



REPUBLIC OF KENYA



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**JNK v RMM ((Sued as the Guardian and Litem of SMK)) (Environment and Land
Case 59 of 2017) [2025] KEHC 12783 (KLR) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12783 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
ENVIRONMENT AND LAND CASE 59 OF 2017
EO OBAGA, J
SEPTEMBER 18, 2025**

BETWEEN

JNK PLAINTIFF

AND

RMM DEFENDANT

(SUED AS THE GUARDIAN AND LITEM OF SMK)

JUDGMENT

1. The Plaintiff had sued his brother SMWK claiming the following reliefs:
 1. Permanent injunction against the Defendant by himself, his servants, employees and or agents restraining them from removing, evicting the Plaintiff and interfering with whatever manner with the Plaintiff quiet and peaceful enjoyment of parcel of land No. Mukaa/Konza Kiima Kiu Block 1/XX until this suit is heard and determined.
 2. A declaration that the Plaintiff is legally entitled to joint ownership over title No. Mukaa/Konza Kiima Kiu Block 1/XX with the Defendant who held the same in trust for the Plaintiff and other family members.
 3. The court be pleased to order cancellation and nullification of title deed for parcel No. Mukaa/Konza Kiima Kiu Block 1/XX issued in the name of the Defendant and subsequently order subdivision, distribution of the said property among the family members the Plaintiff included.
 4. The cost of the suit.
 5. Any other or further relief that the court may deem fit to grant.



2. When it became apparent that the Defendant would not participate in the proceedings due to his mental incapacity as a result of an assault, the plaint was amended and his wife was sued as his guardian and next friend.
3. The two brothers were sons of WKK (deceased) who is said to have been a police officer who passed away in 1968. The deceased left behind two wives. The two brothers' mother was KK.
4. The widows of the deceased used his gratuity and pension to purchase pieces of land from Kalembwani and Ngaamba Farmers Limited. It is the Plaintiff's case that as the Defendant was his elder brother, their mother allowed him to be registered as owner of the land then known as plot 8X which upon registration became Mukaa/Konza Kiima Kiu Block 1/XX (suit property). It is the Plaintiff's case that in the year 1999, the Defendant secretly went to Makueni Lands Registry and caused the suit property to be registered in his name.
5. The Plaintiff contends that the Defendant has refused to share the suit property amongst the other family members. The Plaintiff further contends that as the suit property was purchased through proceeds of gratuity and pension of their father, the property is family property which he is holding in trust for the other family members.
6. It is the Plaintiff's case that the Defendant took advantage of the illiteracy of their mother to have the suit property fraudulently registered as his own. The Plaintiff had recorded his witness statement which was filed in court on 5th April, 2017. In his oral testimony in court, the Plaintiff testified that he is the one who used to make payments for the suit property through money given to him by their mother but all the receipts came out in the Defendant's name.
7. He stated that at the time of purchase of the suit property, their mother had no identity card and women were not allowed to have property registered in their names. He stated that he is the one who kept all the original receipts. He had briefly gone out of the country and on coming back, clan members were called who referred them to the police who declined to handle the matter. They were referred to the District Officer who referred them to court to file a case.
8. On the Defendant's part, the wife of the Defendant who was allowed to come into the suit as guardian and next friend of the Defendant stated that suit property was purchased by her husband and that sometime later, the Plaintiff started putting up a permanent house on the suit property. When they asked him why he was doing that, he told them that he was putting up a house for their mother. He was then allowed to do so. The Defendant stated that the Plaintiff does not reside on the suit property and that the ancestral land is at Kamunthini.
9. The Defendant further stated that the suit property was purchased by her husband who was then working for [Particulars Withheld] which is now known as [Particulars Withheld]. She stated that the Plaintiff was young when the suit property was purchased and that he was only allowed to stay on the suit property as his mother was on the land. The Defendant prayed that the Plaintiff be permanently barred from interfering with the suit property in terms of the prayers in the counterclaim.
10. There was a sister to the two brothers herein who was allowed in these proceedings as an interested party. She neither filed any defence nor came to court to pursue her interest beyond filing an application for joinder which was allowed.
11. The parties were directed to file written submissions. The Plaintiff filed his submissions dated 14th April, 2025. The Plaintiff submitted that he had proved a case of customary trust and relied on the case of *Kazungu Fondo Shutu & Another -vs- Japhet Noti Charo & Another* (2021) eKLR where the court



of Appeal relied on its earlier decision in the case of Juletabi African Adventure Limited & Another – vs- Christopher Michael Lockley (2017) eKLR where it was held as follows:

“The law never implies, the court never presumes a trust, but (only) 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”.

12. The Plaintiff further relied on the case of Isaack Kieba M’Inanga –vs- Issaya Theuri M’Lintury & Another (2018) eKLR where it was held as follows:

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land”.

13. In the Isaack Kieba M’Inanga case (Supra), the Supreme Court set out the following principles:

“Some of the elements that would qualify a claimant as a trustee are:

- 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.
- e. The claim is directed against the registered proprietor who is a member of the family, clan or group”.

14. On 7th May, 2025, the Defendant’s counsel sought an extension of 7 days within which to file submissions. As at 17th September, 2025 when writing this judgment, the Defendant had not filed her submissions.

15. I have carefully considered the evidence adduced by the parties herein as well as the submissions by the Plaintiff. The main issue for determination is whether the Plaintiff has established that the suit property was family land as to call for presumption of customary trust. The other issue is whether the Plaintiff and Defendant are entitled to their respective reliefs in their claims.

16. As was held in the case of Salesio M’Itonga M’ithara & 3 others (2015) eKLR, it is trite law that trust is a question of fact and has to be proved by evidence. Further, as was held in the case of Isimbu –vs- Isimbu (Environment & Land Case E010 of 2021)(2024) KEELC, customary trust is a matter of evidence not inference. The burden of proof lies with the person who wishes the court to make a finding as to the existence of such trust. It is an issue both of fact and law which requires serious demonstration through proper evidence.

17. In the instant case, the Plaintiff states that the suit property was purchased by their mother using proceeds of pension and gratuity of their deceased father who was a police officer. There was no iota of



evidence adduced to show that the Plaintiff's father was a serving police officer or a retiree as at the time he died in 1968. There was also no evidence adduced to show that their mother received any proceeds from gratuity or pension of her husband which she used to pay for purchase of the land.

18. All the receipts which were produced by the Plaintiff were issued in the name of the Defendant. At the time of hearing, the court was informed that the Plaintiff had lined up three witnesses but two had since passed on and the remaining one was elderly and could not come to court. The counsel for the Plaintiff did not specify the two who had died or apply for their statements to be admitted in evidence.
19. As the witness statements are on record and have a direct bearing on the quality of evidence by the Plaintiff, I will inevitably comment on the same in relation to the evidence by the Plaintiff.
20. The witness statement of Darlton Kimweli Mutiso filed on 5th April, 2017 states that he had been engaged by the Defendant as a mason. On 9th October, 1989, the Defendant gave him a sketch map on how he intended to subdivide his father's property that is the suit property. According to the sketch map, the suit property was to be subdivided into two portions. This statement is contradicted by the one of Japhet Ngungu Muumbi who claimed that in 2005, the Plaintiff's mother wanted him to subdivide the suit property amongst his two sons. He directed the Plaintiff's mother to involve the chief who asked Darlton Kimweli Mutiso to go to the Defendant. It is alleged Darlton went to the Defendant who could only communicate through writing. He allegedly gave Darlton a sketch map of subdivision. This cannot be true because as at 2005, the Defendant had already had the suit property registered in his name in 1999 and could not possibly give a sketch map in 2005 as claimed by Japhet Muumbi.
21. As was said in the case of *Isaack Kieba M'Inanga* (Supra), each case has to be determined on its own merits and quality of evidence. The quality of evidence in this case is wanting. It cannot be relied on. I therefore find that as there is no prove that the suit property was family land, no trust can be found in favour of the Plaintiff.
22. There is evidence that the parties herein even sought police intervention but police declined to do so as this was a civil matter. The Defendant's wife in re-examination stated that the original receipts were taken from her at the police station. The mere presence of the original receipts with the Plaintiff is not proof that he is the one who made payments on behalf of his mother. I therefore find that the Plaintiff has failed to prove his case on a balance of probabilities. On the other hand, I find that the Defendant has proved that the suit property belongs to her husband who is the Defendant. Consequently, I dismiss the Plaintiff's suit and allow the counterclaim in terms of prayer (a). As the parties are siblings, I order that each do bear their own costs.

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HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 18TH DAY OF SEPTEMBER, 2025.

In the presence of:

Ms. Muturi for Ms. Kivisya for Plaintiff.

Court Assistant – Steve Musyoki

