Angiyo Ongalo and was registered in the name of Hezekiah when he was still a minor. He further conceded that when he was born in 1982, he found the respondent residing on the suit property. The appellant himself confirmed in cross examination that he held the suit property in trust for the respondent.
45. It is therefore clear that the suit property was before registration, family land belonging to the family of Japheth Angiyo Ongalo. It is also clear that the respondent being a son of Japheth Angiyo Ongalo belongs to Ongalo’s family and his relationship to that family is not remote to render his claim adventurous. Further, as the suit property belonged to the respondent’s father, the respondent was as of 1966 entitled to be registered as owner of the suit property, but due to his unavailability, the same was registered in the name of his minor brother during adjudication; and the claim was properly directed against the appellant who is the registered proprietor of the suit property.
46. Therefore, the evidence on record unequivocally demonstrate that the suit property was family land and the appellant held part of the same in trust for the respondent. The respondent claimed to be entitled to 0.16 hectares. That claim was not challenged by the appellant. In the premises I find and hold that the trial court was right in applying the principles laid down in the case of Isack Minanga (supra) and in finding that the appellant held the suit property in trust for the respondent.
47. Concerning the appellant’s argument that the suit property was subject of succession proceedings and had been awarded to the heirs and could not be transferred to the respondent, it is trite that a succession court deals with the distribution of a deceased’s estate and not questions of ownership, title or trust which arose in this dispute.
48. In the case of Re estate of Julius Wachira (Deceased) [2022] e KLR, the court stated as follows;
- “ The applicants (the respondent herein) claim existence of a trust in their favour. It could be very well that such trust does not exist. However, it is not for this court to declare it. None has been demonstrated by way of declaration by a court of competent jurisdiction. Ideally



the applicants ought to have moved a civil or land court to make a declaration of trust in their favour which they would then seek to enforce against the estate.”

49. Similarly, in the case of *Re estate of Mbai Wainaina (Deceased)* [2015] e KLR the court stated as follows;

“ Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the *Law of Succession Act* is limited. It does not extend to determining issues of ownership of property and declaration of trusts.”

50. Therefore, the succession court did not settle the claim on ownership and or trust regarding the suit property, hence the trial court was right in finding as much.

51. For the above reasons, I find and hold that there is no justification for this court to interfere with the findings and conclusions made by the trial court, which rightly found the existence of a trust in favour of the respondent and further that the distribution of the estate by a succession court is not a bar to a claim based on trust. In the premises, I find no merit in this appeal which I hereby dismiss. As the parties herein are related, I make no order as to costs.

52. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 21ST DAY OF MAY, 2025

A. NYUKURI

JUDGE

In the presence of;

Ms Andia for the appellant

No appearance for the respondent

Court Assistant: M. Nguyai

