



Oloo v Oloo & 2 others (Environment and Land Appeal 014 of 2023) [2025] KEELC 4773 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4773 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL 014 OF 2023**

**AE DENA, J
JUNE 26, 2025**

BETWEEN

JAMES OPONDO OLOO APPELLANT

AND

PETER OTIENO OLOO 1ST RESPONDENT

KENNEDY ONGANYO OTUTO 2ND RESPONDENT

THE DISTRICT LAND REGISTRAR SIAYA 3RD RESPONDENT

JUDGMENT

1. This is a judgement on appeal against the judgement of the Siaya Principal Magistrate Court (SPM) in Siaya ELC Case No. 98 of 2021 delivered on 19/4/2023. The appeal is premised on the grounds listed in the Memorandum of Appeal dated 25/04/2023.
 1. That the learned Magistrate erred in law and fact by failing to find and hold the 2nd respondent was not a purchaser for value without notice of any defect in title and or registration.
 2. That the learned Magistrate erred in law and fact by failing to address at all the issue of land trust which formed the crux of the dispute
 3. That the learned Magistrate erred in law and fact by failing to find and hold that the 2nd defendant did not prove his case as against the plaintiff to the required standard.
 4. That the learned Magistrate erred in law and fact by descending to determine issues not pleaded and canvassed by parties at trial hence arriving at a wrong decision
 5. That the learned Magistrate erred in law and fact by failing to appreciate that the 1st defendant had no authority to deal with the land as a personal property for want of being a trust land.



6. That the learned Magistrate erred in law and fact by dismissing the plaintiffs suit anchored on article 10(1)(b),10(2)(b) and 159(2)(d)(e) of *the Constitution* of Kenya 2010
 7. That the learned Magistrate failed to appreciate that the facts as deposed and the evidence as adduced by the plaintiff were not controverted and that the suit ought to have succeed on that basis.
 8. That the learned Magistrate erred in law and fact by making a decision in favor of the 1st defendant that exceeded the weight of the facts, evidence as adduced by the plaintiff hence at a biased decision
 9. That the learned Magistrate erred by arriving at a decision in favor of the defendants that was against the weight of evidence on record
 10. That the learned Magistrate failed to exercise her discretion judiciously in awarding costs to the 2nd defendant.
- 2 It is proposed to ask this court for orders that;-
- a. The appeal be allowed
 - b. The judgement and orders of Hon. L.Simiyu SPM in ELC Case. No.98 of 2021 at Siaya Principal Magistrates Court delivered on the 19th day of April 2023 be set aside and the plaintiffs suit in the lower court be allowed as prayed
 - c. The appellant be awarded the costs of this appeal and the Lower Court.
- 3 Upon admission of the Appeal, the court ordered that the same be canvassed by way of written submissions. Both parties filed their submissions.

Appellants Submissions

4. The appellant submissions are dated 10/01/2024. It is submitted that the suit property belonged to the appellants father and was registered in the name of the 1st respondent as the eldest son to hold in trust for the remaining beneficiaries including the appellant.
5. The appellant outlined several aspects of a customary trust starting with the nature of land in African Relations and set the defining characteristics as set out by the Supreme Court Kenya in the case of Isack M'inanga Kiebia Vs Isaaya Theuri & Ano (2018)eKLR. It is submitted that mere registration did not confer on the 1st respondent ownership in the English sense. That pursuant to the provisions of section 28 of the *Land Registration Act* 2012 all registered land is subject to overriding interests which includes a customary trust. That the land is held by one generation for the benefit of succeeding generations. That one did not have to prove possession or actual occupation. Further reference is made to the case of Mbui Mukangu Vs.Gerald Mutwiri (2004)eKLR on intergenerational equity.
6. Having examined the root of the title against the prescriptive elements listed by the Supreme Court in Isack M'inanga Kiebia (supra) the appellant urges that he qualifies as a claimant for purposes of a customary trust the land having been ancestral. That a customary trust subsisted at the time of sale of the land to the 2nd respondent.
7. The appellant discussed the jurisprudence laid out on the concept of bonafide purchaser for value without notice, as set in Munyu Maina V Hiram Gathiha Maina (2013)eKLR, Arthi Highway Developeres Limited Vs West End Butchery Limited & 6 Others (2015)eKLR and Funzi Development Ltd & Others Vs County Council of Kwale (2014)eKLR to the effect that once title is found to be to



be plagued with illegalities then the title is null and void and any purchaser cannot place reliance on the doctrine.

8. The appellant also rehashed the contrary position taken in the case of David Peterson Kiengo & 2 Others Vs Kariuki Thuo (2012)eKLR which was on the basis of the torrens system where title is guaranteed by the state as to its correctness and which was the position taken by the 2nd respondent.
9. The appellant submits further that the position as to an innocent purchase for value without notice was pronounced with finality by the Supreme Court in Dina Management Vs. County Government of Mombasa & 5 Others (2023) eKLR to the effect that there is no protection to a title to a property obtained irregularly or illegally. Mere records on the register will not suffice. That a bonafide purchaser is a diligent purchaser and in the present case the 2nd respondent failed in this regard as his evidence is that he was not expected to ascertain the nature of the ownership of the suit property. that having failed to carry out the requisite due diligence the resulting purchase was illegal, null and void. The court is invited to grant the prayers in the plaint.

1st Respondents Submissions

- 10 The 1st Respondents submissions are dated 20/2/2024. Rehashing the grounds of appeal it is submitted that the 1st respondent is the first registered owner right from adjudication as per the green card produced with no indication that he was holding the land in trust. That even assuming he held the same in trust he is entitled to deal with his portion as he pleased. That the 2nd respondent purchased a portion thereof.
- 11 It is contended that as the 1st registered proprietor he has absolute ownership of the land together with all rights appurtenant thereto free from all other interests. That the 2nd respondent has done a lot of development and the 1st respondent is not in a position to compensate him were the court to allow the appeal. That he was ready and willing to transfer the portion he sold to the 2nd respondent. The court is urged to dismiss the appeal with costs to the 1st respondent.

2nd Respondents Submissions

- 12 The 2nd respondents' submissions are dated 29/01/2024. The 1st and second limbs of the 2nd respondent echo the 1st respondents submissions on 1st registration and there being no endorsement on the title to the effect that that the land was held on trust. That assuming that were the position land held under trust is still capable of subdivision for sale to a third party. That the 1st defendant consequently had a right to sell his portion. Reliance is placed in the case of ELC Misc. Civil Suit No. 62 of 2013 In the Matter of Sale of a portion of Parcel of Land No. Dagoretti/Riruta/2028 Eunice Wanjeri Njenga. That customary trust was not pleaded and prayed for and the trial court rightly held so.
- 13 It is submitted that the 2nd Respondent is an innocent purchaser for value without notice who honestly intended to purchase the property in good faith without notice of fraud. The court is referred to the case of Eldoret ELC Case No.117 of 2014 Falcom Global Logistics Co.Ltd Vs Management Committee Eldama Ravine Boarding Primary School. In addition it is urged that the provisions of section 24,25 and 26 of the Land registration Act 2012 the registered proprietor enjoys absolute ownership, free from all other interests and his title is conclusive evidence he is indefeasible owner.
- 14 Responding to the ground that the trial court erred by failing to find that the 2nd respondent did not prove his case as against the plaintiff to the required standard, it is submitted that the burden of proof was for the appellant to prove his case on a balance of probability and not for the 2nd respondent to prove his case. It is also urged that the 2nd respondent proved he undertook due diligence, entered into



a valid land sale agreement with the 1st respondent and proceeded to develop the portion accordingly. That the development were confirmed by the appellant.

- 15 Lastly it is contended that the appellant has failed to submit on grounds 4,6,7,8,9 and 10 of the Memorandum of Appeal the same should be treated as abandoned. The court is urged to dismiss the appeal with costs.

Issues For Determination

- 16 The court has analysed the Record of Appeal the rival submissions and considered the law. The issues commending determination are;-
- i. Whether or not the Appeal is merited?
 - ii. What orders ought to issue?
 - iii. Who bears the costs of the Appeal and the lower court case.

Analysis And Determination

- 17 The duty of an appellate court is stipulated under Section 78 of the [Civil Procedure Act](#) which states as follows

“Subject to such conditions and limitations as may be prescribed, an appellate court shall have power;

- (a) to determine a case finally;
- (b) to remand a case;
- c. to frame issues and refer them for trial;
- d. to take additional evidence or to require the evidence to be taken;
- (e) to order a new trial.

(2,) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

- 18 I will also be guided by the case of *Selle Vs. Associated Motor Boat Co. (EA.123)* where the court stated thus; -

‘.....Briefly put this court must reconsider 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.’

- 19 The main issue that revolves around this appeal in my view is the issue of land trust. The appellants grievance with the judgement of the trial court is that the learned judge erred in law by failing to address at all the issue of land trust which formed the crux of the dispute. The 2nd defendant position is that the issue of trust was not pleaded. Is this the case?

- 20 Guided by the law above I proceeded to review the plaint dated 3/12/2021 to understand the nature of the cause of action. At paragraph 5 & 6 the land is pleaded to be ancestral land which belonged to the family patriarch John Oloo Owor. But having been registered in the name of the 1st born son (the 1st defendant) it was expected that he would hold the same in trust for the family members hence



his utmost fiduciary duty. At paragraph 5 (sic 7) it is pleaded that the suit property has been used as a family land. Looking at the entire plaint it is clear that the suit was largely based on the doctrine of trust and one did not have to go outside the pleadings to see this.

21 Did the trial court fail to address the issue of land trust as raised in the grounds of appeal? I then resorted to the judgement of the trial court dated 19/4/2023. Though not paginated the 2nd paragraph of the first page (page 69 of the ROA) summarises the plaintiffs case interalia ‘That the 1st Plaintiff was registered to hold the land is (sic) trust for all other heirs.’ At paragraph 12 of the judgement (page 74 of the ROA) reads

‘The defendant states that he cannot transfer the land because his brother objects.....The 1st defendant is still registered as owner and there is no prayer for declaration of any trust’.

22 From the foregoing and my review of the entire judgement the learned Magistrate did not consider the issue of trust for the reasons given. I have already noted the issue was very clear in the pleadings. While there is no specific prayer for declaration of a trust the prayers sought in the plaint were dependent upon the entire of the facts pleaded. I have already noted the pleadings and evidence in the matter pointed on a prima facie basis the issue of trust. The issue of trust could not just be wished away for the lack of a specific prayer for declaration of trust.

23 In regard to the above the court is guided by the holding in the case of *Odd Jobs Vs. Mubia* (1974) EA 476 where the court held interalia,

2 “with respect to the learned Judge, the issue does not flow from the pleadings. However, that notwithstanding, a court may base a decision on an unpleaded issue where as here, it appears from the course followed at the trial, that the issue has been left for the court for decision”.

24 Based on the foregoing it is the finding of this court that the learned Magistrate erred in law and fact by failing to address at all the issue of land trust which formed the crux of the dispute.

25 It is submitted on behalf of the plaintiff that a customary trust existed. It is important at this juncture to discuss the concept of a customary trust. Indeed the plaintiff rightly cited the case of *Isack M’inanga Kiebia Vs Isaaya Theuri & Ano* (2018)eKLR. Supreme Court Kenya which discussed customary trust and ownership of land. The apex court stated thus:-

52. Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered *Land Act*. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. 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:1.The land in question was before registration, family, clan or group land2.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.

26 I will therefore proceed based on the foregoing dictum/criteria to determine if the Plaintiff proved the existence of a trust. The plaintiff's case is based on the land being ancestral that has been used as family land by all. That the same was registered in the name of the 1st defendant as the 1st born to hold in trust for the rest of the family.

27 A certificate of search and green card for the suit property was produced by the Plaintiff which confirmed the registration of the 1st defendant as the first registered proprietor. The trial court also recognised the registration of the 1st defendant as the 1st registered owner. A review of the evidence shows that the 1st defendant admitted to the fact that the plaintiff is his brother beneficially entitled to inherit the suit land together with others. Infact this is how the trial Magistrate introduces the 1st defendants case at page 70 of the ROA. At paragraph 11 of the judgement the trial court states

‘All the parties are in agreement that both the plaintiff and 1st defendants are beneficiaries to this parcel.....’

28 The above therefore confirms the intention of the parties that the land would be used as family land. It is also not in dispute that the land before registration belonged to the family patriarch the father of both the plaintiff and the 1st defendant and who are both siblings. It is also clear that though the plaintiff would have been registered as proprietor the opportunity was given to the 1st born of the deceased.

29 Based on the foregoing and the criteria set out by the Supreme court having been largely satisfied it therefore follows that for all intents and purposes, the 1st Defendant is by operation of law a customary trustee.

30 The import of the decision of the Supreme court herein is that a first registration notwithstanding, customary trust may be imputed against the said registration and which is also one of the overriding interests recognised by law.

31 My review of the judgement of the trial court reveals that the trial court based its decision on the provisions of sections 26 of the [Land Registration Act](#) which provides that: -

“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.”



- 32 The trial court made a finding that there was no basis to impeach the title on the basis of fraud or misrepresentation since the same was not the issue. Which I agree but we have now seen that a customary trust is an overriding interest. This is the basis upon which the plaintiff wants the 2nd defendant out of the suit property.
- 33 I think the big issue is did the existence of a trust vitiate the sale of the quarter piece of land to the 2nd defendant by the 1st defendant? It is urged by the plaintiff that the 1st defendant has no authority to deal with the land as personal property. It is submitted by the 2nd respondent that assuming the land was held in trust, the 2nd defendant had a right to sell his portion out of the suit parcel.
- 34 I have read the decision In Re Eunice Wanjeri Njenga [2013] eKLR cited by counsel for the 2nd respondent in buttressing the above proposition. However, the same is distinguishable. In that case there was no dispute. The applicant who held the property for herself and in trust for her children simply wanted to sell a portion with a view to ploughing back for the benefit of the rest of the beneficiaries who were agreeable. The court then found the proposed investments prudent and allowed to subdivide and sale a portion thereof.
- 35 It is trite that a customary trust need not be registered on the title. It is an overriding interest that subsists on the land. It binds the land as was held in the case of Kanyi Vs Muthiora 1984 KLR 712 CA, it did not relieve the registered proprietor of the duties or obligations as trustee.
- 36 That being the case then what happens to the 2nd respondent interest? His case is that he is an innocent purchaser for value without notice of any defect in the title. The trial court at paragraph 13 pronounced that ‘ the 2nd defendant passes as an innocent proprietor for valuable consideration and there is no fraud in the manner of registration or sale.’ The plaintiff is of the contrary view.
- 37 Was the 2nd defendant an innocent purchaser and if yes what ought to have been his remedy? The defendant claims he is a bonafide purchaser of the suit properties. The doctrine of bonafide purchaser has been a subject of numerous litigations extending to the Apex court in Kenya. Black’s Law Dictionary 9th Edition defines who a bonafide purchaser is as hereunder; -
- “One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”
- 38 In the case of Katende v Haridas and Company Ltd. [2008] 2 E.A 173 the Court of Appeal in Uganda states the definition of a bona fide purchaser and the instances when a purchaser can successfully rely on the bona fide doctrine enumerated thus;-
- “For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:
- (1) he holds a certificate of title;
 - (2) he purchased the property in good faith;
 - (3) he had no knowledge of the fraud;
 - (4) he purchased for valuable consideration;
 - (5) the vendors had apparent valid title;



- (6) he purchased without notice of any fraud; and
- (7) he was not party to the fraud.”

39 Applying the above to the facts of the present case it is noteworthy that the 2nd defendant does not hold title and the reason was explained by DW1, he could not transfer because of the objections by his family and the caveat that was lodged by the plaintiff. However he relied on search documents issued by the land registry which showed the 1st defendant as owner. This therefore confirms the vendor had an apparent valid title. His evidence is he was not aware that the 1st defendant was not selling as an owner. Was there notice of fraud? In my view no because there are no allegations of fraud raised or proved against the 1st defendant. Did he purchase in good faith, in my view yes. It was his evidence that he was approached because the 1st defendant mother was ailing. Indeed PW1 admitted in cross examination that Mary Awuor the witness in the sale agreement was his stepmother. This was no stranger and from the hierarchy of succession ranked in priority as a widow of the deceased. I find no reason to disturb the trial court finding that the 2nd defendant was an innocent purchaser for value without notice.

40 So in view of the above finding what would be the 2nd defendant's remedy. The trial Magistrate found that ‘allowing the plaintiff would run mockery to genuine purchasers who will in turn be used the bail out landlords who later turn on them and deny them occupational rights.’ The trial court also found that the sale agreement could be enforced and finalised.

41 I have reviewed the oral testimonies adduced in court by the witnesses. PW1 admitted in cross examination that the 1st defendant ought to subdivide the property and he can only sell what is his. He admitted he was aware that the 1st defendant only sold ¼ acre which he admitted is fenced with barbed wire, a steel gate, a well and trees planted. He also admitted Mary Awuor was the stepmother. It follows therefore if the 1st defendant was entitled together with the mother then the sale agreement is only voidable and not a nullity and which could be enforced. I agree with the trial court in this regard.

42 Additionally my review of the sale agreement reveals that it met all the requirements stipulated in Section 3(3) of the Law of Contract Act.

43 In addition to the above what I note from the entire proceedings and the entire admission of the 1st defendant is a situation where equity needed to intervene to avoid an injustice or the mockery seen by the trial court. By dint of the sale agreement the 2nd defendant moved into the property and made the developments and of which he stated there was no injunction served upon him against developing the land. The word equity broadly means a branch of law denoting fundamental principles of justice.

44 Black’s Law Dictionary, Ninth Edition defines equity as,

“The body of principles constituting what is fair and right; The recourse to principles of justice to correct or supplement the law as applied to particular circumstances; The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called “Law” in the narrower sense) when the two conflict”

45 Additionally the Constitution of Kenya 2010 has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote this principle, amongst others.

46 I think I have said enough to show that at the end of the day I would not fault the final decision of the court except to add that there was a customary trust but it did not vitiate the sale agreement.



47 But were the orders as issued proper? The trial court made final orders as follows;-

1. The suit for the plaintiff fails and the 2nd defendant declared a bonafide purchaser
2. I make an order for sanctity of title as follows the 1st defendant to effect transfer in the name of the 2nd defendant for that parcel that was purchased and currently occupied by the developments of the 2nd defendant within 30 days of today
3. In default the Court Administrator does execute the necessary documents including mutations to facilitate transfer into the names of the 2nd defendant and registration by the 3rd defendant
4. 2nd defendant to pay cost necessary to effect the transfer and registration
5. The caveat placed by the plaintiff be lifted by 3rd defendant only for purposes of registering documents of the 2nd defendant but the same be placed back till the issues between the plaintiff and the 2nd defendant are resolved.
6. The Plaintiff and his brother 1st defendant to allow peaceful occupation by the 2nd defendant
7. SPENT.

49 Based on this courts analysis and findings it was pertinent that the first order of the day would be to make a declaration that the 1st defendant holds the suit property as trustee for the family of John Oloo Owor (deceased). I would have no problem with order No.2 except to emphasise that it should be restricted to the ¼ portion sold and not the entire parcel. I would retain order No.3 but substitute the court administrator with the Deputy Registrar ELC. Order Number three is not very clear but in my view the caveat shall remain by dint of the declaration that the land is held by the 1st Defendant as a trustee.

48 Section 13 (5) of the *Environment and Land Court Act* also empowers me to make any order and grant any relief as the court deems fit and just.

49 The appeal partly succeeds to the extent that the court has made a finding of the existence of a customary trust which binds the suit property. The following orders hereby issue to dispose of the Appeal

1. A declaration be and hereby issues that the 1st defendant holds the title South Alego/ Barding/1168 as trustee for the family of John Oloo Owor (deceased).
2. That the District Land Surveyor Siaya and the Land Registrar Siaya shall within 60 days of this judgement visit the ground and in the presence of the parties survey the portion purchased and currently occupied by the developments of the 2nd defendant in order to come up with the exact boundary of the portion under such occupation.
3. That Costs of (2) above shall be borne by the 2nd Defendant
4. The 1st defendant shall pursuant to (2) above facilitate the transfer of the excised portion in the name of the 2nd defendant within 30 days of conclusion the exercise in (2) above.
5. In default of (4) above the Deputy Registrar ELC shall execute the necessary documents including mutations to facilitate transfer into the names of the 2nd defendant and registration by the 3rd defendant at the cost of the 2nd defendant.



6. The caveat placed by the plaintiff be lifted by 3rd defendant only for purposes of registering the portion in (2) and shall be registered against the remainder of the title in view of (1) above until such a time as the family shall resolve to remove the same.
7. The Plaintiff and his brother 1st defendant shall allow peaceful occupation by the 2nd defendant.
8. Each Party shall bear its own costs of this appeal and the costs in the lower court.

Orders accordingly

DELIVERED AND DATED AT SIAYA THIS 26TH DAY OF JUNE 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

26/06/2025

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

Mr. Oduol for the Appellant

Mr. Odhiambo the for 2nd Respondent

Mr. Peter Oloo 1st Respondent in person

Court Assistant: Ishmael Orwa

