

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT HOMA-BAY**  
**ENVIRONMENT AND LAND COURT APPEAL NO. E009 OF**  
**2025**

**JANE ACHIENG OJIENDA.....APPELLANT**

**VERSUS**

**JOHN**

**OKWANYO.....RESPONDENT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT AND LAND COURT APPEAL NO. E011 OF**  
**2025**

**BETWEEN**

**DAVID ONYANGO**

**MASI.....APPELLANT**

**VERSUS**

**JANE ACHIENG**

**OJIENDA.....RESPONDENT**

***(Being an Appeal from Oyugis CMELCC NO. 64 of 2022  
delivered by Hon. Ongeru C.M on 18<sup>th</sup> February 2025)***

**JUDGEMENT**

- 1.** By way of Plaintiff dated 31<sup>st</sup> October 2022, the 1<sup>st</sup> Appellant herein sought the following orders in the trial court;
  - 1) An Order of Eviction evicting the Defendants, their agents and/or servants from the Plaintiffs Parcel of Land No. EAST KASIPUL/KOKWANYO/1426.**
  - 2) Damages for loss of user and destruction to the Plaintiffs land since the trespass and illegal occupation.**
  - 3) Costs of this suit.**

**4) Interest on (b) and (c) above at Court rates.**

**5) Any other or further relief as the Court may deem fit to grant.**

- 2.** In the Plaintiff, she pleaded that she is the registered proprietor of land parcel NO. EAST KASIPUL/KOKWANYO/1426 measuring 4.0. Ha or thereabouts since 31<sup>st</sup> January 2019. That in total disregard of the fact that the Plaintiff is the legal and registered proprietor by transmission of her father's land, the Defendants trespassed upon the Plaintiffs parcels of land after she became registered and thereon demarcated for themselves portions to the total exclusion of the Plaintiff and without her consent. She urged the court to allow the prayers in the plaintiff.
- 3.** The defendants filed a statement of defence dated 21<sup>st</sup> November 2022. They stated that the 1<sup>st</sup> Defendant is a biological brother of the Plaintiffs father, one Samson Njura Masi whilst the 2<sup>nd</sup> Defendant is a distant cousin. That during Adjudication the Plaintiffs' father was registered as the owner of the original parcel of land because he was the eldest brother and it was the norm during that time for the eldest sons to be registered as such to hold the parcel of land on behalf of the rest of the children. Consequently, there was created a trust on the land and the Plaintiff cannot purport to evict the 1<sup>st</sup> Defendant from the land now.
- 4.** Further, that the Defendant has lived on the suit property since their childhood together with the Plaintiffs father to date and during the lifetime of the Plaintiffs father there were no squabbles over the ownership and occupation of the land. The Plaintiff filed succession of her late father whereof the only tangible property' was the parcel of land without involving her

siblings and or his uncle. That the Plaintiffs father was polygamous yet the Plaintiff succeeded the land in exclusion of her own step sisters and just allocated them land randomly without any consensus at the family level.

- 5.** Furthermore, the Plaintiff sold a portion of the original parcel of land which portion is the suit property herein to the 2<sup>nd</sup> Defendant herein at the price of Kshs. 800,000/= which was paid in two instalments. That despite the land being in the name of her father at the time of the purchase, it is the Plaintiff who approached the 2<sup>nd</sup> Defendant to buy the land on the basis that she had an urgent issue that she wanted to use the funds for. The 2<sup>nd</sup> Defendant bought the land to assist her because of her pestering.
- 6.** The defendants denied the averments under paragraph 6,7,8, of the plaint and the Plaintiff and urged that in 2017 after payment of the 1<sup>st</sup> instalment of Kshs. 400,000, the 2<sup>nd</sup> defendant occupied, fenced, and gated the 4 acres of land purchased which was inspected by the plaintiff in person and thereafter, she sent her surveyor to confirm the acreage fenced. In June 2018, after paying the second and last instalment of another Kshs. 400,000, he planted trees in fenced property.
- 7.** In response to the averments under paragraphs 6, 7 and 8 of the plaint, the 1<sup>st</sup> defendant stated that he has been residing on the suit property ever since he was born and still resides thereon. The 2<sup>nd</sup> Defendant prayed that the court compel the Plaintiff to transfer the land to him and/or in the alternative the Plaintiff to refund the Purchase price at the current market

value of the developed suit property plus interest. The 1<sup>st</sup> defendant prayed that the court dismiss the case against him.

**8.** The matter then proceeded to full hearing

### **Hearing at the trial court**

- 9. PW1** was the Appellant herein. She adopted her witness statement as evidence in chief. In it she stated that she was the only child and daughter of the late Samson Njura Masi who died 5<sup>th</sup> August 2005. He was the registered owner suit parcel number East Kasipul/Kokwanyo/1426. She is applied to succeed him and became the registered owner of the said parcel of land. Her uncle David Onyango Masi and her neighbour John Okwanyo had since invaded her land, apportioned it out between themselves and erected structures and fences on it and started cultivating it without her consent. She wished to have them evicted from it.
- 10.** She produced the certificate of title deed, copy of title deed for East Kasipul/Kokwanyo/1426 as Exp1, a certificate of official search as Exp2, and the Grant of Succession Cause No. 138/2016 as EXP3.
- 11.** She testified orally that she was the daughter of Samson Njura Maro. Before and when he died he used to own parcel number East Kasipul/Kokwanyo/963. That her father did not have sons and she was the only daughter. Further, that when he was alive he gave the title documents and she did succession. She stated that she had the Grant of letters of administration issued on 9<sup>th</sup> February 2017 which she used to get title. That she subdivided the land and remained with no. 1426 which is in her name. She urged that she did a search which shows the land is in her name. That the title deed was

issued in 2019 and Succession was done in 2016 and nobody has objected to the succession.

- 12.** The witness stated that John trespassed 2016 and David on 2017. By that time the land was already in her name. further, she did not sell to any person the land. Further, David was her uncle and had been staying outside of the land. He had his own land, and had not disputed the succession. She further stated that she did not sell land to John Okwanyo and that he gave her land for lease and for a project but there was no agreement for sale.
- 13.** During cross examination, she stated that her father had 2 wives. That the original title was 963, which was in the name of her father. Her grandfather gave the sons each piece of land. David had 955 as his land and he tills in that piece of land. Further that he stays in 963. She could not tell know why he came to her father's piece of land when he came back. He came back when her father had died, and trespassed in 2017.
- 14.** She stated that she was not present when her grandfather subdivided the land. Further, that she knew John but they were not related and that she did not sell him any piece of land. That John was her neighbour and she had told him, about plans to build a house at the grave. Further, that he proposed that he would give her Kshs. 400,000/= and he would assist her in establishing a fresh life. That she paid Kshs, 700,000/= and when shown an email dated 8.5.2012) she stated that she received Kshs. 400,000/= but the purpose was not for land sale. She stated that she returned the money and denied selling him the land using the Grant.

- 15.** The plaintiff closed the case and the defendant called witnesses in support of his case.
- 16. DW1 was David Onyango Masi** who adopted his witness statement as evidence in chief. In late he stated he was a brother to the plaintiff's father who was the registered owner of parcel No. 963 which was later subdivided into four pieces including parcel No. 1426. The suit parcel was and I strolled the plaintiff fraudulently applied They granted succession proceedings without including the whole family and excluded her own sisters Christin Ayango Njura and Synthia Akinyi Njura. Father that he learned but after the succession proceedings the plaintiff caused the departure to be subdivided into several plots including the suit property herein. She did not allocate any portion to him and his family and she was currently demanding that he vacates the land given to the plaintiff's father and him by their own father.
- 17.** He added the plaintiff had sued the second defendant to whom she sold the suit property in the summer of Kenya shillings **800,000** and Given vacant possession yet he had paid her the entire sum and had even developed the suit land. Further, That the matter had been discussed by the clan Elders who affirmed the 2<sup>nd</sup> defendant had bought four acres from the plaintiff, and he and the first defendant were entitled to a share of their land together with other siblings of the plaintiff's father. That the clan elders took into account that the piece of land he lived on had been divided to him, and it was where he lived on with his two wives and over 10 children. He prayed that the court orders that he was entitled to the suit property by virtue of a trust created by her late father and the plaintiff to transfer

to him his portion. He also prayed that the court orders that he transfers the portion bought by the 2<sup>nd</sup> defendant to him or she refunds him his money.

**18.** He stated orally that he was the uncle to the Plaintiff and that her father was the registered owner of East Kasipul Kokwanyo 963 which was later sub divided into 4 pieces including 1426 which was their family land. Further, the plaintiff fraudulently filed the succession cause without involving the family and did not allocate any land to him and his family. He urged that the matter had been determined by the Assistant Chief and the area Chief and urged the court to dismiss the claim as he is entitled to the land by virtue of the trust created by his father on the land.

**19. DW2 was John Ochieng Okwanyo** who adopted his witness statement as evidence in chief.

**20.** He stated that he was the secretary of the Minutes dated 23/01/2020 which he produced as D-exhibit 5. He stated that the Plaintiff visited his rural home severally in 2017 and requested him to purchase her land which request he obliged. He bought it at a cost of Kshs. 800,000/= of which the plaintiff's offer was KShs 200, 000/= per care as the highest of all other interested buyers. On 7<sup>th</sup> May, 2017, she called him and they agreed on the modalities of the agreement and that once she acquired title the sale agreement would be executed. He then sent her the first instalment of Kshs. 400,000/- on 8<sup>th</sup> May 2017 via RTGS through the Standard Bank to her Equity Bank account. He later sent the last instalment of KShs 400,000/= through the same media to her Equity Bank, clearly indicating on all the money transfers that the funds were for

the purchase of land. He then took possession, fenced it, gated it, and planted trees therein until 2020 when she refused to execute the sale agreement after doing succession. He requested the intervention of the Area Chief and Assistant Chief stated that he was entitled to the land and prayed the court dismiss the suit and it was done. He was given possession by the plaintiff herself. They both contracted services of a surveyor to demarcate the land of 4 acres being sold to him. Further, that while doing the succession cause the plaintiff failed to recognize him and the 1<sup>st</sup> Defendant failing to recognize that a trust was created by the plaintiff's father and she excluded him. That clan elders recognized him as a buyer and the 1<sup>st</sup> Defendant's share was affirmed. He added that he was entitled to his share and the 1<sup>st</sup> defendant too besides the two other children of the plaintiff's father. Lastly, that even if the land was sold to him while the land was in the plaintiff's father's name the plaintiff was the one who approached him to sell the land to him, and he paid for it and developed it.

**21.** During cross examination he stated that he sent the money from Standard chartered bank from Nairobi. Jane was not present. That he instructed the bank and it did not request for the land sale agreement. There was a reference code for sale of land. He stated that the plaintiff was evasive and the sale agreement was prepared but she declined to sign. The lawyer prepared. He further stated that he started occupying the land in 2017 August and received the letter in 01.1.2020 to vacate. That Jane declined to attend although she was invited.

**22. DW3 was Benson Odero Ojweke** who adopted his witness statement as evidence and stated that he was the secretary of

minutes dated 23/1/20 which he produced as (Exh.D5 (a) and (b). He stated in the year 2017 he was called by the who wanted to write an introductory letter to Gin he was asked what he knew about the land and he stated that the plaintiff's father had two wives one of whom was the plaintiff's mother and the second wife had three children namely Cynthia A young Christina Cheung and Victor again the chief referred the matter to the and the clan held which established besides the children of the late Njura there was a purchaser who had purchased some portion. They therefore resolved that four (4) acres be allocated to the plaintiff and 2 acres to be allocated to Tom Okuku. Thereafter, they learnt that the plaintiff had sold all her land to the 2<sup>nd</sup> Defendant in the sum KShs 800,000. He was aware that the second defendant paid the sum because he showed him (the witness) bank payments. He added that the land was registered in the plaintiff's father's name because he was the eldest son of the family.

**23.** During cross examination he stated that they invited Jane to the clan meeting but she did not attend.

**24. DW4 was Jacob Ochieng Orinda** who adopted his witness statement as evidence in chief. In it he stated that in 2017 Plaintiff who wanted to sell parcel the 963. One Belson Odero Ojoeke a clan member informed him of a meeting before the area chief. Consequently, a meeting was organized by the clan to deliberate over the issue in 2018 and he was the chairman thereof. They visited the parcel of land and divided it subdivided it. The plaintiff was given four (4) acres and the purchaser Tom Okuku was given two. The remaining portion of the parcel was for the first defendant and the plaintiff's step

sisters. Thereafter, the plaintiff sold all of her land to the second defendant in the sum of KShs 800, 000/=. In the year 2019 the 2<sup>nd</sup> Defendant complained to the clan that the plaintiff was refusing to transfer to him the land. The Assistant Chief summoned the clan again but the plaintiff did not attend. The Assistant chief asked for the Minutes of the meeting of the clan and they gave him. He referred the matter to the Chief who summoned her but she did not also attend. That was all he knew.

25. During cross examination, he stated that in 2017 the Appellant wanted to sell land to Okwanyo but he did not witness the sale or the sale agreement.
26. **DW3** was recalled and he stated that the meeting was held in January 2020 and further, that they were not aware that Jane was the registered owner. He knew that Samson was the owner and Jane was not present during the meeting.
27. **DW5** was the Assistant Chief Kokwanyo Sub Location, **Andrew Orinda Ouma** who testified that he was familiar with the letter of 16/11/2020 which he wrote to the chief. During cross examination he stated that he introduced the complainant to the chief.
28. **DW6** was **David Juma Nyambane**, the Chief Kokwanyo location who produced the letter dated 21/11/2022. He stated that he was aware that Succession had been done but there was a complaint that the beneficiaries were left out. He stated that he did not know if they revoked the grant.
29. Upon considering the pleadings, evidence and testimonies in court, the trial court dismissed the case of the plaintiff against

the 2<sup>nd</sup> defendant but allowed the eviction of the Plaintiff vide the judgement delivered on 18<sup>th</sup> February 2025.

**30.** Being aggrieved with the judgement, the Appellant instituted the present appeal vide a Memorandum of Appeal dated 28<sup>th</sup> February 2025 premised on the following grounds;

**1) That the learned trial Magistrate erred in law and in fact in finding that there was a land sale agreement between the Appellant and the Respondent when there was none.**

**2) That the learned trial Magistrate erred in law and in fact in inferring from the Documents prepared and presented by the Respondent but not signed by the Appellant or witnessed by anybody that such documents constituted a sale agreement.**

**3) That the learned trial Magistrate erred in law and in fact in finding that there was a land sale agreement against the requirements of the law that such an agreement must be in writing and executed by parties to the same.**

**4) That the learned trial Magistrate decided the case against the weight of evidence on record.**

**31.** Additionally, the 2<sup>nd</sup> Appellant an Appeal vide a Memorandum Appeal dated 4<sup>th</sup> March 2025. The Appeal was premised on the following grounds;

**1) That the Honourable Magistrate erred in facts and law in finding in favour of the Respondent as against the Appellant in herein.**

**2) That the Honourable Magistrate erred in facts and law in finding that the claim by the Respondent**

**herein ought to be determined in a succession cause which clearly denied him jurisdiction to issue any orders thereof and yet went ahead to make an eviction order against the Appellant.**

**3) The Honourable court erred in facts and law by failing to keenly consider evidence that was presented before the court by the Appellant more particularly the minutes by the clan.**

**4) The Honourable court erred in facts and law by failing to consider the submissions filed by the Appellant.**

**32.** The Appeals were consolidated by the court on 3<sup>rd</sup> July 2025 with Homa Bay Environment and Land Court Land Appeal No. E009 being the lea file.

**33.** Parties were directed to prosecute the Appeal by way of written submissions. However, at the time of filing submissions, only the 1<sup>st</sup> Appellant had filed submissions.

### **Appellants' Submissions**

**34.** Counsel submitted that the Appellant filed a suit against the Respondent seeking orders to evict him from her parcel of land namely EAST KASIPUL/KOKWANYO/1426. The search and the Title Deed attached to the plaint confirmed that the Appellant is the registered proprietor of the parcel of land EAST KASIPUL/KOKWANYO/1426 and she enjoys the absolute ownership conferred under Section 24 of the Land Registration Act of 2012.

**35.** Counsel urged that the in his scanty judgment the trial Magistrate has made a finding that the Appellant is the registered owner of the suit land and the 1<sup>st</sup> Defendant in the suit in the Lower Court has to give vacant possession. As

regards the case against the present Respondent who was the 2<sup>nd</sup> Defendant in the Lower Court dismissed the case of the Plaintiff against the 2<sup>nd</sup> Defendant (Respondent herein) and allowed the eviction of the 1<sup>st</sup> Defendant. The Appellant can only assume that the trial Magistrate must have agreed with the Respondent that he bought part of the suit land.

**36.** The Respondent, in the statement made to Court, admitted that he bought a portion of land when the title was still in the name of the Plaintiff's father. Counsel submitted that this cannot be the suit land. That this admission is fatal to his claim because, the Appellant had no land to sell. But above all else there is no sale agreement executed between the Appellant and the Respondent in respect of the suit land from which the Court would have made a finding of sale. Counsel urged that it is trite law that a land sale agreement must be reduced into writing and executed by the parties concerned for it to be effective. There is no such agreement and the Court should have found out so and agreed with the Appellant that the Respondent was a trespasser and should be evicted as prayed for. The trial Magistrate assigns no reasons for dismissing the Appellant's case against the Respondent.

**37.** Counsel maintained that the Appellant established that she was the registered proprietor with all the attendant rights and her prayers for eviction should have been upheld. The Respondent "Bought" land which was not the Appellant's and has no rights over the Appellant's present land. This Appeal should be allowed with costs to the Appellant.

### **Analysis and Determination**

**38.** The duty of a court on appeal has been stated severally in various celebrated decisions. In **Williamson Diamonds Ltd and another v Brown [1970] EA 1**, the court held that:

**“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”**

**39.** This is the position stated in **Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123** wherein the Court of Appeal held:

***“...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 ...”***

40. It was also restated in **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR** as follows:

***“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse 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.”***

41. Additionally, the Court the of Appeal, in the case of **Susan Munyi v Keshar Shiani (2013) eKLR** stated as follows:

***“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyse, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions”***

42. Further, in **PIL Kenya Limited v Oppong [2009] KLR 442**, it was held that:

***“It is the duty...of a first appellate court to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage***

*of hearing and seeking the witnesses and their demeanour and giving allowance for that”.*

43. Similarly, decision of **Gitobu Imanyara & 2 others Vs Attorney General [2016] eKLR.** It was held as follows;

*“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 allowances in this respect.”*

44. Guided by the above decisions, this court has considered the record of appeal and the decision of the trial court. I note that the Respondents’ claim to the land was premised on an allegation that he purchased the same from the appellant in 2017 whereas the 2<sup>nd</sup> Appellant claims there was a customary trust established when the appellants’ father was registered as the owner of the parcel no. 654 from which the suit land was subdivided.

45. The first issue that arises from the suit appealed from is;  
**Whether the Respondent in Appeal No. E011 of 2025 purchased the suit land**

46. The Respondent alleged that he purchased the suit land from the 1<sup>st</sup> Appellant and even produced a sale agreement as

proof of the same. A perusal of the sale agreement reveals that it is indeed between himself and the 1<sup>st</sup> Appellant. He endeavoured to evidence this by way of banking in slips or what he termed as RTGS payments from his Standard Bank to the Respondent's Equity Bank account. However, the agreement relating to the sale of land was not executed by any party. What he purported to provide as evidence of the same was a draft or unsigned document to that effect.

**47.** Section 3(3) of the Land Act provides as follows;

**“No suit shall be brought upon a contract for the disposition of an interest in land unless-**

**(a) the contract upon which the suit is founded-**

**(i) is in writing;**

**(ii) is signed by all the parties thereto; and**

**(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party”**

**48.** The purported agreement having not been signed, was not enforceable, particularly the requirement of such a transaction for acquisition of an interest in land being provided for under the law that it be in writing and the signature of each party to be witnessed by at least one person. Therefore, the Respondent did not acquire any interest in the suit land. The respondent admitted that he had entered into and took possession of the suit land. He did so at his own peril. He therefore, was clearly trespassing thereon. It is therefore peculiar that the trial court chose to dismiss the plaintiffs' case against the Respondent and

finding that the Appellant had proved her case. In light of the above, it is clear that the sale agreement having not been signed, the Respondents could not claim an interest in the suit land and the trial court erred in its judgment.

**49.** Moreover, two more legal hurdles still worked against the said Respondent's acquisition of the property in the suit land. One was that even if there could have been an agreement for the sale of the land, the Plaintiff (Jane) had no capacity to enter into an agreement over the purchase of the land. This was because she was not the owner of the same at the time the purported sale took place. The land was not registered in her name and therefore she could not legally transact on it as owner.

**50.** The second legal issue that militates against the Respondent's claim is that the suit land was part of the Estate of the Appellant's deceased father. It has not undergone the process of succession since the said owner died intestate. As such, the actions of the Respondent in purporting to buy the property amounted to intermeddling with the Estate. It was actually an offence for him to purport to deal in the property of the deceased person contrary to Section 45 of the Law of Succession Act, Chapter 160 Laws of Kenya.

**51.** Notably, the judgment indicates that the court allowed the eviction of the 1<sup>st</sup> Plaintiff which is erroneous as there is no '1<sup>st</sup> Plaintiff' and there were no eviction orders sought against the Plaintiff. The upshot of the foregoing is that the decision of the trial court must be set aside.

**Whether the Appellant in this Appeal (No. E009 of 2025) established that there was a customary trust**

**52.** The Appellant contended that the father to the Respondent, Jane, held the land in trust for his family. Under Sections 107, 109 and 112 of the Evidence Act, the burden of proof lay on the appellant to prove his case. Thus, the said burden of proving a customary trust fell on the party alleging it. Such a position was affirmed in the case of **Mbui Mukangu v Gerald Mutwiri Mbui [2004] eKLR.**

**53.** On thing that is clear from the pleadings is that the Appellant only pleaded in paragraph 5(c) of the Defence dated 21<sup>st</sup> November 2022. that there was a trust created. He did not give the particulars of the trust. Even when he mentioned it, he only raised it as a defence and not a claim. Furthermore, he did not file a counterclaim based on the said claim.

**54.** In **Mbasa v Mbasa & another (Civil Appeal E034 of 2021) [2025] KECA 1420 (KLR) (31 July 2025) (Judgment)** the court held;

**On the first issue, customary trust is a recognized legal principle, especially in cases where land is passed down through generational inheritance within communities. The Supreme Court of Kenya, in Isack M’Inanga Kiebia (supra), outlined four key elements necessary to establish a customary trust: the land must have been historically owned by the claimant’s lineage or family, meaning it should have been passed down through generations as part of traditional inheritance; the claimant must prove that he was entitled to the land under customary law practices, demonstrating that he had a recognized**

**right to possess or use the land according to communal traditions; Additionally, the registered owner must have acquired the land subject to the customary rights of others, meaning that even though they hold title to the land, they must have acknowledged the existing customary claims over it at the time of registration; lastly, the claimant must show continued occupation or possession consistent with the alleged trust, proving that his presence on the land has not been interrupted and aligns with the customary arrangement under which he claims ownership.**

**55.** I have carefully analysed the evidence before the trial court. The appellant did not adduce any evidence to show how the property was transmitted from his father or mother who owned it, to the Respondent's father, and as a trust. More so, it was clear that the suit land was part of the larger parcel No. 963 which was subdivided. The appellant testified and called three witnesses to support his claim. His and their evidence was simply general assertions that the land was supposed to be divided between the family of the late father of the Respondent, Jane, and him. Additionally, the appellant does not explain why, if at all his evidence about a customary trust was true, how the parcel No. 1426 which was part of the larger parcel No. 963 before it was subdivided is singled out to be the only parcel he would be laying claim of customary trust on and not in the original 963. Moreover, apart from the appellant none of the other family members, including the siblings of the Respondent,

Jane, raised any complaints about the manner of distribution, if at all, regarding the succession carried out. The appellant only held unto a reed as his case drowned, by 'summoning' the existence and presence of the Respondent's siblings and other family members by purporting to speak on their behalf.

**56.** In my humble view, the Appellant did not lead any evidence to prove that there existed a customary trust. In fact, he barely addressed the issue of the trust in the trial court and in the Appeal, he did not tender any submissions either.

**57.** Further, I have carefully considered the judgment of the trial court. whereas the Appellant contends that the trial court found that the claim and counterclaim by the 2<sup>nd</sup> defendant was the subject of a succession cause, I note that the trial court referred to a claim and counter claim in this regard where no counterclaim existed. Further and more importantly, in as much as the trial magistrate mentioned the issue of the Succession Cause being the appropriate forum for the dispute between the Appellant and the Respondent, his findings as against the Appellant in Appeal No. E011 of 2025 were not the based on the issue he expressed. Therefore, there was no element of succession issues that passed into the decision as the Appellant claim, in defence, that he was entitled to a portion of the land through a customary trust. As the evidence showed, he encroached on the Appellant's (Jane's) land. He did not file a Counterclaim to have the court make a determination on his allegations. I find that the Respondent proved her case against the Appellant in E011 of 2025 and he too was supposed to be evicted.

**58.** The upshot of the foregoing is that the Appeal succeeds in the following terms;

- i) The appeal in ELCLA No. 009 of 2025 is allowed. The appeal in ELCLA No. E011 of 2025 fails. The judgment of the trial court is hereby set aside.**
- ii) There is hereby entered judgment for the Plaintiff against the Defendants in the suit, namely, *Oyugis CMELCC NO. 64 of 2022*, for an order of eviction against them forthwith from parcel No. East Kasipul/Kokwanyo/1426, and for them to pay the costs of the suit.**
- iii) Costs in the Appeals herein to be borne jointly and severally by the Respondent in ELCLA No. E009 of 2025 and Appellant in ELCLA No. E011 of 2025.**

Judgment **dated, signed and delivered via the Teams Platform on this 6<sup>th</sup> day of March 2026.**

**HON. DR. IUR. NYAGAKA**

**JUDGE**

**From 1:40 PM, in the presence of,**

G. Masese Advocate for the Appellant in ELCLA E009 of 2025

Ms. Kisaka Advocate for the Respondent herein/ Appellant in E011 of 2025 (absent)