



**Mutisya v Mwaniki (Environment and Land Appeal E038 of 2023)
[2025] KEELC 5705 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5705 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E038 OF 2023**

NA MATHEKA, J

JULY 29, 2025

BETWEEN

PETER MUTINDA MUTISYA APPELLANT

AND

MUTUKU MWANIKI RESPONDENT

*(Arising from the Judgment of Honourable Magistrate
A. Nyoike in Machakos ELC. CASE No. 21 of 2020)*

JUDGMENT

1. The Appellant herein being dissatisfied by the entire Judgment of Honourable A. Nyoike delivered on 2nd November, 2023 hereby appeals against the entire Judgment on the following grounds;
 1. That the learned Magistrate erred in law and in fact in dismissing the Plaintiff's case.
 2. That the learned Magistrate erred in law and in fact in failing to appreciate the Plaintiff's pleadings evidence and documents on record.
 3. That the learned Magistrate erred in law and in fact in wholly believing the Defendant testimony and failed to appreciate the Plaintiff's testimony and evidence on record.
 4. That the learned Magistrate erred in law and in fact when she failed to appreciate that no other family member lives on the suit land and no other family member is laying a claim to the suit land.
 5. That the learned Magistrate erred in law and in fact when she failed to appreciate that the suit land ceased to be ancestral land for the benefit of the entire family when it was allocated to the Appellant's father as his share of inheritance and a title deed issued in his favour.



6. That the learned Magistrate erred in law and in fact when she failed to find that the Defendant had slept on his rights when he failed to prosecute the caution he had lodged and or prosecute his claim under the Succession Court in High Court Succession Cause No. 510/2010.
 7. That the learned Magistrate erred in law and in fact when she proceeded to issue orders that were never sought.
2. It is thus proposed to ask this Honourable Court to;
1. Set aside the Lower Court Judgment.
 2. Grant prayers 1, 2, 5 and 6 as sought by the Appellant before the Lower Court.
 3. Grant the Appellant costs of the Appeal and in the Lower Court.
3. This court has considered the evidence and the submissions therein. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in *Mbogo and another v Shah* [1968] EA 93 where it was held that;

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”

4. The matter began by a plaint dated 2nd December 2023. The Plaintiff/Appellant testified that he is the owner of land parcel Masii/Kithangani/242 having inheriting the same from his father Mutisya Mwaniki through succession in HCC Succession Cause No. 510 of 2010 and transferred to him in 2012. He produced the title deed as an exhibit. That the Respondent is his father’s brother and with the help of his grandmother his father and his uncles had divided their property among his three sons. The Respondent and his elder brother were allocated land elsewhere in Makueni where they put up their homes. That some years after the death of his father the Respondent illegally moved into the suit land and is occupying about half an acre. That on the 8th November 2015 the Respondent trespassed into the Appellant’s portion and destroyed crops and has placed a caution. He stated in cross examination that the 1st Respondent returned onto the suit land in 1977 and has stayed there to date. He stated that the 1st Respondent’s wife was buried on the suit land that his father was registered as the owner in 1972 but was not born when the land was bought.
5. It is not disputed that the suit land is registered in the name of the Plaintiff/Appellant. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24[a] of the [Land Registration Act](#) provides as follows;

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”



6. Section 26 [1] of the [Land Registration Act](#) states as follows;

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”

7. The 1st Defendant/Respondent testified that Mutisya Mwaniki was his brother and the Plaintiff’s stepfather. That his late mother Ndinda Mwaniki subdivided the suit land into three equal portions for her three sons namely Kikuli Mwaniki, the 1st Respondent Mutuku Mwaniki and Mutisya Mwaniki. Kikuli sold his portion to the 1st Respondent and relocated to Makueni.

8. The Supreme Court in Petition No. 18 [E020] OF 2022 Arvind Shah & 7 Others v Mombasa Bricks & Tiles Limited & 5 Others stated as follows;

“While Sections 25, 26 and 28 of the [Land Registration Act](#) recognize that the rights of a registered proprietor of land are absolute and indefeasible, these are only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests include trusts. In our view, and in the absence of any limitation as to the trusts, this includes constructive trusts. Applying the provisions of Article 24 of [the Constitution](#) therefore, the limitation of the right to property is provided under law, and includes a constructive trust. [86]We have found that the doctrines of equity are part of our laws by virtue of Section 3 of the [Judicature Act](#). And while [the Constitution](#) entitles every person to the right to property at Article 40, this right is not absolute. Article 24 provides that a right cannot be limited except by law. We have also established that, while Sections 25 and 26 of the [Land Registration Act](#) provide for the rights of a proprietor and that the certificate of title is conclusive evidence of proprietorship, Section 28 provides that the registration is subject to overriding interests. One of these overriding interests is trust, which includes constructive trust.

We have also established that constructive trusts can arise in various circumstances, including in land sale agreements. Trust is an equitable remedy which is an intervention against unconscionable conduct. Where the circumstances of the case are such that it would demand that equity treats the legal owner as a trustee, the law will impose a trust. It is imposed by law whenever justice and good conscience require it. On this issue and for the reasons given above, we therefore find that a constructive trust can be imported into a land sale agreement to defeat a registered title.”

9. Section 28 [b] of Land Registration Act provides as follows;

- a. 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—
- b. ...
- c. trusts including customary trusts.



10. Similarly in the case of Peter Gitonga v Francis Maingi M’Ikiara Meru HCCC NO. 146 of 2000 it was stated that;

“A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged.”

11. Finally, the concept of customary trust has found firm approval in the Supreme Court of Kenya in the case of Issack Kieba M’Inanga v Isaaya Theuri M’Linturi & Anor Supreme Court of Kenya No. 10 of 2015 where the Lord Justices of the Supreme Court held as follows;

“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 were 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: the land in question was before registration, family, clan or group land; the claimant belongs to such family, clan, or group; 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; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; the claim is directed against the registered proprietor who is a member of the family, clan or group.”

12. The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must prove that the suit properties were ancestral/ clan land; that during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; that the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family.

13. The Appellant/Defendant led detailed evidence that the suit land was subdivided among the three brothers. That land was held under in trust under Mutisya Mwaniki’s name. That the 1st Defendant has always stayed there. I am satisfied that the 1st Defendant has been in possession of the suit land from the 1970s with other family members and this is not in dispute. Looking at the totality of the evidence that was considered by the court below and noting that both the Appellant and Respondent were in peaceful occupation of their respective parcels for over 35 years before 2015 and when the Appellant filed the suit for eviction, we are persuaded that the trial magistrate was not wrong in his finding. I find that it was dishonest for the Appellant to transfer the suit plot to himself through succession knowing very well the 1st Defendant/Respondent was and had been in possession for decades and had constructed a house thereon. If one was to believe the Appellant for a moment, why would Mutisya Mwaniki and later the Appellant allow the Respondent to occupy the parcel of land for over 35 years without raising any question?

14. I find that a customary trust does exist and the 1st Defendant/Respondent holds an overriding interest over the suit land. Having found that the Appellant has failed to discharge the evidentiary burden on a balance of probability, this Court holds and finds that the trial magistrate did not err in law when



he found for the Respondent herein. The upshot of the foregoing is that this Court finds and holds that the Appeal herein as contained in the Memorandum of Appeal dated 29th November 2023, is not merited.

15. On the issue of costs, Section 27 of the *Civil Procedure Act* requires that costs to follow event, but the Court has the discretion to rule otherwise. The Court in Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR quoted the case of Levben Products v Alexander Films [SA] [PTY]Ltd 1957 [4] SA 225 [SR] at 227M held:

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion [Fripp v Gibbon & Co., 1913 AD D 354]. But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

15. This Court notes that the Appellant and Respondent are relatives and the dispute is over family property. In a nutshell, the Court finds and holds that the Appeal herein is not merited and is dismissed with no orders as to costs as the parties are relatives.
16. It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF JULY 2025.

N.A. MATHEKA

JUDGE

