



**Kinoti v Nkanata (Environment and Land Appeal E070 of 2024)  
[2026] KEELC 181 (KLR) (22 January 2026) (Judgment)**

Neutral citation: [2026] KEELC 181 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E070 OF 2024**

**JO MBOYA, J  
JANUARY 22, 2026**

**BETWEEN**

**JAMES MWENDA KINOTI ..... APPELLANT**

**AND**

**DAVID KINOTI NKANATA ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. R. Ongira  
[ S R M ] in Nkubu ELC Case number 101 of 2019)*

**JUDGMENT**

1. The Appellant herein approached the subordinate court vide Plaintiff dated the 25/11/20219; and wherein the Appellant, who was the plaintiff in the subordinate court sought various reliefs against the Respondent.
2. The reliefs that were sought vide the Plaintiff are as hereunder:
  - i. An order compelling the Defendant to give the plaintiff a portion of land [equal to the other sons] from either land parcel number Nkuene/Ngonyi/1003 or Nkuene;/Ngonyi/1002.
  - ii. Costs and interest of the suit.
  - iii. Any other relief this court deems necessary.
3. The suit in the Subordinate Court was heard and disposed of vide judgment delivered on the 22/08/2024, whereupon the learned trial magistrate [ Hon. R. Ongira – S R M ] found and held that the Appellant had failed to prove his claim to the suit properties or at all. In particular, the learned trial magistrate found that the Appellant did not establish trust as against the Respondent. To this end, the learned trial magistrate proceeded to and dismissed the Appellant’s suit.



4. It is the said judgment and the consequential decree which has aggrieved the Appellant and thus provoking the subject appeal. The appeal is premised on the Memorandum of appeal dated the 20/09/2024; and wherein the Appellant has raised the following grounds:
  - i. The trial magistrate erred in law and fact in failing to consider the evidence by the plaintiff that that defendant is registered as the proprietor of the suit land to hold in trust for the plaintiff.
  - ii. The trial magistrate erred in law and fact by failing to consider the evidence by the plaintiff that the defendant treated him unfairly to give him share of the subject property yet he had given his brothers their share
  - iii. The trial magistrate erred in law by in fact by failing to find that the defendant is the biological father to the plaintiff thus entitled to the share of the suit land held in trust defendant
  - iv. The trial magistrate erred in law and in fact in finding that the plaintiff cannot demand from the defendant a share of the suit land for reasons that he is the registered owner and failed to take into account that the defendant held the suit land in trust for the plaintiff and the siblings.
  - v. The entire finding and judgement of the learned magistrate is bad and is against the law and the evidence on record.
5. The subject appeal came up for directions on the 13/10/2025 whereupon learned counsel for the Appellant informed the court that same had filed and served the record of appeal. Furthermore, learned counsel intimated that the record of appeal was complete. In this regard, learned counsel sought directions as pertains to the hearing and disposal of the appeal.
6. With the concurrence of the learned counsel for the Respondent, the court ventured forward and issued directions pertaining to the hearing and disposal of the appeal. In particular, the court directed that the appeal shall be disposed of by way of written submissions to be filed and exchanged by the parties. In addition, the court also prescribed the timelines for the filing and exchange of the submissions.
7. Learned counsel for the Appellant proceed to and filed written submissions dated the 19/12/2025 and wherein counsel has highlighted four [4] key issues.
8. Firstly, learned counsel for the Appellant has submitted that the learned trial magistrate erred in finding and holding that the Appellant had not established the ingredients underpinning the existence of a trust, yet the Appellant demonstrated that the suit properties were ancestral land. Additionally, it was submitted that the evidence which was tendered was neither controverted nor impugned by the Respondents. In this regard, it has been contended that had the magistrate directed her mind to the evidence tendered, same ought to have found and held that the Respondent was holding the suit properties on trust for the Appellant.
9. Furthermore, learned counsel for the Appellant has submitted that the learned trial magistrate failed to appreciate the holding by the Supreme court in the case of Isack Kiebia M'inanga versus Isiah Theuri M'lintari and another [2018] eKLR, which highlighted the various ingredients to be considered while dealing with a claim based on customary trust.
10. Secondly, learned counsel for the Appellant has submitted that the learned trial magistrate erred in finding and holding that the Appellant had not tendered evidence to demonstrate that same is a biological son of the Respondent. Nevertheless, it was submitted that the Appellant herein, tendered and produced before the court a copy of his birth certificate showing/demonstrating that the Respondent was his [Appellant's] father. Moreover, it was submitted that the fact that the



Appellant was a son of the Respondent was also confirmed vide the proceedings of the tribunal, which proceedings and findings had been filed before the court. Suffice it to state that the counsel referenced page 44 of the record of appeal.

11. The third ground which has been canvassed by the learned counsel for the Appellant relates to the fact that the learned trial magistrate failed to find and hold that the Respondent had treated the Appellant unfairly and thereby discriminating against the Appellant. In particular, learned counsel submitted that the Respondent herein had subdivided and given portions of his land to his other sons, but had failed to give a portion to the Appellant. In the respect, learned counsel has contended that the manner in which the Respondent has treated the Appellant violates the provisions of Article 27 of the Constitution 2010.
12. Finally, learned counsel for the Appellant contended that the Appellant herein tendered and adduced credible evidence to demonstrate that even though the Respondent is the registered owner of the suit property, his registration is subject to overriding interest, including customary trust.
13. In particular, learned counsel cited and referenced the provisions of Section 28 of the Land Registration Act, 2012 [2016].
14. Flowing from the foregoing, learned counsel for the Appellant has invited the court to find and hold that the appeal before hand is meritorious. To this end, the court has been implored to allow the appeal and to set aside the impugned judgment and the consequential decree. Furthermore, the court has been invited to find and hold that the Respondent holds the suit property on trust for the Appellant.
15. The Respondent filed written submissions dated 12.11.2025 and wherein same has highlighted three [3] issues, namely: Whether the learned trial magistrate properly evaluated the evidence and arrived at a correct finding on ownership and possession of the suit properties; Whether the learned trial magistrate erred in finding that the Appellant failed to prove the existence of customary trust; and Whether the appeal discloses any sufficient grounds warranting interference with the trial court's decision or otherwise.
16. It was the submissions of learned counsel for the Respondent that the suit properties lawfully belong to and are registered in the name of the Respondent. In addition, it was contended that the Appellant herein did not tender or adduce any plausible evidence to demonstrate his contention that the suit properties are held on trust for him. Moreover, it has been contended that trust can only be proven on the basis of clear and credible evidence. In this regard, learned counsel for the Respondent has submitted that the learned trial magistrate reached and arrived at the correct decision taking into account the totality of the evidence on record.
17. In support of the foregoing submissions, learned counsel for the Respondent cited and referenced the holding of the Supreme Court in the case of Isack M'Inanga Kiebia versus Isiah Theuri M'Lintali [2018] eKLR and Hubert L martin and two others versus Margret J Kamar and five others [2016] eKLR, respectively.
18. Next, learned counsel for the Respondent has submitted that the learned trial magistrate did not commit any error in her findings and conclusions, as pertains to non -existence of trust. Pertinently, it has been submitted that the learned trial magistrate fully appreciated the law as pertains the customary trust and thus the findings of the court are unassailable.
19. To buttress the foregoing submissions, learned counsel has referenced inter alia the holding of the court in the case of Mbui Mukango versus Gerald Mutwiri Mbui [2004] KECA 155; Mwangi and another versus Mwangi [1986] KLR 328 ; Mumo versus Makao [2002] 1EA 170 and Isaack M'Inanga Kiebia versus Isiah Theuri M'Lintali [2018] eKLR.



20. Regarding the third issue, learned counsel for the Respondent has submitted that the subject appeal does not disclose any reasonable/sufficient grounds, to warrant the intervention of the court. In particular, it has been submitted that the judgment of the learned trial magistrate was well reasoned and supported by the law. To this end, it has been contended that the appeal is misconceived and legally untenable.
21. Having reviewed the record of appeal; the evidence that was tendered before the trial court [both oral and documentary] and upon consideration of the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the subject appeal turns on two [2] key issues, namely: Whether the Appellant tendered and placed before the trial court plausible evidence as pertains to the existence of customary trust or otherwise; and Whether the learned trial magistrate committed any error or transgression[s] of the law or otherwise.
22. Before addressing the thematic issues, which have been highlighted in the preceding paragraph, it is imperative to highlight that what is before me is a first appeal. Being a first appeal, this court is enjoined to undertake exhaustive scrutiny, review, evaluation and analysis of the entirety of the evidence that was tendered before the court of 1<sup>st</sup> instance [ Lower court] and thereafter to discern whether the conclusion[s]/finding[s] arrived at by the lower court accord with the evidence or otherwise.
23. Furthermore, it is important to underscore that in the course of evaluating the evidence on record, this court is called upon to arrive at and form an independent conclusion. Besides, the court is seized of the discretion to depart from the factual finding[s] arrived at by the lower court. Nevertheless, it must be recalled that even though the court is obligated to arrive at an independent conclusion or depart from the factual conclusions, such departure can only be taken If and only if it is demonstrated that the findings of the lower court were based on no evidence; based on misapprehension of the evidence on record; perverse to the evidence tendered; or better still, where it is demonstrated that the judgment was arrived at in contravention of established principles of the law.
24. The scope and jurisdictional remit of the first appellate court while handling an appeal has been expounded in a plethora of decisions. In *Selle & another v Associated Motor Boat Co Ltd of Kenya & others* [1968] EA 123, the court of appeal for Eastern Africa, which is the predecessor of our court of appeal stated thus:

“ An appeal to this court from a trial by the High Court is by way of a re-trial 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 respect. 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. [see also *Kenya Urban Roads Authority & another Vs Belgo Holdings Limited* [2025]KECA ; and *Gitobu Imanyara versus Attorney General* [2016] Eklr.
25. It is the Appellant who approached the lower court contending that the suit property is registered in the name of the Respondent, albeit on trust for him[ Appellant]. Furthermore, the Appellant posited that same is a son of the Respondent and that by virtue of being a son of the Respondent, same was entitled to be granted a portion of the suit properties, belonging to and registered in the name of the Respondent.



26. Additionally, the Appellant contended that the suit properties, which are currently registered in the name of the Respondent comprised of family land; or ancestral land and thus same were registered in name of the Respondent to hold in trust for himself [Respondent] and his entire family, including the Appellant.
27. Furthermore, the Appellant contended despite holding the suit properties on trust for inter alia the Appellant, the Respondent, has breached the trust.
28. To the extent that the Appellant had contended that the suit properties were ancestral land; and family land; and were thus held on trust, it was incumbent upon the Appellant to tender and place before the trial court, sufficient evidence to demonstrate inter alia;
  - i. The suit properties were ancestral land.
  - ii. The suit properties were family land.
  - iii. The Appellant is a son of the Respondent
  - iv. The Respondent was registered as the owner of the suit properties to hold on trust.
  - v. That the Appellant could very well have been registered as the owner of the suit property or portions thereof, save for some intervening circumstances.
29. Despite having laid a claim based on customary trust, the Appellant herein failed to demonstrate how and in what manner the suit properties are contended to be family land. For good measure, the Appellant did not produce any evidence to show that the suit properties previously belonged to the father of the Respondent, or that the suit properties had been passed to the Respondent from the previous generation, to warrant the invocation and deployment of the doctrine of intergenerational equity.
30. Moreover, it is imperative to point out that even though the Appellant had contended that same is a son of the Respondent no evidence was tendered and produced before the trial court to warrant a finding and holding that the Appellant was truly a son of the Respondent. It is instructive to recall that the Appellant herein testified as PW1 and during his [Appellant] testimony, the Appellant merely adopted his witness statement dated 7/11/2023 and which witness statement was constituted as the evidence in chief.
31. Notably, the Appellant herein did not tender and or produce any documents let alone, a copy of his birth certificate. In the absence of evidence to demonstrate that the Appellant was [sic] a son of the Respondent, it was not practicable for the learned trial magistrate to return a finding that the Appellant was indeed a son of the Respondent.
32. Other than the foregoing, it is not lost on me that the Appellant called two other witnesses including Pauline Mugito Kiambati [PW2]. The said witness testified and produced before the court three documents, namely: copy of search in respect of L/R No. Nkuene/Ngonyi/1002, Copy of search in respect L/R Nkuene/Ngonyi/1003 and the demand letter dated 17/09/2019. Same were produced before the court and admitted as exhibits P1 – P3, respectively.
33. There is no gainsaying that even the second witness did not tender or produce a copy of the Appellant's birth certificate. Suffice it to state that the only time a copy of the birth certificate was being tendered was during the time of submissions on behalf of the Appellant which position was correctly found to be irregular. At any rate, there is no gainsaying that evidence can only be tendered in accordance with the [Evidence Act](#), chapter 80 laws of Kenya.



34. It is also important to point out that even if the Appellant had demonstrated that same is a son of the Respondent [ which was not demonstrated], the mere fact that one is a son, does not by and of itself denote that the son is entitled to a portion of the property or properties [if any], held by and registered in the name of the father. It may very well be that the property was purchased by the father and in such circumstance[s], the issue of customary trust does not arise.
35. I wish to state that it is a fallacy and misconception held by certain sons, and I dare add, the Appellant herein, that a son is entitled to partake of the properties of the father, merely on the basis of [sic] birth.
36. To my mind, the only properties that are subject to customary trust, are those properties that were passed over through the generations and thus constitute ancestral or family land. Nevertheless, it is incumbent upon any claimant, the Appellant herein not excepted, to produce evidence that vindicates the contention that the land in question is ancestral land. Absent such evidence, a Court of law cannot proceed on bare allegation[s] or mere assertion[s].
37. Moreover, it is worthy to underscore that trust can only be established and proven on the basis of the evidence. Absent plausible; cogent; and compelling evidence to demonstrate trust, a court of law cannot return a favourable finding in favour of the claimant. In the case of *Kazungu Fondo versus Japhet Noti Charo* [2021] eKLR, the Court of Appeal highlighted the need/necessity to tender evidence and substantiate the plea of trust.
38. The court stated as hereunder:

As earlier stated, the existence of a trust is a question of evidence. In the *Juletabi* case (*supra*), the court held that the onus lies on the 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 [only] in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.” The onus to prove existence of a trust lay squarely on the Appellants. Section 107 of the *Evidence Act* further provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Section 108 of the *Evidence Act* provides as follows:“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

Section 109 of the aforementioned Act again provides that:“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

39. Flowing from the foregoing analysis, I come to the same conclusion, as the learned trial magistrate. In particular, I find and hold that the Appellant did not tender any evidence to demonstrate that the suit properties comprised of ancestral land and that same were held on trust for him.



40. Notably, the burden of proving the claims was on the Appellant. [See the holding in the case of Daniel Torotich Arap Moi versus Mwangi Stephen Mureithi [2014] eKLR; Mucheru Versus national bank of Kenya Limited [2019] eKLR; and Dr. Samson Gwer and 5 others versus KEMRI [2020] eKLR – paragraph 49, 50 and 51, respectively.
41. Turning to the second issue, it has been contended that the learned trial magistrate failed to appraise herself of the evidence on record and thus arrived at an erroneous conclusion. Put differently, it has been contended that the judgment of the learned trial magistrate is wrought with errors and thus same need to be set aside.
42. Despite the contention by the and on behalf of the Appellant, I beg to state that I have discerned no error in the judgment of the learned trial magistrate. On the contrary, I find and hold that the learned trial magistrate correctly apprehended the issues raised at the foot of the pleadings by the Appellant and thereafter analyzed same in accordance with the law.
43. In particular, it is not lost on me that the Appellant herein had effectively sought to have the Respondent compelled to give him [Appellant] a portion of the suit properties. Moreover, the Appellant posited that same required to be given a portion [sic] equal to the other sons.
44. In my understanding, what the Appellant sought before the subordinate Court and by extension before this court, is an order to compel the Respondent to distribute his [Respondent's] in a particular manner. I am afraid that this court cannot compel the Respondent to distribute his land to and to and in favour of his children [if at all] during his lifetime. For good measure, the properties [if any] registered in the name of the father, the Respondent herein not excepted, can only be available for distribution upon the death of the registered owner subject to the *Law of Succession Act*, chapter 160 laws of Kenya.
45. In the case of MURIUKI MARIGI vs RICHARD MARIGI MURIUKI & 2 OTHERS [1997] KECA 386 (KLR), the Court of Appeal dealt with a similar situation where a suit had been filed by sons and grandsons seeking to compel the registered owner to distribute the property during his lifetime. For good measure, it was found and held that the registered owner of the Land could only sub-divide and distribute his/her property, [if at all] out of free – will and not otherwise.
46. For coherence, the Court stated as hereunder:
- “The Appellant as the registered owner of the suit property is still alive. His property is not yet available for sub-division and distribution among his wives and children except if he personally on his own free will decides to sub-divide and distribute it among them. He may not be urged, directed or ordered to do it against his own will.
- In the result and for the foregoing reasons, to the extent that the Respondents wanted the superior court to compel the Appellant to share the suit property during his lifetime in a particular manner and in designated shares, they did not have a cause of action in law respecting which the Court would aid them to enforce.”
47. The foregoing holdings and observations by the Court of Appeal, apply with equal force to the matter beforehand. Barring repetition, I reiterate that the Appellant herein was merely seeking to deploy the machinery of court in an endeavor to compel the Respondent to give same [Appellant] land under the guise of unproven customary trust.
48. To my mind, the learned trial magistrate correctly appraised and evaluated the evidence before her and thereafter, same came to the correct conclusion. I have not discerned any error in the judgment; and



taking into account the principles in *Mwanasokoni versus Kenya bus Services Limited* [1985] eKLR; and *Jabane versus Olenja* [1986] eKLR, I find and hold that the appeal before hand is devoid of merits.

49. Regarding the issue of costs, I beg to state that costs ordinarily follow the event. However, the court is vested with the discretion to direct otherwise, taking into account the circumstances of the case. Nevertheless, the discretion of the court is one that must be exercised judiciously and on the basis of sound principles. Additionally, where a court of law is inclined to depart from the general rule [costs follow the event], then the court is obliged to give good reasons for doing so. [See the holding of the Supreme Court in the case of *Jasbir Singh Rai and 3 others versus Tarlochan Singh Rai and 4 others* [2013] eKLR].

### **Final Disposition**

50. From the analysis, in the body of the Judgment, it must have become apparent that the appeal before hand is bereft of merits and thus same is a candidate for dismissal.
51. In the upshot, and for the reasons alluded to; the final orders that commend themselves to me are as hereunder:
- [I] The Appeal be and is hereby dismissed.
- (ii) The Judgement of the trial magistrate and the consequential decree arising therefrom be and hereby affirmed.
- (iii) costs of the Appeal be and are hereby awarded to the Respondent.
- (iv) The Costs in terms of clause [iii] above shall be agreed upon and in default, to be taxed in the conventional manner.
52. It is so ordered.

**DATED SIGNED AND DELIVERED AT MERU ON THE 22<sup>ND</sup> DAY OF JANUARY, 2026.**

**OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].**

### **JUDGE**

In the presence of:

Hussein Court Assistant

Miss. Nyokabi holding brief for Mr. Mutuma for the Appellant

Mr. Miriti for the Respondent.

