



**Roche v Roche & another (Civil Appeal 177 of 2019)  
[2025] KECA 1637 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1637 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 177 OF 2019  
HA OMONDI, LK KIMARU & LA ACHODE, JJA  
OCTOBER 3, 2025**

**BETWEEN**

**JOHN ODHIAMBO ROCHE ..... APPELLANT**

**AND**

**CYPRIAN LAURA ROCHE ..... 1<sup>ST</sup> RESPONDENT**

**FREDRICK ONG'ONDO ROCHE ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the judgment and decree of the Environment and Land Court  
at Migori (Ong'ondo J.) dated 20th March 2019 in ELC No 311 of 2017)*

**JUDGMENT**

1. Time and again in land disputes, the court is called upon to render itself on whether registration of a person as the proprietor of land, confers on them absolute rights over and above those who are unregistered, but have a justifiable claim over the same land as a result of customary trust. That is precisely the nature of the dispute that has brought the Roche family before us in this appeal.
2. It all began when Cyprian Laura Roche, the 1<sup>st</sup> respondent herein, filed a plaint dated 2<sup>nd</sup> July 2014 in the Environment and Land Court, against John Odhiambo Roche, the appellant and Fredrick Ong'ondo Roche, the 2<sup>nd</sup> respondent. The three litigants are siblings. Cyprian was seeking for:
  - i. An order for a declaration that the defendant holds a portion of land parcel No. Kanyamwa/Kabonyo- Kwandiku/1629 measuring approximately one acre including the father's homestead in trust for the plaintiff.
  - ii. An order for the rectification of the register for land parcel No. Kanyamwa/Kabonyo-Kwandiku/1629 and 2009 by excising a portion measuring one (1.0) acre from each and creating a parcel of land measuring two (2.0) acres inclusive of father's homestead and registering the same in the name of the plaintiff.



- iii. Costs of this suit together with interest thereon at the rate of 14% p.a from the date of filing the suit until payment in full.
3. The father of the litigants died in 1971 and their mother in 2005, leaving the parents' home abandoned. Cyprian had returned home from Denmark in 1992 and with the consent of the family members, she rehabilitated the dilapidated homestead at a cost of about Kshs. 2,510,000. She then assigned Islem Otieno Yusuf, Pw2 and John Okello Kasera Pw3, caretaker duties over the home. In the same year, Fredrick was registered as the proprietor of the land, LR No. Kanyamwa/Kabonyo-Kwandiku/1629 (the suit land), measuring 3.4 Ha. This parcel includes their parents' homestead which stands on 0.8 Ha and which he was to hold in trust for John and Cyprian.
  4. The original land LR No. Kanyamwa/Kabonyo- Kwandiku /662 was therefore subdivided into two portions creating the suit land. Fredrick got his portion out of the original land. He also agreed to give 1.0 acres of the original parcel, contiguous to the homestead, to Cyprian. However, in June 2014, John expressed his intention to sell and alienate the suit land together with the renovated homestead, notwithstanding Cyprian's equitable interest thereon.
  5. John contended in his statement of defence dated 14<sup>th</sup> July 2014, that Cyprian carried out illegal and unlawful reconstructions on the suit land of her own volition, and therefore, she was a trespasser. He averred that he is the rightful owner of the suit land following a successful land adjudication process, to which Cyprian did not object as required under Section 26 of the [Land Adjudication Act](#). He denied that any fiduciary relationship existed between Cyprian and himself.
  6. Cyprian filed a reply dated 28<sup>th</sup> July 2014 to the defence, and stated that the rehabilitation of their parent's homestead came as a result of a resolution by the family and that in any case, where constructive or implied trust is created, proof of fiduciary relationship is not necessary.
  7. The litigants were nine siblings in total being two brothers and seven sisters. Upon the demise of their father, the family land was held in trust by their eldest brother Fredrick, for the rest of the family. Cyprian renovated the parents' home at a cost of Kshs. 2,510,000 and produced a valuation report compiled by Tysons Ltd to prove as much. Subsequently, Fredrick gave John his entitlement. During adjudication the original parcel no. 662 was subdivided into parcel no. 1629 measuring 3.4 Ha which was allocated to John, and parcel no. 2009 measuring
  2. 3 Ha which Fredrick retained. Cyprian did not receive her share of one acre which was to include the parents' home as earlier agreed by the family.
  8. According to Fredrick, he and John had earlier agreed with their mother during the adjudication process in Homa Bay, to consider their sisters during the adjudication process if they came forward. None of the sisters came forward. However, their mother instructed that Cyprian should be allocated the homestead since she was not married.
  9. John's view in the trial court was that the suit land should belong to him, along with the homestead situated thereon, since he is the last-born son and that traditionally, daughters are not entitled to ancestral land. He now wished to sell the suit land that is in his name, and retain the parent's homestead.
  10. Upon considering the matter before him, Ong'ondo J rendered a judgment dated 20<sup>th</sup> March 2019 and found in favour of Cyprian in terms of prayers no. i) and ii) in the plaint. John was condemned to pay the costs. That decision irked John and provoked this appeal.
  11. In the memorandum of appeal dated 8<sup>th</sup> August 2019, John alleged that the learned Judge erred in law and in fact by: making a finding that he was holding parcel no. Kanyamwa/Kabonyo-Kwandiku/1629 in trust; failing to find that the parcel of land given to Cyprian is the homestead that houses all the



- other family members during functions; disregarding John’s evidence on proof of ownership from the time of adjudication; and, rendering a judgment that was against the weight of evidence on record.
12. John filed written submissions dated 5<sup>th</sup> February 2025, vide the firm of M/s Amondi & company Advocates, and urged that he is the first registered owner of the suit parcel, pursuant to a successful process of land adjudication. He posited that the only way to challenge the process of adjudication was for the respondents to raise objections under Section 26 of the *Land Adjudication Act*, and thereafter appeal to the Minister under Section 29, or consider Judicial Review proceedings in the Land and Environment court.
  13. John urged that a trust relationship would only arise where evidence is led to that effect, and where the suit parcel is registered in the name of the parties’ father. He urged that the learned Judge erred in implying and presuming the existence of a trust without demonstration of any such intention by the parties. He took refuge in the Supreme Court decision in *Isack Kieba M’inanga vs Isaaya Theuri M’Lintari & Another SCOK No.10/2015*, where the Court held that, not every claim of a right qualifies as a customary trust and it was upon the respondents to lead evidence proving that indeed a constructive trust existed.
  14. John contended that the learned Judge ignored evidence adduced to the effect that there are interested parties. More specifically, the daughters and grandchildren of the patriarch who will be left homeless, whenever they visit the home and cannot access the homestead which is locked by Cyprian. It was further urged that each party should bear their own costs, since they are family members and the cause of action arose out of an adjudication process, in which John has not been accused or demonstrated to have acted fraudulently.
  15. In rebuttal, Cyprian filed submissions dated 18<sup>th</sup> October 2024 vide the firm of M/s G.S. Okoth & Co. Advocates and urged that the notice of appeal and the appeal were filed out of the prescribed time and therefore, there is no appeal before this Court. However, she proceeded to contest the appeal stating that before the adjudication process, the suit property belonged to their late father but during adjudication the property was recorded in the name of Fredrick as the eldest son.
  16. Cyprian urged that from the testimonies of both John and Fredrick, it is evident that if she was male, she would have been considered in the adjudication process. The original Land Parcel No. 662 was subdivided into Land parcel No. 1629 which was allocated to John and 2009 which Fredrick retained and was ready to surrender one acre to Cyprian. Cyprian contended that the only barrier to the family’s resolution that she should be allocated one acre out of her father’s estate was John’s insistence on retrogressive culture and beliefs which are repugnant to justice and morality.
  17. Cyprian relied on Section 3(2) of the *Judicature Act* to urge that customary law is applicable only to the extent that it is not repugnant to justice and morality. She invoked Article 27 on the principle of equality, including the right to equal opportunities regarding culture. She also referred to Section 25 (1) (b) and (2) of the *Land Registration Act* (L.R Act) to state that a proprietor’s right is subject to liabilities, rights and interests as declared under Section 28 and that nothing in the section relieves a proprietor from a duty that he is subject to as a trustee. She pointed out that Section 28 (b) of the L. R. Act stipulates that unless stated otherwise in the register, registered land is subject to trusts, including customary trust, without it being noted in the register.
  18. To buttress her position, Cyprian cited *Mumo v Mueni* [2002] 1 EA 170 (CAK) where this Court held that a trust is a question of fact and must be proved. She urged that John failed to consider that the portion awarded to her is the homestead that accommodates all other family members during family functions.



19. The appeal came up for plenary hearing on 10<sup>th</sup> February 2025. Ms. Mwangi learned counsel held brief for Mr. Amondi learned counsel for John and relied on the filed submissions. She added that there was no evidence that the land was held under customary trust, or that the family intended it to be held in trust for family members. She argued that proper land adjudication was conducted to register John as the proprietor and the first registered owner of the suit parcel. In her view Cyprian should have moved the court under Section 26 of the *Law of Succession Act*. She urged that the appeal be allowed and the decree set aside.
20. G. S. Okoth learned counsel, appeared on behalf of Cyprian. He also relied on the filed submissions and added that the question of adjudication did not arise in the pleadings, or later in the memorandum of appeal and raising it in the submissions flouts rule 107 of the Court of Appeal Rules.
21. The sum of it is that John is before us on a first appeal. Our duty on first appeal as stated by this Court in *Abok James Odera T/A A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, is that:
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority versus Kusthon (Kenya) Limited* (2000) 2EA 212 wherein the Court of Appeal held, inter alia, that: -
- “On a first appeal from the High court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
22. We have anxiously considered the record, grounds of appeal and the rival submissions. The tension herein is between John on the one hand, holding that Cyprian is a trespasser, and Cyprian on the other hand, urging the Court to invoke a customary trust and find that a portion measuring one acre out of the suit land was held in trust for her. Then there is the secondary question of who should bear the costs of the suit.
23. Cyprian raised some preliminary issues that we disposed of first. She urged that the notice of appeal and the appeal itself were filed out of the prescribed time and therefore, there is no appeal before this Court. Also that the question of adjudication did not arise in the pleadings, or in the memorandum of appeal, and raising it at this belated hour in the submissions flouts rule 107 of the Court of Appeal Rules.
24. We did not delve into the first preliminary issue because, although the Court can move on its own motion to strike out an appeal filed out of time, or raise the issue of its own accord, the respondent was also under a duty to be alert and move the Court timeously to free her from an appeal that was filed out of time. The appellant having failed to do so and the appeal having been argued substantively, we proceeded to decide it on merit. We agree with the respondent on the second preliminary issue. The question of adjudication did not arise in the pleadings, or the memorandum of appeal. It therefore, does not lie in the mouth of the appellant to raise it at this belated hour in the submissions. To do so would go against rule 107.
25. Black’s Law Dictionary 6<sup>th</sup> Edition page 1817 defines the concept of customary trust as follows:
- “ 1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one



person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary). For a trust to be valid, it must involve specific property, reflect the settlor's intent, and be created for a lawful purpose.

.....

2. A fiduciary relationship regarding property and charging the person with title to the property with equitable duties to deal with it for another's benefit; the confidence placed in a trustee, together with the trustee's obligation toward the property and the beneficiary. A trust arises as a result of a manifestation of an intention to create it."

26. A customary trust in the context of Kenyan land law, is a legal concept where land is held by one person or entity, for the benefit of a group or family members, often across generations. It is essentially an intergenerational equity concept where the current holder of the land is entrusted to hold or manage it for the benefit of another or others.

27. The Supreme Court finally settled the question regarding customary land held in trust in *Kiebia v M'lintari & another* [2018] KESC 22 (KLR), inter alia as follows:

"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 rights 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."

From the foregoing guidelines in *Kiebia supra*, it is evident that categories of a customary trust are not closed and the Court will make its determination in reliance of the evidence before it.

28. Customary trusts as well as other trusts are overriding interests and need not be noted in the register. Here is what the Apex Court went on to state what some of the elements that would qualify a claimant as a trustee in *Kiebia supra* thus:

"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 land;
2. The claimant belongs to such family, clan, or group;
3. 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.”
29. The proviso to Section 28 of the Registered *Land Act* (R. L. A), (repealed), was retained in Section 25 of the *Land Registration Act* (L.R. A), indicating that certain trusts may be noted in the register. Once so noted, such trusts, not being overriding interests would bind the registered proprietor in terms noted in the register. The rights of the person in possession or actual occupation of the land, as previously envisaged under Section 30 (g) R.L.A have now been subsumed in the “customary trusts” under Section 25(b) of the L.R. Act. Thus, a claimant can prove the existence of a specific customary trust arising, although not exclusively, from the fact of rightful possession or actual occupation of the land. (See- Court of Appeal decision in Nyeri Civil Appeal No. 143 of 2019: Peter Wainaina Mburu vs James Kamande Wainaina).
  30. In the instant appeal, Fredrick testified on behalf of Cyprian. The evidence of both Fredrick and Cyprian evinces that Fredrick held the suit land in trust for the family members. Cyprian’s evidence that she rehabilitated the deserted homestead pursuant to a family resolution was not contested, and neither was Fredrick’s evidence that their mother’s wish was that Cyprian who was unmarried should be given the parcel of land on which the homestead stood.
  31. There is no evidence on record to show that Cyprian had notice of the adjudication process attended by the mother and the two sons, for her to be condemned for not coming forward. In any case, the fact that she did not challenge the land adjudication process, does not negate her claim to part of the parent’s estate held in trust by her two brothers. *The Constitution* and the *Law of Succession Act* (L.S.A) promote non-discrimination in inheritance matters, ensuring equal rights for both sons and daughters regardless of gender or marital status.
  32. Section 38 L.S.A provides that:
 

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of section 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”
  33. Article 27 guarantees that every person is equal before the law and has the right to equal protection and benefit of the law. This includes the full and equal enjoyment of all rights and fundamental freedoms, and specifically addresses the right of men and women to equal treatment in different spheres of life.
  34. On the question whether, in this case, John held one acre of the suit property in trust for Cyprian, the learned Judge rendered himself as follows:
    27. Article 27 of *the Constitution* of Kenya, 2010 provides for equality and freedom from discrimination. So, PW1 is entitled to the homestead which is a portion of the suit land by virtue of the said Article as well as Article 10 (b) of *the Constitution*, justice shall be done to all, irrespective of status. Section 28 (a) of the *Land Registration Act*, 2016 is to the effect that trusts including customary trusts are overriding interest over registered land.
    28. The evidence of PW1 and PW4 disclose a trust in respect of land. In Mumo case (supra) it was held that trust was a question of fact to be proved by evidence. It is evident that PW1 is the unmarried daughter of deceased one



and deceased two. She has occupied the homestead which she has heavily renovated. Therefore, DW1 is holding the suit land inclusive of the homestead in trust for PW1.

35. Consequently, upon reevaluating the evidence in the record of appeal afresh, and considering the rival submissions, we arrive at our own conclusion that Cyprian is entitled to a share of her father's property just like her brothers, by virtue of Section 38 L.S.A and Article 27. Therefore, the learned Judge was correct in holding that John held the one acre of their father's estate in trust for her. We find that the land on which the homestead stands is held in trust on behalf of Cyprian as instructed by the deceased matriarch.
36. Turning to costs, the general principle concerning costs is found in Section 27(1) of the Civil Procedure Act which provides that:
- “Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purpose aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers.”
37. This Court In re Estate of Monica Wanjiru Macharia (Deceased) (Family Appeal 15 of 2023) [2024] KEHC 14780 (KLR) held that:
- “Section 27 of the Act is clear that it lies in the discretion of the court to award costs in a suit. This discretion must be exercised judiciously.”
38. The court set out factors that ought to be taken into consideration when determining the costs of a suit in Morgan Air Cargo Limited vs Everest Enterprises Limited [2014] eKLR. They include:
- a. The conduct of the parties;
  - b. The subject of litigation;
  - c. The circumstances which led to the institution of the proceedings;
  - d. The events which eventually led to their termination;
  - e. The stage at which the proceedings were terminated;
  - f. The manner in which they were terminated;
  - g. The relationship between the parties and
  - h. The need to promote reconciliation amongst the disputing parties pursuant to Article 159(2) (c) of the Constitution.”
39. John's plea was for this Court to dismiss the costs awarded to Cyprian on the ground that the dispute involves family members. He did not fault the learned Judge's discretion in awarding the costs. In the circumstances of this case, we see no evidence that the learned Judge exercised his discretion injudiciously when awarding the costs. We therefore, have no basis to interfere with it.
40. In the end we find no merit in this appeal, and it is therefore dismissed with costs to the 1<sup>st</sup> respondent.

**DATED AND DELIVERED AT KISUMU THIS 3<sup>RD</sup> DAY OF OCTOBER 2025.**



**H. A. OMONDI**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**Signed**

**DEPUTY REGISTRAR**

