Magere & another v Mauti & 2 others (As Legal Representativies of the Estate of the Late Margaret Nyangara - Deceased Original Respondent) (Environment and Land Appeal E012 of 2023) [2025] KEELC 7647 (KLR) (5 November 2025) (Judgment)

Neutral citation: [2025] KEELC 7647 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND APPEAL E012 OF 2023

M SILA, J

NOVEMBER 5, 2025

BETWEEN

RONALD SAGWE MAGERE ..... 1ST APPELLANT

ALFRED MATINI MAGERE ..... 2ND APPELLANT

AND

DOUGLAS MAUTI ..... 1ST RESPONDENT

VINCENT OMBOGA ..... 2ND RESPONDENT

GLADYS MORAA MARIBA ..... 3RD RESPONDENT

AS LEGAL REPRESENTATIVIES OF THE ESTATE OF THE LATE MARGARET NYANGARA - DECEASED ORIGINAL RESPONDENT

(Being an appeal against the judgment of Hon. C.A Ocharo, Chief Magistrate, delivered on 5 October 2023, in the suit Kisii MCELC No.248 of 2018)

JUDGMENT

(Appellants being registered proprietors of the suit lands after the land was transferred to them by their father in 2006; father of the appellants passing on in the year 2016; evidence indicating that the original defendant/respondent was married to the father of the appellants and they had a house on the land owned by the 1st appellant; court persuaded that the evidence shows that the original defendant/respondent left in 1987 and came back in 2016 after the death of the appellants' father; appellants suing her for eviction and for her to be permanently restrained; original defendant/appellant lodging a counterclaim that their registration is in trust inter alia because this was her matrimonial home; trial court upholding the counterclaim and making an order that the original defendant/respondent be registered as proprietor of the suit lands; on appeal, court's assessment is

that the original defendant/respondent would only be entitled to rights to the cultural home which would be a life interest but not to nullification of the title of the appellants; original defendant/ respondent passing on before the appeal could be heard thus the life interest terminated and the trust got extinguished; appellants thus now holding title to the land absolutely and without the encumbrance of the life interest in the cultural home; judgment of the trial court reversed)

1. The appellants are brothers and the respective registered proprietors of the land parcels Nyaribari Chache/B/B/Boburia/2933 and Nyaribari Chache/B/B/Boburia/2661 (the suit lands). They commenced this suit vide a plaint filed on 13 October 2016 in the superior Environment and Land Court wherein they sued Margaret Nyang'ara (the defendant). Sadly, she died before the hearing of this appeal and she was substituted by the current respondents who are said to be her sons. In the plaint, the appellants contended that the defendant was purporting to be their step mother yet she got separated from their father sometime in the year 1987. They claimed that she came to the suit lands in August 2016 ploughed and planted seedlings, and destroyed the tea bushes of the appellants without their authority. It was alleged that she also obstructed the appellants and their employees from accessing the suit lands. In the plaint, the appellants asked for the following orders :

    a. A declaration that they are the legally registered owners of the suit lands.

    b. A permanent injunction to restrain the defendant and anybody claiming through her from the suit lands and a further order of eviction.

    c. Costs of the suit.

    d. Any other relief deemed fit to grant.

2. The defendant filed a defence and counterclaim on 7 February 2017. She admitted that the appellants were respectively the registered proprietors of the suit lands. She however denied all other allegations in the plaint. In the counterclaim, she pleaded that in 1974 she got married to Pius Mauti Magere, the father of the appellants, who died in August 2016 and they had 7 children, three of whom had died. She pleaded that following her marriage, the deceased settled her on the suit lands. She pleaded that the deceased built a home for her on the parcel No. 2933 and she tilled it together with the parcel No. 2661 and has been on the land for 20 years and counting. She pleaded that she has spousal rights over the suit lands and that this constitutes an overriding interest which did not require registration pursuant to Section 28 of the *Land Registration Act*, 2012. She further pleaded that the registration of the suit lands in the names of the appellants did not divest her of her unregistered rights and the appellants are thus her trustees. She alluded to a previous case Kisii CMCC No. 514 of 2016. In the counterclaim she asked for the following orders :

    a. A declaration do issue that the counterclaimant's spousal rights over the suit lands is an overriding interest within the meaning of Section 28 of the *Land Registration Act*, Act No. 3 of 2012 and that by reason of the overriding interest the 1st appellant holds land parcel No. 2933 and the 2nd appellant land parcel No. 2661 as trustees for the counterclaimant.

    b. The counterclaimant be registered as proprietor of land parcel No. 2933 in place of the 1st appellant and be registered as proprietor of land parcel No. 2661 in place of the 2nd appellant by the Kisii County Land Registrar.

    c. Costs and incidental to the counterclaim.

3. The appellants filed a reply to defence and defence to counterclaim more or less joining issue with the defendant.

4. While the case was before the superior ELC, Mutungi J, who was handling the matter initially called for a Chief's report to determine the status of occupation. A report was filed. There was also reference to the Land Registrar to file a report and one was similarly filed. The reports however did not lead to a resolution of the dispute. Through a ruling delivered on 29 June 2018, an order of status quo was made and on 15 October 2018, the judge transferred the case to the Magistrates' Court for disposal. That is how the case ended up being heard before the Magistrates' Court at Kisii. The trial was handled by two Magistrates; first Hon. E. Obina and later Hon. C.A Ocharo who completed the matter and wrote the judgment.

5. Hearing commenced on 21 August 2019 before Hon. E.A Obina, Principal Magistrate when the 1st appellant testified as PW-1. He had a statement which he adopted as his evidence. In it he stated that his father died on 17 August 2016 and was survived by two widows, being Teresia Bonareri Mariba and Agnes Kemunto Magere, and 16 children. He stated that he owns the parcel No. 2933, the 2nd appellant the parcel No. 2661, and their mother is registered as owner of a parcel Nyaribari Chache/B/B/Boburia/2932 (parcel No. 2932) which is not part of the dispute. He stated that his father transferred to him the land in 2006 after obtaining the Land Control Board consent. To his dismay, after the death of his father, the defendant and her children encroached into his land, started cultivating and putting up structures. He produced the search to the parcel of land and the Land Control Board consent as exhibits to demonstrate ownership.

6. Cross-examined, he claimed not to know whether his father and the defendant had any relation. On the usage of the land, he testified that the defendant was using the upper portion while he was using the lower portion of the land. There was a permanent house on this upper portion which he stated was built by his father. He did not know when it was built. He testified that the defendant started staying in the house after the death of his father (which was 2016). He claimed that it is after his death that she came with children namely Vincent and Mautia both adults. He acknowledged that after his father's death, the defendant filed the suit Kisii CMCC No. 514 of 2016, which was a burial dispute, and within that case it was agreed that the defendant can participate in the burial of his father as wife. According to him the defendant should claim land from his father's ancestral land at Bobaracho, where his mother stays.

7. Re-examined, he insisted that the defendant came in 2016 and that before 2016 the house was being used as a store.

8. PW-2 was Alfred Matini Magere, the 2nd appellant. He also adopted a pre-recorded statement as his evidence. There is no difference between this statement and the 1st appellant's statement save that he stated that he owns the parcel No. 2661. His father gifted them the land. His mother was gifted the parcel No. 2932 which is near where they stay. In court, he testified that the land registered in his name does not have a house though the upper portion of it was being used by the defendant. Cross-examined, he testified that he did not know about the defendant until she emerged after the death of his father. He stated that he has never seen a grave on the portion that she was now occupying. He mentioned that the suit lands are in Nyamwechechi and their ancestral home is in Bobaracho. He was of opinion that the defendant should go to Bobaracho and find for herself some space.

9. Re-examined, he testified that there is ancestral land in Bobaracho which nobody was using and this is where she should go. He stated that he was not a party to the burial dispute.

10. PW-3 was Manson Monyenye Moreka. He is a retired Assistant chief of Birongo Sub-Location. His evidence was that on 4 December 1987, they held a meeting to discuss a complaint lodged by Pius Magere about the immorality of the defendant. He stated that they unanimously agreed that the defendant should undergo customary cleansing rituals as she was having an affair with Magere's brother

which was an abomination. But since dowry had not been paid, they agreed that the defendant was to vacate and get married elsewhere. At that time the defendant had 4 children. Cross-examined, he acknowledged that he did not have the minutes of this meeting that was held on 4 December 1987.

11. PW – 4 was Yuvinalis Mogaka Pius, who hails from Bobaracho. The appellants are his brothers and he was aware that the land was transferred to them by his late father and the parcel No. 2932 transferred to their mother Teresia. He stated that his father had two widows, Teresia and Agnes, and that he allocated each house their respective parcels of land and he gifted the children land as he wished. At no time did he mention the defendant or gift land to her and her children. Cross-examined he testified that he was among the defendants in the suit Kisii CMCC No. 514 of 2016. Those sued were himself, his mother Teresa, and his step-brother. The defendant had sued them so as to be involved in the burial of their father. He claimed that the defendant used to stay at her maternal home together with her children. He acknowledged that the defendant was staying in the house that was built. There was coffee, tea and trees used by his brothers. He refuted that the defendant had any relation with his father and he claimed that she was a total stranger. Re-examined he stated that the house was used as a store and that his father has other land in his name.

12. PW-5 was Teresia Bonareri. She introduced herself as wife of Pius Magere (the deceased). She also adopted a written statement as her evidence. In it, she stated that her husband left two widows, that is herself and Agnes Kemunto. She stated that her late husband bought various parcels of land in different localities and they would build structures to assert ownership. She stated that the suit lands were bought by herself and her husband in 1968 and they built a house on it. Her husband transferred the parcels to her sons in 2006. She stated that the defendant is a stranger and not the legal wife of the deceased. She recalled attending the meeting of 4 December 1987 chaired by PW-3 and that in that meeting the community unanimously resolved that she is not a wife of the deceased as no dowry was paid and that she was having an affair with a brother of her husband.

13. Cross-examined, she testified that the defendant came to the suit lands after the death of her husband. She then sued her and her children over the burial dispute. She denied that the decision made was that she should participate in the burial. She stated that on the disputed land is a house that she built with her husband ; it is a two-roomed brick house. She stated that the defendant started living in this house after she surfaced in 2016 and refused to move out. She acknowledged that her husband had brought her but did not marry her. She claimed that she (defendant) became adulterous and was chased away. She stated that her husband used to live with the defendant where he did his business at Keroka. He had bought land in Keroka and settled his other wife. Re -examined, she stated that her husband did not give the defendant any land. He distributed the land at home to one Albert. With the above evidence, the appellants closed their case.

14. It is also at this point that the matter was taken over by Hon. C.A Ocharo.

15. DW-1 was the defendant. Her witness statement constituted an affidavit sworn on 23 January 2017. In it she deposed that she was married to the deceased and they had 7 children. She averred that the children were raised in the home put up for her in the suit lands by her late husband. She stated that after his death, the appellants ganged up to exclude her from participating in the burial arrangements so as to disinherit her and this led her to file the suit Kisii CMCC No. 514 of 2016. The case was settled by consent and she made reference to its terms. She stated that the consent recognised her as a wife and that she was allowed to continue occupying the premises. She stated that the same consent acknowledged that the 1st appellant had encroached into her homestead and planted trees and that he was given indulgence up to 30 November 2016 to harvest the trees which he however did not harvest. She contended that the suit herein was filed to ward off the unsavoury effects of the 1st appellant's defiance of the decree. She claimed to have been resident on the suit land, and if the appellants wanted

her out, they could have filed suit against her a long time ago. She found it curious that the suit was filed after the demise of her husband who never sought to restrain her from the suit lands. She asserted that it was a lie that she encroached into the suit land after the demise of her husband as she has been on the land with a home for over 25 years. She stated that the decree in Kisii CMCC No. 514 of 2016 was a culmination of long drawn negotiations which involved the 1st appellant who agreed to cede his rights on the suit land by allowing her to occupy it and also harvest his trees. She stated that Everlyne Kerubo, one of her daughters was buried on the suit land. She averred that the suit lands were given to the appellants as gifts when her relationship with her husband was at an all time low. She averred that any differences that she might have had with her late husband are normal occurrences that afflict marriages, and it is immoral for the appellants to make a meal out of the same and render her and her children vagabonds.

16. In her oral evidence in court, she testified that she got married in 1974 as 2nd wife. She testified that her husband established a home where he had purchased land and gave her land to cultivate and his co-wife had no problem. She stated that she lived on the land peacefully. She testified that three of her children died and are buried where she built and that the appellants attended the burials of the first two children that died. She testified that it was after the death of her husband that the appellants started given her problems and claimed that the land belonged to them. She exhibited the decree in Kisii CMCC No. 514 of 2016 and the report of the Land Registrar that was filed after directions from the Judge. She stated that the plaintiffs live far away with their mother.

17. Cross-examined, she testified that her husband chased her away in 1987 and she left for her home. She could not recall for how long she was there but she said she used to come and go (in relation to the suit lands). She denied being unfaithful and that she was sent home because of this. She denied that her children were sired by one Onduso. She did not have evidence that she is recognized as a tea farmer. She stated that her husband was buried in the ancestral land. She nevertheless asserted that it is on the suit lands that her husband settled her. She did not have proof of marriage. She stated that they initially lived with her husband in a rented premises at the shops but he later settled her on this land.

18. DW -2 was Rucina Mosiara Bosire a resident of Riamwachechi. She also relied on a pre-recorded witness statement. In it she stated that she has been a resident of Riamwachechi since she got married to one Daniel Bosire and she knew Pius Mautia Magere as husband of the defendant. She stated that Pius bought land from her mother in law, one Kwamboka and that he (Pius Magere) and the defendant moved into this land. She stated that they build a mud walled house and later put up a permanent house were the defendant and her children lived. She stated that Pius Magere had three wives and the defendant had seven children. She affirmed that three of the children died and were buried on the suit lands. Cross-examined, she testified that the land had already been sold when she got married to the family and that it was her mother in law who told her that Pius had bought the land. She did not see the defendant chased away by elders. She stated that according to custom the defendant can only claim the ancestral land where her husband is buried and the land was not ancestral land.

19. DW-3 was John Magwaro Matini and he introduced the defendant as his aunt and Pius Magere as his uncle. He is a cousin to the appellants. His evidence was that the defendant was married to Pius who settled her in 1974 on land which he had earlier purchased (the suit lands). They had a mud walled house which they later upgraded in 1977 to a permanent house where the defendant resided. He stated that some of her children died and were buried on the suit lands. Cross-examined, he denied that the defendant was chased away. He added that the defendant should claim land belonging to her husband and not her step-children.

20. DW-4 was William Kebu Ondieki. He had a statement wherein he introduced himself as a cousin to Pius. He stated that Pius had three wives, and that the defendant was his second wife. He stated that

Pius settled his wives separately and that the first wife and her children occupy the ancestral land. He bought the suit lands and settled there with the defendant in 1974 where he built a mud walled house then a permanent house. He also stated that three of the defendant's children died and were buried on the land. He stated that the defendant cultivated maize, bananas, napier grass, tea and trees. Cross-examined, he stated that according to custom the land where the defendant established a home is what she can claim. He testified that Pius built a house on the land in 1982-1983. He was not aware of any case that took place in 1987.

21. With the above evidence, the defendant closed her case.

22. In her judgment, the trial Magistrate found that indeed the appellants are the registered proprietors of the suit lands. She also found that there had been the previous suit Ksii CMCC No. 514 of 2016 which was a burial dispute. She found that the burial dispute was compromised by consent on 30 August 2016 which consent recognized the defendant as wife of the deceased. She formed opinion that this consent laid the issue to rest and is res judicata, as the defendants (I assume defendants in that burial dispute) are persons upon whom the appellants would be claiming through in as much as they were not party to those proceedings. She held that she could not revisit the issue of the defendant being wife. She proceeded to hold that the defendant was married to the appellants' father in 1974 and was settled by him in the portion that she occupies where she was up to 1987. She held that there was no evidence that the defendant was settled anywhere else and she referred to the report of the Land Registrar. She did not think that the appellants were truthful in feigning ignorance of the defendant's existence. She held that the appellants cannot deny the defendant the right to remain in occupation and that the registration of their names was done after the defendant had been settled by her husband on the suit lands. She referred to Section 2 of the *Matrimonial Property Act* which provides as follows :

> " Matrimonial home means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property."
>
> She thereafter proceeded as follows :
>
> > "The defendant has persuaded this court on a balance of probability that her late husband Pius Magere settled her on the upper portion of the suit properties and the plaintiffs are estopped from evicting her as being a spouse, she acquired overriding interests to the plaintiff's registrable rights.... The defendant has an overriding interest on the portion she was settled on by her late husband and the plaintiffs are estopped from evicting the defendant.
> >
> > The upshot is that the suit against the defendant is dismissed with costs to the defendant while counterclaim succeeds in its entirety with costs."

23. Aggrieved the unsuccessful plaintiffs have preferred this appeal on the following grounds :

    1. That the learned trial Magistrate erred in law and fact by failing to appreciate the law and evaluate the evidence placed before her before arriving at the impugned decision.

    2. That the learned trial Magistrate erred in law and fact by failing to take into account the evidence tendered in court and the submissions brought before her before arriving at the impugned decision.

    3. That the learned trial Magistrate failed to appreciate the concept of overriding interest under Section 28 of the *Land Registration Act*, 2012 and Section 2 of the *Matrimonial Property Act*.

4. That the learned trial Magistrate erred in law and fact by failing to appreciate that the registration of the appellants over the suit properties was indefeasible and protected by law.

5. That the learned trial Magistrate erred in law and fact by holding that the appellants were registered over the suit property in trust for the respondent.

6. That the learned trial Magistrate erred in law and fact by shifting the burden of proof in the counterclaim to the appellants contrary to the *Evidence Act*.

7. That the judgment of the learned trial Magistrate was therefore not well founded in law and hence null and void.

The appellants pray that the appeal be allowed and the judgment of the lower court be set aside and be substituted with an order allowing their claim and dismissing the counterclaim. They also want costs of the appeal.

24. I have already stated that before the appeal could be heard, the defendant/original respondent died and she was substituted by the present respondents.

25. The appeal was argued through written submissions and oral highlights at the hearing thereof. In his submissions, Mr. Nyambati, learned counsel for the appellants, submitted that the relationship between the defendant and the deceased lasted from 1974 to 1987 when she was banished by the community and that it was only in 2016 when the respondent showed up to meet his body. He submitted that the decree that ensued in the burial dispute did not indicate the land where the matrimonial home was. As to whether the property was matrimonial property, he referred to Section 8 (1) (a) of the *Matrimonial Property Act*, 2013 which provides as follows :

> " Matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife".

He submitted that the house on the suit lands was never occupied by Pius Magere or the deceased, and that no evidence was led that the two lived as man and wife on the suit properties. On the issue of burial of children, he submitted that no burial permit was produced. He submitted that never having lived in the suit properties the respondent could not lay a spousal claim or advance the idea that it is matrimonial property. He referred to Section 6 of the *Matrimonial Property Act* which provides as follows :

6.

(1) For the purposes of this Act, matrimonial property means –

a. The matrimonial home or homes;

b. Household goods and effects in the matrimonial home or homes; or

c. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

26. He referred me to the decision of Musyoka J in the case of P.O.M vs M.N.K (2017) eKLR and the decision of Nyakundi J in the case of T.M .V vs F.M.C (2018) eKLR. He submitted that for the defendant to have a claim of spousal rights, she ought to have proved that at the time the properties were being transferred she was a lawful wife to Pius Magere. He submitted that the defendant was not a spouse because she had been banished in 1987. He further submitted that when Pius Magere

transferred the properties there was no subsisting marriage with the defendant. He submitted that the properties do not form part of the free estate of Pius Magere. He further submitted that wives have a defined way of claiming provision from the estate of their husbands and this was not the correct court to do so. On the occupation by the defendant, he refuted the same, pointing to the evidence that there were trees on the land and tea which were not of the defendant. He did not see how a trust could ensue.

27. For the respondents, Mr. Nyamurongi, learned counsel, submitted inter alia that the appellants allude that the defendant and Pius separated and argued that there cannot be a separation without marriage. He referred to the evidence of John Magwaro Matini and William Kebu Ondieki to urge that they corroborated the evidence of marriage and that Pius set up a matrimonial home for the defendant on the suit land. He submitted that the appellants never informed court where Margaret and Pius had a matrimonial home for them to separate in 1987. He referred to the Matrimonial Property's Act definition of a matrimonial home as "any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property." He also referred to Section 6 on definition of matrimonial property which I have already set out above. He submitted that the suit property constituted the defendant's matrimonial home thus matrimonial property. He submitted that in the case Kisii CMCC No. 514 of 2016, Teresia, the mother of the appellants knew that her sons were registered as proprietors of the suit lands, and if the defendant was a trespasser, it does not explain why Teresia entered into the consent recognising the defendant as a spouse and agreeing that she could occupy the suit property. He submitted that the appellants cannot run away from the acts of their mother in the consent that she entered. He submitted that the appellants are bound by the acts of their father in settling the defendant on the suit property. He submitted that the burden was on the appellants to prove that there was no trust and referred me to the decision in the case of Munyu Maina vs Hiram Gathiha Maina (2013) KECA 94 (KLR). He submitted that it is only in equity that a trust can be inferred and referred to the case of Chase International Investment Corporation & Another vs Laxman Keshra & Others (1978) KLR 143.

28. He submitted that under Section 14 of the *Matrimonial Property Act*, where matrimonial property is acquired during marriage in name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse. He similarly referred to Section 28 (j) of the *Land Registration Act*, on overriding interests. He closed his submissions by asserting that if the judgment is not upheld it will render the defendant a vagabond.

29. In his oral highlights, Mr. Nyambati submitted that Section 28 (a) of the *Land Registration Act*, was deleted by an amendment in 2016 and the application of it as an overriding interest could not be available to the defendant when the counterclaim was filed in 2017. He further emphasised that the trial court relied on a consent to which the appellants were not parties and that the consent did not name the suit lands. He opined that the decree vitiated the right to a hearing under Article 50 of *the Constitution*. On his part, Mr. Nyamurongi referred to Section 28 (j) of the *Land Registration Act* for 'other interests provided in law' as constituting overriding interests. He also reiterated Section 14 of the *Matrimonial Property Act*. He submitted that if the defendant was indeed a total stranger a report would have been made to the police and she could not have been recognized in the consent. He submitted that the preoccupation of the court should be to do justice.

30. I have considered all the above.

31. This is a first appellate court and its duty is now a well trodden path. In Selle & Another vs Associated Motor Boat Company Limited & Others (1968) EA 123, it was stated as follows by Sir Clement De Lestang, VP at page 126 :

> " An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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 aspect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

32. This duty was reiterated in the case of Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, where the court stated thus :

> " 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."

33. I have all this in mind as I deal with this appeal.

34. The case of the appellants, at first glance, appeared simple. They pleaded to be the registered owners of the suit land, claimed that the defendant had encroached into their parcels of land, and they wanted her evicted and barred by an order of permanent injunction. The defendant's response was that she is rightfully on the suit land on the basis that it is matrimonial property. She contended that the properties are held in trust for her and indeed filed a countersuit seeking cancellation of the title of the appellants.

35. We need to recall that under Section 26 of the *Land Registration Act*, a title is prima facie evidence that the registered owner is the rightful owner and that he is holding it free of any encumbrances. That law is drawn as follows :

26.

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

a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

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

c) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

36. The burden therefore is not upon the registered proprietor to prove his title, unless of course it is a case where there are multiple titles so that each has to prove the genuineness of his title, but on the person claiming that the title is vitiated by some factors and ought to be cancelled. In our case what was pleaded by the defendant is that the title was held in her trust and she claimed an overriding interest on the basis that the title is matrimonial property. The burden was therefore upon the defendant to prove that the suit lands were matrimonial property, that they were held in trust, and that the trust was an overriding interest.

37. It would be straightforward if the register reflected that the titles of the appellants were encumbered by a trust. This would be an overt trust visible from the register itself. Thus if the register had reflected the registration of the appellants 'in trust for Margaret Nyangara' it would be apparent that the registration is in trust. It is what I refer to as an 'overt trust' , clear from the register. In such instance then the beneficiary can sue to give effect to the trust and have the property registered in his/her name. Not much problem would ensue in such instance.

38. The situation can get a little more complicated when what is claimed is what I would term as a 'latent trust' i.e one that is not in the register and is claimed as an overriding interest. An overriding interest is of course an interest in land that may not be noted in the register or even sometimes not capable of being noted in the register, but they are rights that subsist under law and can either be activated by the right holder or need to be respected by the registered proprietor. Section 28 of the *Land Registration Act*, lays down the overriding interests and it provides as follows :

> Overriding interests.
>
> 28. 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) spousal rights over matrimonial property; (deleted by The Land Amendment Act, No. 28 of 2016 commenced on 21 September 2016)
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> (b) trusts including customary trusts ;
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> (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
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> (d) natural rights of light, air, water and support;
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> (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
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> (f) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies; (deleted by The Land Amendment Act, No. 28 of 2016 commenced on 21 September 2016).
>
> (g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;

(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

(i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and

(j) any other rights provided under any written law.

39. I have deliberately copied the section inclusive of the law prior to 21 September 2016 because part of what was contended by the defendant was that she had an overriding interest based on spousal rights. Specifically, she did plead at paragraph 6 of her counterclaim, that 'her spousal rights' over the suit premises constitute an overriding interest which do not require registration within the meaning of section 28 of the *Land Registration Act* No. 3 of 2012. Similarly, prayer (a) of her counterclaim was for a declaration the her 'spousal rights' over the suit lands constitute an overriding interest and that the appellants hold the suit lands as trustees.

40. Now this pleading was not specific as to what subsection of Section 28 the defendant was claiming an overriding interest. She merely said she had 'spousal rights' but if by this pleading she was alluding to 'spousal rights over matrimonial property' which was hitherto contained in Section 28 (a) of the *Land Registration Act*, then she missed the mark because at the time the suit was filed, which was 13 October 2016, and the time that the counterclaim was filed, which was 7 February 2017, we did not have a Section 28 (a) and we did not have 'spousal rights over matrimonial property' being recognised as one of the overriding interests. I indeed cannot see any other interpretation that I can give to the pleadings of the defendant other than that she was claiming under Section 28 (a) but which had already been repealed. If she was not claiming under Section 28 (a) then her pleadings would have been different, or she would have needed to be more specific on which subsection of Section 28 her claim for an overriding interest was pegged.

41. I have taken the trouble of going through the submissions of Mr. Nyamurongi at the trial court but I now do not see mention of Section 28. It was probably due to the acknowledgment that Section 28 (a) of the *Land Registration Act* was no longer in existence and could not help the defendant. There was however no move to amend the counterclaim to specify under what provision of the law, if Section 28 (a) was now not applicable, that the defendant was claiming an overriding interest. What I see in the submissions of Mr. Nyamurongi in the lower court is the argument that the suit property is matrimonial property under Section 2 of the *Matrimonial Property Act*, 2013, and reference to matrimonial home under Section 6 of that Act. It would therefore appear to me that what the defendant was now pressing was no longer rights under Section 28 (a) but an overriding interest under Section 28 (j) i.e an overriding interest based on 'any other rights provided under any written law' and the law she was pointing at was Section 2 and 6 of the *Matrimonial Property Act*, 2013 which is now where I wish to go.

42. Section 2 is the definition section of the *Matrimonial Property Act* and among the definitions is that of 'matrimonial home'. The law provides that 'matrimonial home' means "any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property."

43. Section 6 defines matrimonial property. It will be recalled that I had copied it earlier but for ease of reference I will copy it again. It provides as follows :

6. Meaning of matrimonial property

(1) For the purposes of this Act, matrimonial property means—

(a) the matrimonial home or homes;

(b) household goods and effects in the matrimonial home or homes; or

(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

(3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

(4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.

44. When we go through the above sections, it will become apparent that the claim by the defendant to the suit lands, if any, could only be under Section 6 (1) (a) of the *Matrimonial Property Act*. It could not be under Section 6 (1) (b) which deals with household goods; nor under Section 6 (1) (c) which is property jointly owned and acquired during marriage. I rule out Section 6 (1) (c) because the evidence tendered was that the property had been purchased prior to the alleged marriage of the defendant to Pius Magere. This was indeed the evidence of the defendant herself as she testified that at the time of her being married in 1974, her husband had already purchased the land that he took her to, and that the 1st wife was already there and had no issue. Now, this evidence complicates matters for her because of the provisions of Section 8 of the *Matrimonial Property Act* which provides as follows :

8. Property rights in polygamous marriages

(1) If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, the—

(a) matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife; and

(b) matrimonial property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives taking into account any contributions made by the man and each of the wives.

(2) Despite subsection (1)(b), where it is clear by agreement of the parties that a wife shall have her matrimonial property with the husband separate from that of the other wives, then any such wife shall own that matrimonial property equally with the husband without the participation of the other wife or wives.

45. It will be seen from Section 8 (1) above that in case of a dissolution of a polygamous unition, the property acquired by the man and the first wife shall be retained equally by the man and first wife only if the property was acquired before the man married another wife. We could of course argue that this only applies in dissolution of as marriage but the section gives you the general approach towards matrimonial property in a polygamous union. The general approach will need to be rebutted when

we are not dealing with a divorce situation and can indeed be modified by various sections in the *Matrimonial Property Act* including Section 11 which provides that customary law principles are also be taken into account. That section is drawn as follows :

> 11. Consideration of customary law principles
>
> During the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of *the Constitution*, be taken into account including—
>
> (a) the customary law relating to divorce or dissolution of marriage;
>
> (b) the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of *the Constitution*; and
>
> (c) the principles relating to access and utilization of ancestral land and the cultural home by a wife or wives or former wife or wives.

46. From the above, it will be noted, especially at Section 11 (c), that account may be made of the cultural home by a wife or wives, or former wife and wives. I know too, that the context of Section 11 remains division of property, but yet again, it can be used as a general supposition in other situations as well. What captures my mind from a reading of Section 11 is the concept of a cultural home by a wife.

47. A cultural home would be the place where a spouse would culturally be entitled to some rights of occupation. I would equate it to a lesser right than the right of ownership of matrimonial property and I think it can apply where the spouse is unable to demonstrate rights of ownership of the property as a matrimonial property. For example, as I have pointed out, a man may be in a polygamous union. He may bring in a 2nd wife to the same land which he may have acquired with the 1st wife. Strictly speaking according to Section 8 (1) (a) that is land owned by the man and his 1st wife but it cannot be escaped that it is also on the same land that he has set up a home for the 2nd wife and it may be inequitable to say that the 2nd wife has absolutely no rights whatsoever to her home because it is on land that was purchased with the man and his 1st wife. I think that is where the concept of the cultural home comes in so as to protect such a spouse.

48. Now, let us transcribe all this to the situation at hand.

49. The defendant claimed that she had been married. I would agree that the issue of her marriage was an issue in the previous suit and there was agreement that she was wife of the deceased. I think it is prudent that I copy the consent which is reflected in the decree that was produced as an exhibit. It was drawn as follows :

> By consent of counsel for the parties this suit be and is hereby marked as settled on the following terms:
>
> 1. The plaintiff (in her capacity as wife of the late Pius Mauti Magere and members of her family (as children of the deceased) do participate in the burial arrangements of the deceased.
>
> 2. The body of the late Pius Mauti Magere be forthwith released to Mr. John Momanyi for burial on a date set by the Burial Committee.
>
> 3. The plaintiff and her family do continue occupation of the land on which her matrimonial home stands and do utilize the same exclusively provided that Mr. Ronald Sagwe be and is hereby allowed to harvest his trees growing thereon on

or before 30th November, 2016 and provided further that the 1st defendant be and is hereby allowed to continue harvesting tea leaves until 29th August 2018.

4. Each party do bear its own costs of the suit.

Given this 29th August 2016.

50. For context, the plaintiff in the above consent is the defendant herein. The defendants were Teresia Bonareri, Vitalis Mogaka, and Vincent Omboga. Teresia is the mother of the appellants and the other two defendants I believe are her sons. Ronald Sagwe, mentioned in that consent though not a party, is the 1st appellant herein. I will not go beyond the above consent at least in so far as it relates to the status of the defendant, given that one of the parties to that agreement was Teresia, the 1st wife of the deceased. I do not think she would have agreed to enter into a consent of that nature if she did not recognize the defendant as wife of the deceased. So yes, we can move on with the assumption that the defendant was wife of the deceased.

51. But what exactly was her relationship to the two suit properties ? This is where things become fuzzy and my own view of the evidence is that I do not think that the parties were entirely candid in their testimonies. I may not have seen the witnesses, but my impression is that both sides were economical with the truth, in an attempt to present what they believed would strengthen their case at the expense of full candour. For example, the appellants claimed that the defendant is a total stranger to them which I do not believe. The defendant also claimed to have been in continuous occupation of the premises which I also do not believe. If she were running an active homestead, I doubt that the suit lands would be in the state that they were. The consent in the earlier case (Kisii CMCC No. 514 of 2016) mentions trees planted by the 1st appellant, and in the consent entered in that suit he was to be allowed to harvest them. Similarly, pursuant to that consent, Teresia was to continue harvesting tea up to 29 August 2018. Now such could not happen if the defendant was in active continuous and exclusive use of the premises as her exclusive home. Moreover, the evidence presented regarding the developments in the suit lands is that there is only a single house. You would expect, if the defendant was truly in continuous occupation, that there would be some outhouses, an external kitchen even, and external units for her mature sons. In fact, it would appear that after this case was filed is when some additional developments were being made which made the appellants to file an application to stop their construction.

52. These facts, to me, point to a situation of a place that was not in active occupation and despite my doubt as to full candour by the appellants, the picture painted makes me believe their evidence that the house was abandoned and used as a store. I am in fact of persuasion that the defendant left this home in 1987 and went back to the home of her parents and I would think that it is here that she raised her children. If not, then you would have evidence of how her children were raised up on the suit lands, how they went to school, and such like evidence which is nowhere on record. There was of course mention of three children having been buried on the suit lands. However, there was no revelation of the years that they were buried and no mention of how old they were, and I wonder if this evidence was deliberately left out. I am of the persuasion that it is true that the defendant left in 1987 and she came back to the suit lands in 2016 after the demise of Pius Magere. I am also of the persuasion that her motivation was not solely to bury him but also to try and claim some land. That is why, despite the pleadings of the suit Kisii CMCC No. 514 being pleadings solely to be involved in the burial arrangements of the deceased, there was wringed out in the consent, the part that she should occupy the land where her home stands and use it exclusively, and that the 1st appellant would harvest his trees and Teresia the tea up to a certain period. These have nothing to do with burial but point to a scenario where the defendant wished to secure land rights over the suit lands.

53. I have upheld the consent in so far as the status of the defendant is concerned but does this consent really hold as against the appellants in respect to ownership and use and occupation of the suit lands ? I am not persuaded. The appellants were title holders at the time that this consent was entered. They were not parties to the suit. It cannot be claimed that Teresia was litigating on their behalf as Teresia had her own land which was distinct from the suit lands. She could not purport to enter into an agreement over parcels of land that were not registered in her name. One cannot in one suit purport to enter a consent affecting the rights of a title holder who is not a party to that suit. Whatever the case, the consent was not even specific on which land the defendant was to keep and its size. It merely said that she would continue occupation of the land 'where her matrimonial home stands.' If that consent related to the suit lands, it cannot bind the appellants, who were the registered proprietors, as they were not parties to it. This now brings me to the proprietorship of the appellants. Was it a proprietorship in trust for the defendant ?

54. As I mentioned earlier I am persuaded that the defendant left occupation of the house in 1987. I also mentioned that I am not persuaded that she came back until 2016. Now having left in 1987 it will be seen that 19 years had passed to 2006 when Pius Magere transferred the suit lands to the appellants. It is not clear what kind of relationship the defendant and Pius Magere had at this moment in time. They were certainly not living together and the defendant was at her maternal home. It could very well be that Pius Magere was of the view that she would never come back and that their relationship had terminated. Around the year 2006, Pius Magere was clearly organising his affairs, having in mind that he had little time left on earth. On 24 January 2006, he went to the Land Control Board and procured consent to transfer three parcels of land, that is Nyaribari Chache/B/B/Boburia/2932 to Teresia who was his wife, and Nyaribari Chache/B/B/Boburia/2933 and 2661 (the suit lands) to the appellants who were her children. It was said that he had 16 children and it is not clear to me how he catered for the rest though evidence was led that he had other parcels of land. This certainly was a man who was settling his affairs and distributing his property in a manner that he deemed fit given the circumstances.

55. Regarding the suit lands, the defendant was not in occupation, and one may discern the reasoning behind Pius Magere distributing these parcels of land to his sons (the appellants). It was clearly his wish that they should own the same. There is no indication that he was transferring the suit lands to the appellants with the purpose that they will hold them in trust for the defendant, so that if she came back then she would claim them as beneficiary of the trust. All indication shows that he was distributing the land to his sons as their inheritance.

56. I did mention earlier that there could be creation of an interest under Section 11 (c) on account of a cultural home of a spouse. From the evidence, it would appear that culturally, despite the differences that Pius had with the defendant, the defendant could be allowed to come back to her cultural home. However, that must be tempered with the fact that similarly, Pius was also settling his children and it was his wish that this be their inheritance. He was vested with this right as well.

57. Balancing these interests, I would think that all that the defendant would actually be entitled to would be nothing more than a life interest. Why do I say so ? Let us assume that Pius had transferred the land to the children of the defendant. If the defendant came back to the cultural home, would she be entitled to insist that the titles of her children be nullified and the land be transferred to her instead ? I do not think that this would be a sound basis. There cannot be sound basis just because the transfer is to children who are not hers. They are still children of the proprietor. I would equate this to a situation where parents transfer the land that they are living in and occupying to their children inter vivos. Their interest now remains a life interest on the land. When they depart the earth the land will now remain wholly in the name of their children, as transferred, without a further encumbrance of a trust by virtue of residence of the parents. I think it would be strange if this was not so ; it would mean that the act

of a parent transferring his land inter vivos to his/her child as his inheritance would mean nothing. It would also mean that a surviving parent can sue to nullify such transfer made by the deceased parent yet I would think that the only interest that the surviving parent ought to be entitled to is occupancy and use of the land that he/she used to utilize at the time of the transfer. Further, if such transfer was not to be respected, it would mean other people, whom the deceased owner did not wish for them to inherit that land would do so. The end result would in fact be disinheriting the very child that the parent wished to inherit the land and leave him/her with no land.

58. That indeed is the effect of the judgment of the trial court. By proceeding to make an order that the land be transferred to the defendant, the trial court disinherited the appellants yet this was the land that their father wished them to own. The court in fact left the appellants with no land at all yet this was land that was bought by their father and he transferred the same to them during his lifetime. As I have elaborated above, I am persuaded that the only interest the defendant would have is an interest to utilise the cultural home for the duration of her life and after that the land would have to be fully owned by the appellants. Any trust in the land would be a trust limited to the lifetime of the defendant and it would be a trust limited to the defendant utilising her cultural home and nothing more.

59. I have not seen any authority on this point and I presume that it is a novel point of law and the foregoing would be my interpretation of the situation at hand.

60. So what is the situation that we currently have ? The defendant is now deceased. It therefore means that the life interest is extinguished. The land must now be considered as being held and owned solely by the appellants with no encumbrance of a trust over the cultural home. If the defendant was still alive, my decision would be that she has a life interest in the cultural home with allowance being made for any use by the appellants of the suit lands. For example, if the appellants had their homes on the land, or farming it, that would have needed to be taken into account. In the circumstances at hand, if the defendant was alive, all that I would have entitled her to is the upper side of the land parcel Nyaribari Chache/B/B/Boburia/2933 i.e the portion across the road where the cultural home was located, and no more. I would not have granted her use and occupation of the land parcel Nyaribari Chache/B/B/Boburia/2661 because from my appreciation of the evidence, she had no cultural home on this land. Indeed, the Land Registrar's report, which the defendant produced as an exhibit, states that the lower part has napier grass and coffee which is under utilization by the appellants. There was mention of a new house built by a son of the defendant but on the parcel No. 2932 which is not among the parcels in dispute in this case.

61. From the foregoing, I am persuaded to allow this appeal. I set aside the judgment of the lower court. I will make the declaration that the appellants are proprietors of the suit lands absolutely with no encumbrance of any trust in favour of the deceased defendant. I will make the finding that the only trust that existed was a trust in relation to the cultural home, which was a life interest in favour of the defendant, and which life interest got extinguished upon her death. On the order for eviction and permanent injunction against the deceased, the defendant is deceased and therefore there is no purpose in issuing an order of eviction or the order of permanent injunction against her. She is not there to be evicted and not there to be permanently restrained from the suit land.

62. The last issue is costs. The parties were somehow related. There will be no orders as to costs.

63. Judgment accordingly.

DATED AND DELIVERED THIS 5TH DAY OF NOVEMBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Nyambati instructed by M/s G.M Nyambati & Company Advocates, for the appellants.

Ms. Kebungo instructed by M/s Nyamurongi & Company Advocates for the respondents.

Court Assistant – Michael Oyuko.