

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ELC APPEAL NO. E080 OF 2025

IBRAHIM MUTUMA M'MUGUONGO1ST APPELLANT

STEPHEN KAARIA M'NANUA2ND APPELLANT

VERSUS

STEPHEN MARANGU MUGAMBI.....RESPONDENT

[Being an Appeal from the Judgment/Decree of Hon. Rose Ongira – Senior Resident Magistrate in Nkubu MCELC delivered on 24th April, 2025]

JUDGMENT

1. The Respondent herein *[who was the plaintiff in the lower court]* filed the Complaint dated the 27.07.2023; and wherein the Respondent sought various reliefs. In particular, the Respondent sought a declaration that **LR Nkuene/Mitunguu- Kithino/2272** *[hereinafter referred to as the suit property]* is held by the 1st Appellant on trust for him [respondent]. In addition, the Respondent also sought a declaration that the sale of the suit property to and in favour of the 2nd Appellant was illegal; unlawful and in breach of the trust.
2. Additionally, the Respondent sought for an order of cancellation of the transfer and registration of the suit property in the name of 2nd Appellant; and re-conveyance of the suit property unto him. Moreover, the Respondent also sought an order compelling the 1st Appellant to execute the transfer instruments in his favour; and in default, that the transfer instruments be executed by the deputy registrar of the court.

3. Lastly, the Respondent sought an order of permanent injunction to restrain the Appellants either by themselves, servants, agents and or anyone acting on their instruction from interfering with his [Respondent's] occupation; possession; and use of the suit property.

4. The Appellants herein duly entered appearance and filed a statement of defence. The statement of defence and counter claim is dated the 12.10.2023. The 1st Appellant denied the claims by and on behalf of the respondent. In particular, the 1st Appellant posited that their mother, namely; Marisera M'Mugambi was the lawful owner of **LR Number Nkune/Mitunguu-Kithino/383** [*hereinafter referred to as the original parcel of land*].

5. It was the further contention by the 1st Appellant that their mother [now deceased] subdivided the original parcel of land into various portions and thereafter transferred **LR No. Nkuene/Mitunguu-Kithino/1830**, unto him [1st Appellant]. Moreover, the 1st Appellant contended that the suit property is a subdivision of LR No. **Nkuene/Mitunguu-Kithino/1830**.

6. Additionally, the 1st Appellant contended that the suit property was lawfully sold to and in favour of the 2nd Appellant. In this regard, the 1st Appellant has posited that the suit property lawfully belongs to and is registered in the name of the 2nd Appellant. Furthermore, it was contended that the 2nd Appellant is a *bona fide* purchaser for value and hence entitled to vacant possession of the suit property.

7. Be that as it may, the 1st Appellant contended that the Respondent has failed and refused to vacate the suit property and to move unto his [Respondent's] property, namely **LR Nkuene/Mitunguu-Kithino/1829**, which is stated to be a subdivision of the original parcel of land. Besides, it has been contended that the Respondent has no lawful rights to and in respect of the suit property.
8. The 2nd Appellant reiterated the position taken by the 1st Appellant. In addition, the 2nd Appellant averred that the suit property was sold to and transferred in his favour by the 1st Appellant. Moreover, it has been contended that before entering into the sale agreement, the 2nd Appellant undertook due diligence and in particular, conducted a search in respect of the suit property. The 2nd Appellant has averred that the search revealed that the suit property belonged to and was registered in the name of the 1st Appellant. To this end, the 2nd Appellant posits that same was thereafter convinced that the suit property was available for sale.
9. Flowing from the foregoing, the 2nd Appellant has contended that same is a lawful and bona fide purchaser for value without notice of any defect in the 1st Appellant's title. In this regard, the 2nd Appellant invited the lower court to allow the counter claim dated the 12.10.2023; and to grant orders of eviction against the respondent; permanent injunction; and *mense profits*.
10. The suit in the lower court was heard and disposed of *vide* Judgment dated and delivered on the 24.04.2025 and wherein the Learned Trial Magistrate found and held that the Respondent had been in occupation of the portion of land now comprising the suit property. Furthermore, the Learned Trial

Magistrate found and held that the respondent's occupation of the suit property was informed by customary trust.

11. Arising from the foregoing, the Learned Trial Magistrate proceeded to and entered Judgement in favour of the respondent. In particular, the Learned Trial Magistrate found and held that the suit property was being held by the 1st Appellant, albeit on trust for the respondent. Additionally, the Learned Trial Magistrate found and held that insofar as the suit property was impacted upon by customary trust, same was not available for sale to and in favour of the 2nd Appellant.

12. Moreover, the Learned Trial Magistrate found and held that the 2nd Appellant, who was/is the area chief, was privy to the information pertaining to the suit property. In addition, the Learned Trial Magistrate found that the 2nd Appellant purchased the suit property, while the Respondent was in occupation thereof. To this end, the Learned Trial Magistrate held that the 2nd Appellant was/is not an innocent purchaser for value.

13. With the foregoing findings, the Learned Trial Magistrate dismissed the counter claim by and on behalf of the 2nd Appellant. It is the said Judgment and the decree arising therefrom, which has aggrieved the Appellant and thus provoking the subject Appeal.

14. The memorandum of Appeal is dated the 22.10.2025. It suffices to state that the Appeal was filed with leave of the court. The order granting leave was made on the 21.10.2025.

15. The grounds at the foot of the memorandum of Appeal are:

- i. *That the Learned Magistrate erred in Law and fact in finding and holding that the 1st Appellant held the subject parcel of land No. NKUENE/MITUNGUU-KITHINO/2272 in trust for the Respondent.*
- ii. *That the Learned Magistrate erred in law and fact in finding and holding that the transfer and/or sale of the subject parcel of land No. NKUENE/MITUNGUU-KITHINO/2272 to the 2nd Appellant by the 1st Appellant was in breach of the customary trust, irregular and unlawful therefore null and void ab intio.*
- iii. *That the Learned Magistrate erred in law and fact in ordering the cancellation of the registration of the 2nd Appellant from title of LR No. NKUENE/MITUNGUU-KITHINO/2272 and the same to revert in the name of the 1st Appellant for eventual transfer to the Respondent.*
- iv. *That the Learned Magistrate erred in law and fact in finding and holding that the 1st Appellant to execute all the requisite instruments and/or documents to effectuate transfer of the subject parcel of land No. NKUENE/MITUNGUU-KITHINO/2272 to the Respondent.*
- v. *That the Learned Magistrate erred in law and fact in granting permanent injunction restraining the Respondents, their agents, employees or assigns on their behest from interfering with the*

Respondent's use and occupation of the subject parcel of land No. NKUENE/MITUNGUU-KITHINO/2272.

- vi. THAT the learned Magistrate erred in law and fact in failing to take into consideration the evidence tendered by the Appellants in support of their defense thereby occasioning miscarriage of justice.***

16. The Appeal beforehand came up for directions on the 22.01.2026, whereupon learned counsel for the Appellants confirmed that same had filed and served the record of Appeal. In addition, learned counsel posited that the record of Appeal was complete. Counsel thereafter sought directions as pertains to the hearing and disposal of the Appeal.

17. With the concurrence of the learned for the respondent, the court proceeded to and issued directions. The directions were: The Appeal shall be canvassed by way of written submissions; the Appellant shall file and serve the written submissions within 14 days from the date of directions; the Respondent shall file and serve written submissions within 14 days from the date of service; and the Appellant shall be at liberty to file rejoinder submissions [if any] within 7 days from the date of service.

18. The Appellant filed written submissions dated the 30.01.2026 and wherein the Appellants have raised and canvassed four key issues. The issues canvassed by the Appellant are: The Learned Trial Magistrate failed to interrogate the evidence tendered by the Respondent and to ascertain whether the evidence was sufficient to establish customary trust; the Learned Trial Magistrate erred in finding that mere occupation/living on the suit property constituted trust; the Learned Trial Magistrate misconstrued the

burden of proof and erred in finding that the Respondent had discharged the requisite burden of proof; and the Learned Trial Magistrate erred in granting an order of permanent injunction in respect of the suit property against the lawful/registered owner thereof.

19.Regarding the first issue, it has been submitted that the Learned Trial Magistrate failed to subject the evidence tendered by the Respondent to the requisite scrutiny and interrogation and thereafter arrived at an erroneous conclusion that the Respondent had established the plea of customary trust. In particular, it has been submitted that the Respondent only settled on the portion of land which now comprises the suit property during the life time of their mother, but the Respondent was thereafter allocated his own parcel of land, namely; LR Nkuene/Mitunguu- Kithino/1829.

20.Additionally, it has been submitted that upon being allocated his own land, namely; LR Nkuene/Mitunguu-Kithino/1829, the Respondent was obligated to move to his land, but same has failed to do so. In any event, it has been submitted that mere occupation/living on the suit property does not give the Respondent any colour of right.

21.It was the further submission by learned counsel for the Appellant that the Learned Trial Magistrate did not appreciate the ingredients underpinning the plea of customary trust and that the findings by the Learned Trial Magistrate, are perverse to the totality of the evidence on record. Thereafter, learned counsel has cited various decisions, namely; **M'Mbui and others versus Rinyiru [2025] KEELC; M'Rinyiru versus Mbui [2021] KECA; Juletabi African Adventure Limited and another versus Christopher Michael Lockley [2017] eKLR; Gichuki versus Gichuki [1982] KLR 285;**

Mbothu and 8 others versus Waitimu and 11 others [1986] KLR 171; and Isack M’Nanga Kiebia versus Isaiah Theuri M’Lintari and another [2018] EKLR.

22. Secondly, learned counsel for the Appellant has submitted that the Learned Trial Magistrate erred in law by finding and holding that the Respondent had proved/established customary trust even though the evidence tendered did not satisfy the requisite standard. In particular, it has been submitted that the Respondent did not prove his case on a balance of probabilities, in the manner required under the law.

23. Learned counsel for the Appellants has thereafter cited the decision in the case of **Gatirau Peter Munya versus Dickson Mwenda Kithinji and 2 others [2014] eKLR; and Peter Ndungu Njenga versus Sophia Watiri Ndungu [2000] eKLR**, respectively.

24. The next issue that has been canvassed by the learned counsel for the Appellants relates to the cancellation of the 2nd Appellant’s title. It has been submitted that the Learned Trial Magistrate misapprehended and misapplied the law, in coming to the conclusion that the sale and transfer of the suit property to the 2nd Appellant was vitiated by customary trust.

25. On the contrary, it has been submitted that the sale and transfer of the suit property was lawful, and thus the transfer ought not to have been cancelled. In any event, it has been submitted that there was no evidence tendered or placed before the court to show that the 2nd Appellant purchased the suit property in bad faith; with the knowledge of any irregularity; or illegality.

26. Lastly, learned counsel for the Appellant has submitted that the Learned Trial Magistrate erred in law in granting an order of permanent injunction against the 2nd Appellant, yet the 2nd Appellant was demonstrably the registered owner and proprietor of the suit property. To this end, it has been posited that the issuance of the orders of temporary injunction was in contravention of the provisions of **sections 24 and 25 of the Land Registration Act, 2012.**

27. In view of the foregoing, learned counsel for the Appellant has invited the court to find and hold that the judgment of the trial magistrate was vitiated by errors of principles and thus same ought to be set aside. To this end, the court has been implored to allow the Appeal; set aside the impugned judgment; dismiss the Respondent suit in the lower court; and to allow the 2nd Appellant's counter claim in the lower court.

28. The Respondent filed written submissions dated the 05.03.2026 and wherein same has highlighted four [4] key issues. The issues are: The Learned Trial Magistrate correctly appreciated and applied the law as pertains to customary trust; the Respondent duly proved/established customary trust including occupation of the suit property; the sale and transfer of the suit property to the 2nd Appellant was vitiated by breach of customary trust; and the second Appellant did not establish the elements underpinning the plea of bona fide purchaser for value or at all.

29. Learned counsel for the Respondent has revisited the evidence that was tendered before the trial court and thereafter submitted that the Respondent duly proved and established that same was in occupation of the suit property. In addition, it was submitted that the Respondent had been in occupation of

the portion now comprising of the suit property even during the life time of their mother [now deceased].

30. Moreover, it has also been submitted that the mother of the 1st Appellant and the Respondent herein did not ask the Respondent to move out of the portion now comprising of the suit property.

31. Additionally, learned counsel for the Respondent has submitted that the 1st Appellant had indeed agreed to transfer the suit property to and in favour of the respondent. However, it has been posited that the 1st Appellant thereafter reneged on the mutual understanding/agreement to transfer the suit property. Moreover, it has been submitted that the 1st Appellant had even signed the transfer form to facilitate the transfer of the suit property.

32. Be that as it may, it has been submitted that the 1st Appellant herein subsequently failed to present/lodge the transfer forms for registration. In any event, it has been posited that the transfer form had been left with the 1st Appellant to present to the land registrar, when the Respondent left the country; and went back to Saudi Arabia, wherein the Respondent works.

33. In short, learned counsel for the Respondent has submitted that the totality of the evidence tendered and adduced before the trial court, clearly showed and established the existence of customary trust. To this end, it has been posited that the findings and conclusion of the Learned Trial Magistrate are well grounded and based on the evidence on record.

34. Finally, learned counsel for the Respondent has submitted that the 2nd Appellant did not prove the requisite ingredients underpinning the plea of bona fide purchaser for value. In particular, it was submitted that the 2nd

Appellant, who is the area chief, was privy to a dispute concerning the suit property; and which disputed had been lodged with his office.

35. In fact, it was submitted that the 2nd Appellant had even issued summons to the 1st Appellant as pertains to the land dispute.

36. Furthermore, it was submitted that the 2nd Appellant failed to undertake a physical search on the suit property. For good measure, it was submitted that had the 2nd Appellant visited the suit property before entering into the sale agreement, same would have established that the suit property was being occupied by the respondent.

37. From the foregoing, it has been submitted that the 2nd Appellant herein, who proceeded to buy the suit property, which property is under the occupation of the respondent, cannot partake of and benefit from the doctrine of Bona fide purchaser for value. In this regard, it has been contended that the 2nd Appellant's counter claim was rightfully dismissed by the Learned Trial Magistrate.

38. Having reviewed the record of Appeal; the pleadings filed by the parties; the evidence tendered [both oral and documentary]; and upon consideration of the written submissions by the respective parties, three [3] issues crystallize for consideration and determination. The issues are: whether the Respondent established/proved the plea of customary trust; whether the 2nd Appellant proved the elements/ingredients underpinning the doctrine of bona fide purchaser for value or otherwise; and whether the Learned Trial Magistrate correctly apprehended and applied the law of customary trust.

39. Before venturing to address the thematic issues that have been isolated in the preceding paragraph, it is important to highlight that what is before me is a first Appeal. By virtue of being a first Appeal, this court is mandated to undertake a fresh and exhaustive scrutiny, review, and analysis of the totality of evidence tendered before the court of first instance. The court is obligated to review the evidence and determine whether the finding and conclusion arrived at by the trial magistrate accord with the evidence on record and the legal principles.

40. The court is seized of the authority and jurisdiction to arrive at an independent conclusion and to depart from the findings of the trial court. However, it is established that the appellate court can only depart from the factual finding[s] and conclusion of the trial court where it is demonstrated; that the conclusions were based on no evidence; the conclusions are perverse to the evidence on record; the findings are based on misapprehension of the evidence and law; and that there is a demonstrable error of principle which vitiates the findings of the trial court.

41. Suffice it to state that, barring the foregoing, the first appellate court is enjoined to defer to the findings and conclusions of the trial court. Notably, the jurisdiction of the first appellate court to interfere with the findings/conclusions of the trial court is circumscribed. The jurisdiction is not at large.

42. The jurisdictional remit of the first appellate court, while undertaking its mandate as pertains to the first Appeal, has been the subject of various court decisions. In the case of **Odera t/a AJ Odera & Associates v Machira t/a Machira & Co Advocates [2013] KECA 208 (KLR)**, the Court of Appeal expounded on the scope of the jurisdiction.

43. The Court stated thus

*46. We also wish to be guided by the reasoning of this court in the case of **Mwana Sokoni versus Kenya Business Limited (1985) KLR 931 page 934,934** thus:*

*“Although this court on Appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first Appeal if this should become necessary. As was said by the House of Lords in *Sottos Shipping versus Sauviet Sohold*, *The Times*, March 16, 1983. “It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said” Again in *Peters versus Sunday Post Limited (1958) EA424*, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O’ Conner, P said at page 429: “It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses.*

44. Recently, the Court of Appeal re-visited the jurisdictional remit in the case of **Kenya Urban Roads Authority & another v Belgo Holdings Limited [2025] KECA 764 (KLR)**. The Court stated as hereunder:

*We have considered the Appeal, and this being a first Appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course, where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgment. This position is anchored in section 78 of the [Civil Procedure Act](#), which requires a first appellate court to re-evaluate, reassess, and reanalyse the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions of the Superior Courts among them *Peters v Sunday Post Limited* [1958] EA 424, where the predecessor to this Court expressed itself as follows: “Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying*

the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight.

This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of Appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may

seem equally open, and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”

45. Bearing in mind the principles enunciated in the decisions [supra], it is now apposite to revert to the issues for determination. I shall address the issues sequentially.

46. Regarding the first issue, it is important to underscore that the suit in the lower court was filed by the respondent. It is the Respondent who was contending that the suit property was held on trust for himself. To this end, it was incumbent upon the Respondent not only to plead and particularize customary trust, but same was also obligated to tender/adduce plausible; cogent; concrete; and credible evidence to prove customary trust.

47. Additionally, it is not lost on me, that the evidence to be tendered by the Respondent was to prove and demonstrate customary trust on a balance of probabilities. Suffice it to state that the burden of proof lay on the shoulders of the respondent. [See the provisions of **Sections 107, 108 and 109 of the Evidence Act, Chapter 80 Laws of Kenya**].

48. The law as pertains to burden of proof is now well settled. In the case of **Moi v Muriithi & another [2014] KECA 642 (KLR)** the Court of Appeal reiterated the position that the burden of proof lies on the claimant.

49. The Court stated thus:

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.”

50. Did the Respondent prove/establish customary trust? To start with, the Respondent herein tendered evidence that LR No. Nkuene/Mitunguu-Kithino/383 [*the original parcel of land*] belonged to and was registered in name of Marisela M’Mugambi [now deceased]. In addition, the Respondent also availed evidence to show that the deceased was indeed the mother of the 1st Appellant and himself. In any event, the fact that the 1st Appellant and the Respondent shared the same mother, was not in dispute.

51. Additionally, the Respondent tendered evidence to show that same was placed in occupation of a portion of the original parcel of land by his mother, now deceased. Suffice it to state that the Respondent posited that he erected/established his homestead on a portion of the original parcel of land.

Moreover, the Respondent testified that his homestead, now falls on and constitute part of the suit property.

52.It was the further testimony of the Respondent that his homestead, which now falls on the suit property, was erected/constructed during the lifetime of his mother [now deceased]. Besides, the respondents posited that his mother did not tell him to vacate the portion of the original land, wherein his homestead is located. Simply put, the Respondent averred that his occupation of the portion which now constitute[s] the suit property traces itself back to the time when the land had not been subdivided.

53.Furthermore, evidence abound that the Respondent is still in occupation of the suit property. In any event, DW2 [the 2nd Appellant] admitted and acknowledged that when he went to the suit property, after same had been sold and transferred unto him, he [2nd Appellant] found the homestead of the Respondent thereon.

54.With regard to the occupation of the Respondent on the suit property, it suffices to reproduce the evidence of the 1st Appellant. The 1st Appellant testified as DW1.

55.While under cross examination by learned counsel for the Respondent same testified thus:

“Parcel number 2272 is where Stephen has a home. It has been there from 2019. It is still on the said land and when he built it, my mother was there. I do not have any evidence showing my mother wanted Stephen to vacate, but David Guantai was a witness. David Guantai is not my witness in court.”

56. I wish to add that even the 1st Appellant has conceded and confirmed that the portion where the Respondent lives/resides, namely; the suit property, is where the both the 1st Appellant and the Respondent were brought up.

57. Other than the evidence pertaining to and concerning occupation of the suit property by the respondent, it is also important to recall that the 1st Appellant herein had indeed agreed to subdivide LR No. Nkuene/Mitunguu-Kithono/1830 and thereafter to transfer the portion under the respondent's occupation to the respondent.

58. In particular, evidence abounded that the 1st Appellant indeed applied for land Control Board Consent and thereafter caused the Respondent to pay/shoulder the surveying fees. For good measure, the 1st Appellant conceded that indeed the survey fees were paid by the respondent.

59. This is what the 1st Appellant stated while under cross examination:

“Parcel number 2272 was subdivided from 1830 and when it was sub-divided he was present. I paid the surveyor called Muthuri and I left him with the receipts. Parcel 1830 receipts was paid by Stephen Marangu Mugambi [Exhibit P4].”

60. The 1st Appellant having involved the Respondent in the subdivision of parcel number 1830; having caused the Respondent to foot the survey fees; having procured the consent to transfer the suit property to the respondent, cannot now make about turn and posit that the suit property was/is not being held in trust.

61. Moreover, there is no gainsaying that the 1st Appellant had indeed made representations to the respondents and thereafter took steps towards actualizing the representations. The Respondent was thereafter induced to act to his detriment, by inter alia, paying the survey fees. Surely, the representations; the payment of the survey fees; and the occupation of the suit property by the Respondent denotes the existence of customary trust.

62. In the case of **Kiebia v M'lintari & another [2018] KESC 22 (KLR)**, the Supreme Court expounded on the law pertaining to customary trust. Pertinently, the apex court stated thus:

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 is 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:

- 1. The land in question was before registration, family, clan or group land*
- 2. The claimant belongs to such family, clan, or group*
- 3. 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*
- 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.*
- 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.*

53. We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered Land Act, are

customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in Obiero v. Opiyo and Esiroyo v. Esiroyo. Once it is concluded, that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests.

63. Without belaboring the point, it is my finding and holding that the totality of the evidence that was tendered by the respondent; and which evidence was not controverted by the 1st Appellant, established; proved the existence of customary trust. In any event, the 1st Appellant conceded that even though he was alive to the fact that the Respondent's occupies the suit property, he [1st Appellant] had not taken any legal action to evict the respondent.

64. This is what the 1st Appellant stated while under cross examination:

“ I never took the plaintiff to court to vacate the land. I never gave him notice. When I sold the land Stephen Marangu's home was there”

65. I am not in agreement with the submissions by learned counsel for the Appellants. In any event, there is no gainsaying that learned counsel for the Appellants appear not to have internalized the legal position that the occupation, if proven, founds customary trust. [See the provisions of **Section 28 [g] and [h] of the Land Registration Act, 2012.**]

66. The next issue that falls for consideration is whether the second Appellant established and proved the elements/ingredients underpinning the doctrine of *bona fide* purchaser for value. To start with, the 2nd Appellant testified that when the 1st Appellant offered to sell unto him the suit property, same [2nd Appellant] undertook an official search and established that the suit property was registered in the name of the 1st Appellant. However, the 2nd Appellant

conceded that he did not undertake a physical search to discern the status of the suit property.

67. Furthermore, the 2nd Appellant testified that it is only after he purchased the suit property that he went to the land and discovered that the respondent's home is located thereof. This is what the 2nd Appellant stated while under cross examination:

“ I conducted due diligence before buying the land, but I never visited the land before purchase. I conducted a search and found the land belonged to the 1st defendant. I went to the land and found the houses were built and that the deceased's parents were living there before their demise. I do not know when Stephen built in the place.”

68. What becomes apparent is that the 2nd Appellant bought the land oblivious of the development and improvements thereon. The 2nd Appellant did not exercise due diligence prior to and before purchasing the suit property. Had the 2nd Appellant exhibited due diligence and exercised the caution of a reasonable person, same would have known that the suit property was under the occupation of the respondent. Such occupation, would no doubt, have raised some alarm in the mind of the 2nd Appellant.

69. In the case of **Torino Enterprises Limited v Attorney General [2023] KESC 79 (KLR)**, the Supreme Court underscored the level of diligence required of a purchaser, before such a purchaser can invoke and partake of the doctrine of Bona Fide Purchaser for Value.

70. The Apex Court stated thus:

Therefore, if the Appellant was a diligent purchaser, it ought to have at least known of this fact. An innocent purchaser for value would also denote one was aware of what they are purchasing by inspecting the suit premises. This takes us to the question of whether the Appellant had visited the suit premises and if so, what was its impression of the military installations on the suit premises? The fact that the suit land was occupied must have sounded a warning of “buyer be aware” to the Appellant. We therefore find that it was not an innocent purchaser for value entitled to orders for restoration or compensation.

71. Additionally, there is evidence that the 2nd Appellant herein, who is the chief of the area was aware and knowledgeable of the land dispute between the Respondent and the 1st Appellant. In fact, the Respondent herein had lodged a complaint with the 2nd Appellant and the 2nd Appellant proceeded to and issued summons to the 1st Appellant. The summons were dated the 20.05.2022 and wherein the 1st Appellant was required to attend a meeting at the offices of the 2nd Appellant.

72. Other than the foregoing, there is also evidence that despite being aware of the land dispute between the Respondent and the 1st Appellant, the same proceeded to and purchased the suit property. I am afraid that the 2nd Appellant was complicit in the perpetuation of the breach of the customary trust. The 2nd Appellant was not an innocent purchaser. The actions of the 2ND Appellant were not taken in good faith.

73. Before departing from this issue, it is imperative to reference the holding in the case of **Dina Management Ltd v County Government of Mombasa & 5 others [2023] KESC 30 (KLR)**. The Supreme Court re-calibrated the

elements to be proven before the plea [doctrine] of bona fide purchaser for value can arise.

74. The Apex Court stated as hereunder:

“90. The [Black’s Law Dictionary](#) 9th Edition defines a bona fide purchaser as:

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

91. The Court of Appeal in Uganda in [Katende v Haridar & Company Ltd](#) [2008] 2 EA 173, defined a bona fide purchaser for value as follows:

“For the purposes of this Appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that: 1. he holds a certificate of title; 2. he purchased the property in good faith; 3. he had no knowledge of the fraud; 4. he purchased for valuable consideration; 5. the vendors had apparent valid title; 6. he purchased without notice of any fraud; and 7. he was not party to the fraud.”

92. On the same issue, the Court of Appeal in [Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No 28 of 2005](#) [2015] eKLR stated as follows: “...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid

and legal title, *secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...*

[Emphasis supplied].

75. I am afraid that the 2nd Appellant did not purchase or buy the suit property in good faith. Further, and in any event, there is no gainsaying that the 2nd Appellant did not satisfy the requisite conditions to warrant a finding/declaration of *bona fide purchase*.

76. The last issue for consideration relates to whether the Learned Trial Magistrate properly apprehended and applied the law as pertains to customary trust. I have reviewed the judgment of the Learned Trial Magistrate. It suffices to state that the Learned Trial Magistrate indeed appreciated the evidence that was tendered; took into account the fact that the Respondent was in occupation of the suit property; appreciated the import of Section 28[g] and [h] of the Land Registration Act; and thereafter found that the Respondent had proven customary trust.

77. Furthermore, the Learned Trial Magistrate subjected the evidence that was tendered before her to exhaustive scrutiny and appraisal, and thereafter juxtaposed the evidence against the decision of the Supreme Court in **Kiebia v M'lintari & another [2018] KESC 22 (KLR)**. The findings and conclusion of the Learned Trial Magistrate demonstrate a clear appreciation and application of the principles guiding customary trust claims.

78.Regarding the question of whether the 2nd Appellant was a bona fide purchaser for value, the Learned Trial Magistrate appreciated various issues. The issues are: The 2nd Appellant is the chief of the area; the 2nd Appellant was privy to and knowledgeable of the land dispute between the Respondent and the 1st Appellant; and the 1st Appellant proceeded and purchased the suit property without undertaking a physical search on the property.

79.Having taken into account the foregoing issues, and upon consideration of the holding in the case of **Katende versus Haridar & Company Limited [2008] 2EA 173**, the Learned Trial Magistrate came to the conclusion that the 2nd Appellant did not buy the suit property in good faith. Needless to say that the said conclusion accords with the evidence on record.

80. The finding is well grounded.

81.Flowing from the foregoing; and taking into account the principles espoused in the case of **Mwanasokoni versus Kenya Bus Limited [1985] eKLR**, I come to the conclusion that the subject Appeal is meritless.

Conclusion.

82.The Appellants herein had sought to persuade me that the Learned Trial Magistrate failed to apprehend the law on customary trust and the doctrine of bona fide purchaser for value. However, in the cause of reviewing the evidence on record, I have come to the conclusion that the Learned Trial Magistrate not only appreciated the applicable principles, but also correctly applied same to the evidence tendered.

83. Furthermore, I have also found that the conclusion[s] that were arrived at by the Learned Trial Magistrate are backed by the evidence and the law. To this end, there is no gainsaying that the subject Appeal is a candidate for dismissal.

Final orders:

84. From the foregoing analysis, the final orders that commend themselves to the court are:

- i. The Appeal be and is hereby Dismissed.*
- ii. The Judgment of the Learned Trial Magistrate dated 24.04.2025 and the consequential decree arising therefrom be and is hereby affirmed.*
- iii. Costs of the Appeal be and are hereby awarded to the Respondent.*
- iv. The Costs in terms of clause [iii] shall be agreed upon and in default to taxed in the conventional manner.*

85. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 25TH DAY OF MARCH, 2026

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

JUDGE

In the presence of:

Court Assistant Naserian

Ms. Kerubo for the Appellants

Mr. Miriti for the Respondent