

- e) **An order directing the Defendant to within three (3) months of the date of judgment subdivide Title No. MAKUENI/MUBAU/46 into two equal portions and process a title for the Plaintiff's share of the property.**
 - f) **If the Plaintiff fails to comply with prayer (e) above, the court does direct the Land Registrar, Makueni to cancel the title in respect of Title No. MAKUENI/MUBAU/46 and cause the land to be subdivided equally at the Defendant's cost and two title deeds issued in the names of the Plaintiff and the Defendant.**
 - g) **Costs and interest of this suit; and**
 - h) **Any other order that the court may deem just to make.**
2. The Defendant filed a Statement of Defence and Counterclaim on 10th November, 2023. He denied the Plaintiff's claim against him and urged the court to issue the following orders as per his counterclaim:-
- a) **A declaration that the Defendant is the sole registered and lawful owner of Land Parcel No. MAKUENI/MUBAU/46.**
 - b) **A declaration that Land Parcel No. MAKUENI/MUBAU/46 is not a customary land and/or held in trust for the Plaintiff and her family herein by the Defendant.**
 - c) **Eviction and demolition order for any structure(s) erected by the Plaintiff, her agents, employees, servants and/or whom whatsoever on the suit property.**
 - d) **General damages for illegal use, occupation and/or possession of a portion of the suit property by the Plaintiff, her agents, employees, servants and/or whom whatsoever.**
 - e) **Costs and interest of this suit.**

f) Any other relief the court may deem fit and just to grant.

3. The Plaintiff filed a Reply to Defence and Defence to the counterclaim on 27th November, 2023 denying the Defendant's counterclaim and praying for its dismissal.
4. The Defendant filed a Reply to Defence to Counterclaim on 4th December, 2023.
5. At the hearing of the Plaintiff's case, three witnesses testified. PW1, Marietta Mumbua Musyoki adopted her statement dated 13/3/2023 as her evidence in chief. She averred that her late husband was the first person to take possession of the suit property in or about the year 1966. She added that the Defendant settled in the suit property after the death of her husband. It is her case that the Defendant is fraudulently registered as owner of the suit property which measures about 28 acres.
6. She further averred that she stays on a small portion of the suit property with her family whilst the Defendant utilizes the larger portion thereof with his family. PW1 stated that three of her children and one grandchild are buried in the suit property. That when the land dispute between the Defendant and herself arose, the *Atangwa Clan* to whom they belong tried to intervene and a resolution was made that the land be shared equally. It is PW1's testimony that the Defendant has remained adamant and has been using all manner of tricks to evict her from the land. PW1 produced the bundle of documents in her list dated 13/3/2023 and the supplementary list dated 31/1/2024 as PEX 1 – 6 in support of her case.
7. On cross-examination by Mr. Onyancha, PW1 averred that the Defendant is the younger brother to her husband. She asserted that she birthed one child with her late husband while five more were from other men. PW1 refuted the assertion that she remarried after the death of her husband. She stated that her father-in-

law was not buried in the suit property. She further stated that her husband was buried at Mitheu Cemetery in Machakos.

8. PW1 stated that she was not aware when the Defendant obtained the title deed to the suit property. She further stated that she was aware of a case over the suit property that was in Machakos. She conceded that there were various eviction orders which had been issued against her but she had defied them. She denied the assertion that it was the Defendant who had invited her to stay at the suit property insisting that before the Defendant moved into the land, he was staying at Kilala in Makueni County.
9. PW1 denied the assertion that it is the Defendant's sons who built the house she now lives in at the suit property. She reiterated that she was seeking the equal subdivision of the suit property.
10. In re-examination, PW1 stated that the Defendant was staying at Kilala in a shop which was owned by her late husband. She stated that by the time the Defendant moved into the suit property, she had given birth to two more children. PW1 insisted that her husband is buried in the suit property. She added that it is her grandson who has built the house she stays in.
11. PW2, Peter Mbithi Mutie adopted his statement dated 17/4/2023 as his evidence in chief. He averred that he was the Chairman of the *Atangwa Clan* and that the clan had earlier resolved that the suit property should be divided into two equal portions.
12. In cross-examination, PW2 averred that the Defendant's father, Sombi, was buried at his land in Machakos. He added that Sombi came to the suit property after the death of his son, Musyoki Sombi. PW2 maintained that the suit property is family land. He stated that he was not aware that Sombi was buried in Ngwata area of Kambu nor was he aware that Musyoki Sombi was buried in

a public cemetery called Mitheu. PW2 insisted that it was members of the public who resisted the eviction of the Plaintiff from the suit property.

13. On re-examination by Mr. Mutuku, PW2 stated that the suit property was allocated to Musyoki Sombi during demarcation. He further stated that it was the Defendant's father who asked the clan not to subdivide the land as it belonged to Musyoki Sombi.

14. PW3, Gregory Muli Musyoki adopted his statement dated 31/1/2024 as his evidence in chief. He averred that he comes from Mubau Location and that he is a former Chief. He averred that the land dispute herein was brought before him and that he wrote a letter to the court requesting for time to be given so that the community could resolve the matter amicably.

15. PW3 averred that the *Atangwa Clan* explained to him about the history of the suit property pointing out that it belonged to Musyoki Sombi. He added that he was aware that there had been a court order directing that the Plaintiff be evicted but the same was resisted by members of the public.

16. On cross-examination by Mr. Onyancha, PW3 averred that he was not among the people who helped the Plaintiff to remain put in the suit property. He further averred that the Defendant did not involve the Plaintiff at the time of processing of the title deed. It was his testimony that land was only being given to adults who had identity cards.

17. In re-examination, PW3 stated that the Plaintiff and her children are occupying about one acre of the suit property. He reiterated that he was not present at the aborted eviction exercise of the Plaintiff. PW3 stated that he was not faulting the court when he wrote the letter but was only concerned about the peaceful co-existence of the two parties herein.

18. Three witnesses testified in support of the Defendant's case. DW1, Mutua Sombi adopted his statement dated 1/12/2023 as his evidence in chief. He also

produced the bundle of documents in his list dated 29/11/2023 as DEX 1 – 11 respectively.

19.DW1 averred that the Plaintiff is his sister-in-law being the wife of his elder brother. He averred that the land was allocated to him by Musyoki Mutile during demarcation.

20.On cross-examination by Mr. Mutuku, DW1 averred that he did not know when he was born. He stated that the land was given to him in 1952 when he was 11 years old. DW1 further stated that he could not recall anything regarding the case that he filed in Machakos in 1983. DW1 stated that all the documents relating to this case are with his wife. He averred that the Plaintiff stays in the suit property.

21.DW2, Philip Mutuku Mutua adopted his statement dated 1/12/2023 as his evidence in chief. He averred that the Defendant is his father and that he resides within the suit property. He further averred that the Plaintiff is his aunt and that she stays in the suit property. It was his testimony that he was the one who had put up a house for the Plaintiff in the suit property at the instruction of his father. He added that before the Plaintiff's house was constructed, she was sleeping at a granary.

22.On cross-examination by Mr. Mutuku, DW2 stated that he was born in 1962 and that he was not present when his father was being allocated land in 1952. He averred that he did not know when the Plaintiff's uncle died. DW2 stated that the Plaintiff's house was constructed in 1967 and that he assisted in carrying the building materials.

23.DW3, Jones Mutua Sombi adopted his statement dated 1/12/2023 as his evidence in chief. He averred that the Defendant is his father and that the Plaintiff's husband's name was Musyoki Sombi. He further averred that the Plaintiff's husband died in the year 1951 and was buried at Mitheu Cemetery as

he had no land. DW3 stated that Musyoki Sombi was staying at Kilala where he was doing business.

24. DW3 averred that his grandfather was buried at one of his son's homesteads. He added that the Defendant was convinced by his brother Wambua Sombi to allow the Plaintiff to move into the suit property so as to prevent her children from becoming street urchins. He further averred that the Plaintiff came to the suit property when she had five children and that she was not evicted because the neighbours intervened and thwarted her eviction.

25. In cross-examination, DW3 asserted that he is the first-born son of the Defendant born in 1955. DW3 averred that he was only told about the death of Musyoki Sombi in 1951 as he was not present. He further averred that they constructed a house for the Plaintiff in 1966. He stated that he was aware that his father obtained eviction orders against the Plaintiff in a case the Defendant filed in Machakos. However, the said order had not been implemented.

26. DW3 averred that Bernard Mutinda is his cousin being the son of the Plaintiff. He further averred that Bernard stays at the suit property. DW3 asserted that he was aware that Bernard had placed a caution on the title of the suit property.

27. On cross-examination by Mr. Onyancha, DW3 stated that he was told by his uncle Wambua Sombi that Musyoki Sombi died in 1951 and that he was buried at Mitheu Cemetery in Machakos. He reiterated that the Plaintiff's husband was doing business in Machakos.

28. At the close of their respective cases, the parties agreed to file written submissions.

29. In the Plaintiff's submissions dated 14th March, 2025, Counsel identified two issues for determination: -

- a) *Whether the suit property is the subject of a customary trust in favour of the Plaintiff?*

b) Whether costs should be borne by the Defendant?

30. Regarding the first issue, Counsel submitted that the Plaintiff testified that she bore all her children in the suit property and that the ones that had died were buried in the suit property. Counsel further submitted that the Plaintiff led evidence to confirm that she resides in the suit property together with her children and grandchildren and that she utilizes the land for subsistence farming. Counsel contended that it was the Plaintiff's evidence that she refused to move out of the suit property because she has no other place which ever known as her home.
31. Counsel argued that the Plaintiff had adduced evidence to the effect that the Defendant had been barred by the court in 2009 from evicting the Plaintiff from the suit property since he had not effected the said eviction from the year 1984 by reason of lapse of time. Counsel contended that the Plaintiff had demonstrated that she is entitled to the land by virtue of a customary trust in accordance with Section 28 of the Land Registration Act, 2012.
32. To support the assertion that there exists a customary trust over the suit property, Counsel cited the decisions of the court in **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR**, **Ndiwa Chesebe v John Chesebe Shikuku [2019] eKLR** and **Dickson Nyaga Kaugi v Charity Machaki & another [2018] eKLR**.
33. On the issue of costs, Counsel contended that the Plaintiff had proved her case against the Defendant and in the circumstances, she should be allowed the costs of the suit.
34. The Defendant filed his submissions dated 29th April, 2025. On his behalf, Counsel that the Plaintiff did not have locus standi to prosecute the instant suit because she is claiming the beneficial interest of her late husband in the suit

property yet she has not taken out letters of administration on behalf of the estate of the deceased Musyoki Sombi.

35. Counsel went on to submit that the suit herein is res judicata as the issues that have been raised herein were substantially adjudicated and conclusively determined in Machakos Civil Case No. 112 of 1983. That an eviction order was issued against the Plaintiff who has never appealed the said judgment. That the Plaintiff and her family have all along disobeyed the court order that was issued in the said suit and hence these proceedings are in contravention of the provisions of Section 7 of the Civil Procedure Act.

36. Counsel went ahead to contend that the Defendant's registration as the proprietor of the suit property conferred to him with the absolute and indefeasible rights to the suit property. It was further submitted that the Plaintiff's allegations of fraud in the registration of the Defendant as the owner of the suit property were unsubstantiated. Counsel contended that the Plaintiff had not discharged the burden of proof against the Defendant as required.

37. Counsel opined that the Plaintiff had failed to establish any legal or equitable right on the suit property and therefore her claim that the land was allocated to her deceased husband is unsubstantiated. It was argued that the Plaintiff seems to base her claim on her long-term occupation of the land but no claim of adverse possession had been filed.

38. In closing his submissions, Counsel contended that the Plaintiff's claim for half the suit property was untenable and that it should be dismissed with costs. Counsel further urged the court to award costs for the Defendant's counterclaim. Reliance was placed on the following authorities: -

- i. **Joshua Ngatu v Jane Mpinda & 3 others [2019] KEELC 4603 (KLR)**

ii. **Joseph N.K. Arap Ng'ok v Moiyo Ole Keiwua & 4 others [1997]**
KECA 1 (KLR)

39. The Plaintiff filed supplementary submissions dated 23rd May, 2025. On her behalf, Counsel contended that that the suit herein is not *res judicata* Machakos Civil Case No. 112 of 1983 because the issue of a customary trust was never pleaded nor adjudicated upon in the said suit. That the only prayer that was allowed in the 1983 suit was an eviction order against the Plaintiff which the Defendant had been unable to implement to date.

40. After a perusal of the pleadings, the evidence and the submissions, the following particulars are common ground: -

- i) Land Parcel No. MAKUENI/MUBAU/46 is registered in the name of the Defendant vide the title deed issued to him on 25/07/1975.
- ii) The Plaintiff has been residing in the suit property together with her children prior to the Defendant's registration as proprietor of the suit property.

41. The emerging issues for determination are as follows: -

- i) ***Whether this suit is res judicata the Machakos RMCC No. 112 of 1983?***
- ii) ***Whether the Plaintiff has demonstrated a valid claim to the suit property on grounds of a customary trust?***
- iii) ***Whether the Plaintiff is entitled to the prayers sought?***

42. It was contended by the Defendant that the Plaintiff's suit herein is caught by the doctrine of *res judicata* as outlined in Section 7 of the Civil Procedure Act as follows: -

'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom

they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.’

43. None of the parties adduced the pleadings that were filed in Machakos RMCC No. 112 of 1983 (the 1983 suit). Nonetheless, the Defendant produced DEX 6 which is a copy of the judgment that was delivered by the court on 9th February, 1984. The Defendant herein was the Plaintiff in the said suit whereas Bernard Mutinda Musyoki and his mother, the Plaintiff herein, were the 1st and 2nd Defendants respectively.

44. As per paragraph one of the judgment in the 1983 suit, Mutua Sombi sought the following reliefs against the Defendants: -

- (a) Eviction order or possession of the portion of land in dispute;***
- (b) An order that the Plaintiff is the sole proprietor of the said land;***
- (c) General damages;***
- (d) Costs and interest.***

45. The court awarded Mutua Sombi the eviction order and costs of the suit as prayed but disallowed prayers (b) and (c).

46. From the foregoing, it is apparent that a claim to the suit property on the ground of a subsisting customary trust was not a substantial question that was pleaded by any of the parties. The Defendants did not raise a counterclaim on the issue of customary trust as a defence to the Plaintiff's claim in order to challenge his title and in order for the court to make a determination on that issue.

47. It is therefore obvious that the court in Machakos did not adjudicate on an issue of customary trust nor did the court make a final determination thereof.

48. As a result, it is the finding of this court that the suit herein is not barred by the doctrine of res judicata.

49. Onto the second issue, it is the Plaintiff's case that she is entitled to half a share of the suit property on the grounds that she has established a customary trust over the Defendant's title.

50. A customary trust is a valid claim to land as noted under Section 28 of the Land Registration Act, 2012 and being an overriding interest, it affects the rights of a proprietor of land under Section 25 (1) (b) thereof. Section 25 (1) (b) provides as follows: -

1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

a.

b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

51. Section 28 (b) of the Land Registration Act, 2012 outlines 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;

52. The burden of proving a customary trust falls on the party alleging it. This position was reaffirmed in the case of **Mbui Mukangu v Gerald Mutwiri Mbui [2004] eKLR** where the Court of Appeal also weighed in on what entails a customary trust in the following terms:-

“It was unregistered land held under custom but the tenure changed during the land consolidation process and subsequent registration under the Registered Land Act. It is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations.” [emphasis added]

53. In the Plaintiff's evidence, she insisted that she took possession of the suit property in the company of her husband in or about 1966 and that the Defendant joined them there. DW2 and DW3 confirmed that the Plaintiff was residing in the suit property in or about 1967 before the land was eventually registered in the name of the Defendant in 1975.

54. It was the Plaintiff's evidence that besides residing in the suit property and using it for subsistence farming, she has also buried three of her children and a grandchild in the land. This piece of testimony was not controverted.

55. PW2, Peter Mutie, who stated that he was a former Chairman of the Atangwa Clan to whom the parties herein belong confirmed that when the clan elders heard the land dispute herein, it was resolved that the suit property should be subdivided into two because it is family land. He produced PEX 3 which is the letter dated 22/1/2009 written by the Chairman of the Atangwa Clan and addressed to the court in Machakos to illuminate on the Clan's resolution. PW3 corroborated PW2's evidence.

56. In addition, DW1 produced DEX 6 which was the judgment of the court in Machakos RMCC 112 of 1983. At page 2 paragraphs 2 and 3, the court expressed itself in part as follows: -

“Defence exhibit No. 1 is claimed to have been the decision of clan members in 1975. She does not accept to have been taken to the disputed land by the Plaintiff.

But Mr. Wambua Sombi (DW1) says that the second Defendant with her son, the first defendant were taken to the land in dispute by the plaintiff. He claims he is the one who told the plaintiff to do so and adds it was because the land belonged to the husband of the second defendant. He says that Musyoki, the husband of the second defendant asked the plaintiff to stay with him on the land in 1949. But Mr. Wambua Sombi says he was at Dar-es-salaam working when these things were happening. He was not present. He was away when the land in dispute was acquired and when it was registered. But he claims to have been present at the meeting of clan members in 1975.”

57. In respect of the foregoing, it undoubtedly clear that the suit property is family land that was initially in the joint possession of the Defendant and his family together with the Plaintiff, her husband and their family.

58. In **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR**, the Supreme Court articulated the elements which a person must prove to demonstrate the existence of a customary trust when the Court held as follows:-

“[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 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.”

59. A claim to land based on a trust must be supported with compelling evidence as stated in the case of Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] KECA 118 (KLR)

“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

See Gichuki vs. Gichuki [1982] KLR 285 and Mbothu & 8 Others vs. Waitimu & 11 Others [1986] KLR 171.”

60. Accordingly, in answer to the second issue, it is the finding of this court that the suit property is family land and that the title thereof is registered in the name of the Defendant in trust for both families.

61. On the issue of costs, in the case of SUPERMARINE HANDLING SERVICES LTD v KENYA REVENUE AUTHORITY [2010] eKLR, the Court of Appeal expressed itself thus: -

“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order... Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule. In the appeal now before us, the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was shown that the defendant had been guilty of some misconduct which led to litigation.”

62. In view of the fact that the parties have a familial relationship, it is only fair that each party bears its own costs.

63. The upshot is that the Plaintiffs' suit partially succeeds whereas the Defendant's counterclaim wholly collapses. For the avoidance of doubt, judgment is hereby entered for the Plaintiff against the Defendant as follows: -

- 1) **A declaration that Title No. MAKUENI/MUBAU/46 is the subject of a customary trust in favour of the Plaintiff.**
- 2) **A declaration that the Defendant is the registered owner of Title No. MAKUENI/MUBAU/46 holds half portion of the said property as trustee for the Plaintiff.**
- 3) **An order directing the Defendant to grant vacant possession of half portion of Title No. MAKUENI/MUBAU/46 to the Plaintiff within fourteen (14) days from the date of judgment.**
- 4) **An order directing the Defendant to within three (3) months of the date of judgment subdivide Title No. MAKUENI/MUBAU/46 into two equal portions and process a title for the Plaintiff's share of the property.**
- 5) **If the Plaintiff fails to comply with prayer (4) above, the court does direct the Land Registrar, Makueni to cancel the title in respect of Title No. MAKUENI/MUBAU/46 and cause the land to be subdivided equally at the Defendant's cost and two title deeds issued in the names of the Plaintiff and the Defendant.**
- 6) **Each party shall bear its own costs.**

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HON. E. O. OBAGA
JUDGE

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT
TEAMS THIS 21ST DAY OF OCTOBER, 2025.**

IN THE PRESENCE OF:

Ms. Onyango for Mr. Onyancha for Defendants.

Mr. Mutuku for Plaintiff.

ORIGINAL