

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
EMBU
ELC APPEAL NO. E011 OF 2024

EVANSON NYAGA SOLOMON.....

APPELLANT

VERSUS

BEDAN NJERU SOLOMON.....1ST

RESPONDENT

JEFITHA NJERU SOLOMON.....2ND

RESPONDENT

ENOSH NJERU SOLOMON.....3RD

RESPONDENT

MARGARET WANJA SOLOMON.....4TH

RESPONDENT

JUDGMENT

1. This appeal was lodged against the judgment of Honourable J.W Gichimu, Senior Principal Magistrate, delivered on 2/4/2025 in Runyenjes ELC Case No. 19 of 2018, which the Appellant instituted seeking to have the Land Registrar, Embu directed to remove the caution registered against the land known as Kyeni/Mufu/717. The Appellant's claim was that he was the registered proprietor and owner of the land known as

Kyeni/Mufu/717 (the suit land), and that on or about April 2012, the Respondent caused a caution to be registered against the suit land without any colour of right. The Appellant sought to have the caution removed.

2. The Respondent filed a defence and lodged a counterclaim jointly with Jecklia Gicuku Solomon, Jefitha Njeru Solomon, Enosh Njeru Solomon, the late Njagi Solomon and Margaret Wanjagi Solomon vide which they sought a declaration that the Appellant held the suit land in trust for himself and for them. They sought an order for the suit land to be subdivided into eight equal shares and for the parties to each get a share as well as costs.
3. The Respondent averred that they are siblings. That their father died in 1953 and was survived by two widows, Jemimah Ciangoci Solomon and Runji Solomon and their children. They averred that during the land adjudication process in the late 1950's, the family of the late Solomon Ndwiga was given two parcels of land for each wife to share out to their children. They contended that their mother was given the suit land and that they appointed the Appellant to be registered to hold the land in trust for the other children since the custom did not allow women to be registered as proprietors. They contended that the Appellant converted the suit land into his own and purports to hold it absolutely and intended to sub divide it and share it out to his children to the exclusion of his siblings. The 1st Respondent admitted that he placed a caution against the suit land but denied he did so

without any colour of right. He averred that he was entitled to a portion of the suit land.

4. The Appellant filed a reply to the defence and counterclaim in which he denied the averments and invited the court to enter judgement as prayed in the plaint and dismiss the counterclaim with costs.
5. During the hearing, the Appellant testified that the Respondent was his younger brother. He stated that he owned parcel no. 717. It was registered in his name on 17/5/1961 and a title deed was issued to him on 31/3/1970. That when their father died in 1953, he did not leave behind any land as the Respondent alleged, neither did his mother Jemima and stepmother Runji.
6. He stated that, in 1962, his mother and stepmother settled on the suit land where they lived until his mother's demise in 1967. She was buried on his brother's land. He stated that none of his brothers and sisters had constructed any house on his land and that after their mother's death, he took the initiative of educating them with his elder brother and was surprised at how thankless they were.
7. He averred that he was registered as the absolute owner of the suit land and denied that he held the land in trust for his siblings. He stated that he was the only one that had lived on the suit land for 52 years. That he developed the land and built a permanent home and throughout there was no objection. He averred that the individuals claiming the land were elderly men and women aged between 63 and 72 years, suggesting that their

claims were motivated by mischief. Further, that during the land demarcation in 1959, the Respondent was too young to understand land matters and that Margaret Wanja Solomon was married and lived far way from his home. He urged the court to direct the Respondent to remove the caution registered against the suit land to enable him use his land.

8. On cross-examination, he stated that he was 19 years old when the suit land measuring 7 acres, was registered in his name. He belongs to the Marigu clan. His mother Jemimah had eight children, while his stepmother Peris Runji had six children. After their father's death, both families lived together. He stated that land was being allocated by the clan to individuals and not by home units. He and his elder brother were allocated land, although he did not know the criteria which the clan used.
9. He denied that the eldest son was given land to hold in trust for the family or that the land could not be registered in their mother's name because she lacked an identity card. He stated that he personally went to the lands office to have the suit land registered in his name. He denied the claim that their mother declared him a trustee over the suit land. He planted coffee on the land with his mother and was registered as the owner of the coffee and issued number 561. The Appellant produced copies of the title deed, register and demand letter.
10. The Appellant called his elder brother, Epephras Mburia Solomon as a witness. Solomon stated that their father died in 1953 but did not leave behind any land. From 1955, he took up the

responsibility of providing for his family with regard to their education until their mother's death in 1967. That when their mother died, her children including the Respondent, went to live with him on his land and the Appellant joined him in paying school fees for those who were still in school. That during land adjudication, the Appellant was given land by the Marigu clan, which is the suit land measuring 6 acres. He was also given land but the Respondent was not given any land. He denied that the Appellant was given the suit land to hold it in trust for his brothers and sisters.

11. The Respondent, Bedan Njeru Solomon and his six witnesses told the court that the suit land is customary land and was given to their mother, Jemimah Ciangoci in the late 1950's by the clan. They stated that the land could not be registered in the late Jemimah's name because it was during the colonial period and she did not have an identity card. Therefore, she picked the Appellant, being the second eldest son to represent the family as a trustee. Her eldest son, Epephrahs Mburia had already been given land by the clan and could not be registered as a trustee. Their father's other wife, Runji, was given Kyeni/Mufu/503 with her children. They averred that the Appellant evicted his brothers and sisters from the suit land and that he is the only one living there. They maintained that the Appellant was registered as proprietor of the suit land to hold it in trust for his siblings.

12. After hearing the suit, the trial court noted that in 1961, when the Appellant was registered as the owner of the suit land, he was 19 years old and in school, and that the land was given to him by the Marigu clan. The court found that it had been established that the suit land was clan land before it was registered in the Appellant's name. The court observed that it was uncontroverted that the Appellant's father's two wives were each given land by the clan. That because women did not have identity cards during the colonial times, they were asked to provide the names of their eldest sons for registration. The Appellant's elder brother, Epephras could not be registered as the owner of the suit land because he already had his own land. Hence the Appellant's mother gave out the Appellant's name and that is how he was registered as the owner of the suit land.
13. The trial court was satisfied that the Appellant was registered as proprietor of the suit land on behalf of his mother, and as such, the land did not belong to him alone but to him and his brothers and sisters. The court found that the registration of the Appellant as the owner of the suit land was as a trustee for all his siblings therefore creating a customary trust in favor of the Respondent and his siblings. The court further observed that under the principles set out in **Isack M'inanga Kiebia v Isaaya Theuri & another (2018) eKLR** actual possession or occupation was not necessary for a trust to be inferred. The court found that evidence showed that the Respondent and his siblings had lived on the land before being removed by the Appellant and that they

were not allocated any other land by the clan nor was their mother.

14. The trial court observed that the land given to the Appellant's stepmother was also registered in her son's name for the benefit of her children. Further, it noted that the Respondent and his siblings could not have been registered as the owners of the suit land because they were too young and the land had to be registered in the name of the eldest son. The court found that the Respondent had proved his counterclaim on a balance of probabilities and dismissed the Appellant's suit.
15. Aggrieved by that determination, the Appellant raised eight grounds in the memorandum of appeal. He faulted the trial court for awarding the suit land to the late Jecklia Gicuku Solomon and Njagi Solomon when the court ordered the suit land to be divided into eight equal shares. He also faulted the court for declaring that the suit land was registered in his name to hold in trust for his unidentified siblings without sufficient evidence and for finding that a customary trust existed over the suit land.
16. Further, he faulted the court for finding that the first registration in his name was not absolute in the absence of sufficient evidence to the contrary. He took issue with the court's finding that the Respondent was justified in placing a caution against the suit land and dismissing his case with costs. He asserted that the court disregarded his written submissions and gave a judgment that was against the evidence adduced.

17. The Appellant urged the court to allow the appeal, set aside the trial court's judgment and direct the removal of the caution placed against the suit land as well as the costs of the appeal and the suit in the trial court.
18. The appeal was canvassed through written submissions. The Appellant submitted that customary trust is a question of fact that must be proved by evidence and that the burden of proof lay on the Respondents who failed to adduce cogent evidence to support their claim that the suit land was held in trust. The Appellant argued that the land register did not indicate that he held the suit land in trust and that Section 24(a) of the Land Registration Act provided that he was the absolute owner. He argued that the Respondent or his siblings had never lived or developed the suit land and that the claim that they once lived there was not supported by evidence and that their claim of customary trust should have failed at that point.
19. Further, he submitted that the Learned Magistrate erred by awarding portions of the suit land to dead persons who were not substituted in the suit. In his view, the Learned Magistrate should have ordered their substitution to have their interests represented by their beneficiaries for their claim of customary trust to succeed. He maintained that the Respondents did not prove their claim for customary trust on a balance of probabilities and urged that the appeal be allowed.
20. The Respondent submitted that the appeal lacked merit and urged that the Learned Magistrate correctly analyzed the

evidence and law in finding that the Appellant held the suit land under a customary trust for himself and his siblings. He argued that there was nothing in the repealed Registered Land Act that precluded the declaration of a trust in respect of registered land even if it was a first registration.

21. He submitted that the Appellant's evidence failed to explain why only he among his siblings and mother was given the whole land measuring 7 acres. His view was that it was highly unlikely that the clan would have given him the land leaving nothing to his siblings. The Respondent urged this court to uphold the Learned Magistrate's findings and dismiss the appeal with costs.
22. The issue that falls for determination in this appeal is whether the Appellant holds land parcel Kyeni/Mufu/717 under a customary trust. In **Kiebia v M'lintari & another (Petition 10 of 2015) [2018] KESC 22 (KLR)**, the Supreme Court set out the principles to be considered in a case of customary trust. These are;
 - i. The land in question was before registration, family, clan or group land.
 - ii. The claimant belongs to such family, clan, or group
 - iii. 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.
 - iv. The claimant would have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.

v. The claim is directed against the registered proprietor who is a member of the family, clan or group.

23. In this case, the Respondent and his witnesses gave consistent evidence that the Appellant was selected by their mother to be registered as the owner of the suit land, not for his sole benefit, but to hold it in trust for his siblings. They explained that this arrangement was made during the land adjudication period, when the clan was allocating land. That their mother nominated the Appellant to be registered on her behalf because he was the second eldest son and the eldest son had already been allocated land by the clan. It was not disputed that since the eldest son had already been allocated land, he could not be nominated as the family trustee.
24. Additionally, that their mother could not be registered as the proprietor of the land because she did not have an identity card at the time. The prevailing custom during the colonial period was that women were not given identity cards, and that as such, they could not be registered as landowners. This fact was not controverted by the Appellant. Since their mother could not be registered as proprietor of the suit land at the time of adjudication and allocation by the clan, it was not unusual for the clan to allocate land to a 19 year old son to the exclusion of his mother, who was the head of her household after the demise of their father.
25. The evidence of Josphat Kaunju Kamunga, a recording clerk during the land adjudication process and a clan member,

corroborated the Respondent's testimony that the Appellant's registration was done in trust for his siblings since their mother could not be registered as proprietor of her family's land. He confirmed that their stepmother, Runji, was allocated parcel no. 503, which was registered in the name of Njue Solomon, who was a minor at the time. This evidence was uncontroverted and corroborates the Respondent's account.

26. This court agrees with the finding of the trial court that the Appellant was registered as proprietor of the suit land to hold it under a customary trust for himself and his siblings.
27. The Appellant's other challenge of the trial court's decision is that by awarding some of the subdivided portions to Jecklia Gicuku Solomon and Njagi Solomon, the trial court awarded parts of the suit land to dead persons. In this court's view, that is not fatal to the claim, as the respective shares of the departed siblings will devolve to their legal representatives.
28. The appeal fails and is dismissed. The court directs that land parcel Kyeni/Mufu/717 will be subdivided into seven equal shares, following which the Appellant, the Respondent, and the Respondent's co-claimants in the counterclaim will each receive one share. The subdivision will take into account the portion on which the Appellant has built his home so that he is awarded that portion.
29. Since the parties are members of the same family, each party will bear its costs of the suit before the trial court and of this appeal.

Delivered virtually at Bungoma this 2nd day of February 2026.

K. BOR
JUDGE

In the presence of: -

Mr. Evanson Nyaga Solomon- the Appellant

Mr. Bedan Njeru Solomon- the 1st Respondent

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