<u>REPUBLIC OF KENYA</u>

<u>IN THE ENVIRONMENT AND LAND COURT AT MERU</u>

<u>ELC APPEAL E079 OF 2025</u>

STANELY MBURUGU MBOROKI……………………………..APPELLANT

VERSUS

FLORENCE MPINDA [Guardian ad Litem of SILAS M' IKIOME M'MBOROKI………………………………………………. RESPONDENT

[Being an appeal from the judgment and decree of Hon. M. C Nyingei – P M in Meru MCCELC E067 OF 2022 delivered on 17th of July 2025]

JUDGEMENT

1. The Appellant *[who was the Plaintiff in the lower court]* filed the Plaint dated 3.8.2022. The Appellant sought the following reliefs:

   I. A declaration that the defendant holds land parcel number LR. No. Kiirua/ Kiirua/ 388, now subdivided into LR Nos. 3084, 3085, 3086, 3087 and 3088 in trust for the plaintiff under the customary trust doctrine.

   II. An order for the defendant to transfer a portion measuring 2.5 acres to the plaintiff in execution of a customary trust.

   III. The court orders the executive officer of the court to sign all necessary documents to effect the transfer

   IV. Cost of the suit.

2. The Respondent *[who was the defendant]* in the lower court duly entered appearance and thereafter filed a statement of defence. The statement of defence is dated the 11.4.2023. The Respondent denied/ disputed the claims by the Appellant.

3. The Respondent contended that LR No Igoji/ Kiangua/ 253 lawfully belonged to him; same was Lawfully sold; the land was sold during the lifetime of the Father of the parties [now Deceased]; the issue of trust did not arise. In addition, the Respondent posited that the suit property was bought in the year 1978, and by the time of purchasing the suit property, the land, namely; Igoji/Kiangua/ 253, had not been sold. Moreover, it was posited that the suit property was not bought/ acquired with the proceeds of the sale of the land at Igoji.

4. The suit before the lower court was heard and disposed of *vide* Judgement delivered on 17.7.2025. The Learned Trial Magistrate [Hon M.C. Nyigei – PM] found and held that the Appellant had not proved customary trust in respect of the suit property. In addition, the Learned Trial Magistrate also found that the suit property did not comprise family or ancestral land. Furthermore, the Learned Trial Magistrate also found that the suit property could not have been registered in the name of the Appellant.

5. The Learned Trial Magistrate further held that the Appellant did not prove that the proceeds of LR No Igoji/ Kiangua/253 were deployed towards the purchase/ acquisition of the suit property. Moreover, the trial court held that the suit property was acquired in 1978, yet the Igoji/Kiangua Land was disposed of in 1979. To this end, the Learned Trial Magistrate proceeded to dismiss the Appellant's suit.

6. It is the said Judgment and the consequential decree that has aggrieved the Appellant and thus provoked the appeal. The appeal is premised on the Memorandum of appeal dated 9.10.2025. The grounds at the foot of the Memorandum are:

    I. ***The Learned Principal Magistrate erred in law and grossly misconstrued the principle applicable in customary trust, and thereby arrived at the wrong decision.***
    II. ***That the learned principal magistrate grossly misinterpreted and misunderstood the principle enunciated in the case of <u>Mumo vs Makau (2002) I EA 170 and Shah & others vs Mombasa Bricks and tiles limited and many others</u>, and arrived at the wrong decision.***
    III. ***That the Principal Magistrate's decision was against the evidence before her and could not be sustained at all.***
    IV. ***That the learned Principal Magistrate failed to judiciously apply her mind.***

7. The subject Appeal came up for direction[s] on 19.1.2026, whereupon learned counsel for the Appellant intimated to the court that same had since filed and served the record of appeal. In addition, learned counsel posited that the record of appeal was complete. The counsel thereafter sought directions as pertains to the hearing and disposal of the appeal. Furthermore, counsel proposed to have the appeal canvassed by way of written submissions.

8. With the concurrence of Learned Counsel for the Respondent, the court proceeded to and issued directions in line with **Order 42 Rule 13 of the Civil Procedure Rules 2010**.
9. The directions were: The appeal shall be heard before one [1] Judge sitting at Meru: the appeal shall be canvassed by way of written submissions; the Appellant shall file and serve 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], and same to be filed and served within 7 days from the date of service. The court thereafter fixed a return date for mention to confirm compliance.

10. The Appellant filed written submissions dated 9.2.2026. The Appellant has raised and canvassed two [2] key issues. The issues highlighted by the Appellants are: The Appellant tendered and adduced credible evidence to demonstrate the existence of customary trust; and the Learned Trial Magistrate misapprehended, misconceived and misapplied the law as pertains to customary trust.

11. Learned counsel for the Appellant has thereafter cited and referenced various decisions, including: **Arvind Sha & 7 others Vs Mombasa Bricks and tiles Limited 2024 KESC; and Twalib Hatayan & another vs Said Sagger Ahmed 2014 Eklr respectively.**

12. The Respondent filed written submissions dated 23.2.2026, wherein the Respondent has raised and canvassed two [2] key issues. The issues are: Whether a constructive trust exists over LR Kiirua/ Kiirua/ 388; and whether

the learned principal magistrate grossly misconstrued the principles applicable in customary trust land law or otherwise.

13. Learned counsel for the Respondent has thereafter reviewed the totality of the evidence that was tendered before the trial court; highlighted key legal principles underpinning customary trust; and thereafter cited various decisions.

14. The decisions cited are: **Twalib Hatayan & another vs Said Sagger Ahmed 2015 Eklr; Arvind Sha & 7 others Vs Mombasa Bricks and tiles Limited 2024 KESC; Kiebia vs M'Lintari & another 2018 KESC 22; Gathua vs Wainanina 2024 KEELC 4082; and Susan Mumbi Waititu & 2 others Vs Mukuru Ndata & 4 others 2008 KEHC 909.**

15. Flowing from the foregoing submissions, and taking into account the various case laws cited, learned counsel for the Respondent contended that the Learned Trial Magistrate correctly apprehended the law on customary trust; correctly applied the law to the facts of the case; and arrived at the correct conclusion. The court has been invited to find that the subject appeal is meritless.

16. Having reviewed the record of appeal, the pleadings by the parties, the evidence tendered, [both oral and documentary], the written submissions and upon taking into account the applicable law, I come to the conclusion that two issues crystallize for determination.

17. The issues are: Whether the Appellant has proved the plea of customary trust to the requisite standard or otherwise; and whether the Learned Trial

Magistrate misapprehended and misapplied the law as pertains to customary trust or otherwise.

18. 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[s] and conclusion[s] arrived at by the Learned trial magistrate accord with the evidence on record and the legal principles.

19. 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 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.

20. 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. The same cannot be exercised for the mere asking.

21. 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), t**he Court of Appeal expounded on the scope of the jurisdiction.

22.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*

19. 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).**

20.The Court stated as hereunder:

37. 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."

23. 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.

24. Regarding the first issue, it is worthy to recall that the Appellant approached the lower court contending that LR NO Igoji/Kiangua/253 was registered in the name of the Respondent, albeit on trust. In particular, the Appellant posited that the said parcel of land was subject to a customary trust. The Appellant averred that even though the said parcel of land was subject to Customary trust, the Respondent proceeded to and sold same in an endeavour to defeat and circumvent the customary trust.

25. Additionally, the Appellant posited that the Respondent illegally sold **LR Igoji/ Kiangua/253 to M'Rithaa M'Muga.** It was contended that the impugned and offensive sale was undertaken without the knowledge and consent of the Appellant.

26. Furthermore, the Appellant contended that after the Appellant sold LR Igoji/Kiangua/253, which was said to be held on trust, the Respondent utilized the proceeds of the sale of the said land to purchase and acquire the suit property. Insofar as the suit property is said to have been acquired with the proceeds of the sale, the Appellant posits that the suit property and the resultant sub-divisions are subject to trust.

27. Arising from the foregoing, the Appellant contended that the suit property and the resultant sub-divisions are subject to a customary trust and the Respondent ought to be directed to excise an apportion measuring 2.5 acres, and the same be transferred to and be registered in the name of the Appellant.

28. It is common ground that the land which was contended to be held on trust for the Appellant was LR Igoji/ Kiangua/ 253. It is the said land which was contended to have been family or ancestral land. It is the land which was contended to have belonged to both the Respondent and the father of the parties; and thus, the existence of a customary trust.

29. It is not lost on me that the particulars of customary trust which have been pleaded in terms of paragraph 5 of the Plaint dated 3.8.2022 relate only to LR Igoji/Kiangua/253. For good measure, there are no particulars of trust or customary trust which have been pleaded as against the suit property; and the resultant sub-division[s].

30. I beg to state that any claimant, the Appellant not excepted, is enjoined not only to plead customary trust but also to supply the particulars underpinning the plea of customary trust. It is only after the particulars have been supplied that the claimant is called upon to tender plausible, cogent, compelling and concrete evidence to prove the plea of customary trust. The evidence to be tendered must relate to a proper pleading before the court. In the absence of proper pleadings, the evidence [if any] goes towards proving no cause.

31. As pertains to the subject matter, there is no gainsaying that no particulars of customary trust were pleaded or supplied. It then means that the plea of customary trust as against the suit property and the resultant sub-division[s] was never pleaded. The plea of customary trust was thus premature; misconceived and legally untenable as against the suit property and the resultant sub-divisions.

32. In the case of **Gitiba Buruna & another v Jackson Rioba Buruna [2007] KECA 431 (KLR), t**he Court of appeal discussed the manner of pleading trust, save for constructive trust, which arises by way of construction/inference on the basis of the evidence. In particular, the Court of Appeal emphasized that breach of trust, including resulting trust; implied trust; and I dare add, customary trust, must be particularized.

33. The Court of Appeal stated thus:

> ***"Mr. Makoloo is also correct that the resulting trust on which the learned Judge relied was not pleaded by the Respondent. <u>Under Rule 8 (1) (a) of Order VI Civil Procedure Rules, a plaint should contain the specified particulars including particulars of trust on which a party relies. The Respondent did not however, rely on a breach of a trust. The finding that there was a resulting trust was merely an inference</u>***

<u>arising from the facts as accepted by the learned Judge." [Emphasis Supplied].</u>

34. The second aspect relates to the quality of evidence that was tendered. The Appellant had posited that the Respondent used or deployed the proceeds of the sale of LR Igoji/Kiangua/253 towards purchasing or acquiring the suit property. It is the usage of the said proceeds that underpins the contention of customary trust.

35. Having made the foregoing assertions, it was incumbent upon the Appellant to tender and adduce evidence to show that the proceeds of the sale of LR Igoji/ Kiangua/253 were the ones that were used to purchase the suit property. The Appellant failed to tender any evidence to that effect. It suffices to posit that a court of law was [is] not called upon to speculate or infer that the proceeds could have been deployed towards the purchase. It is not the business of the court to make decisions and findings based on a hypothesis.

36. The third aspect that merits consideration is whether customary trust, which is an overriding interest in terms of **Section 28 of the Land Registration Act**, can move from the designated land [if at all] to another land; or whether customary trust can be [sic] exported to a different land located elsewhere.

37. To start with, overriding interests, including customary trust, attaches to, impacts upon and moves with the designated land. It means that if [and I say if] LR No Igoji/Kiangua/253 was impacted by customary trust, then the customary trust colours any dealings or any transactions affecting the

designated land. It is only the designated Land that is affected by the customary trust.

38. Put differently, customary trust [if any] could not be affected by the sale of Igoji/Kiangua/253. To this end, the Appellants' claim of customary trust could only be raised, canvassed and propagated against LR Igoji/Kiangua/253 and not otherwise.

39. The last aspect that deserves consideration relates to the ingredients that must be proven before a plea of customary trust can suffice. The elements to be established were distilled by the Supreme Court of Kenya in the case of **Kiebia v M'lintari & another [2018] KESC 22 (KLR).** The Apex court stated thus:

> *52. Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as the construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. 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 the 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 was, 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.

40. The Appellant was enjoined to prove and demonstrate that the suit property and the resultant subdivisions were family or ancestral land. However, it is common ground that the suit property and the resultant subdivision[s] do not constitute family land. On the contrary, it is conceded by the Appellant that the suit property was indeed purchased by the Respondent.

41. The other element that needed to have been proven was to the effect that the land underpinning the plea of customary trust could have been registered in

the name of the claimant, *save* only for the intervening circumstance. The bottom line is that the claimant must show that the land in question could very well have been registered in his name, *save* that the claimant was either a minor, of unsound mind, was not available at the point in time, or there was [sic] a family agreement warranting the registration in the name of the registered owner.

42. Can it be said that the suit property could have been registered in the name of the Appellant? It is clear that the Suitland belonged to a third party. The suit land was only purchased by the Respondent. The suit land did not belong to the ancestry or family of the Appellant.

43. To my mind, the Appellant did not come close to meeting or satisfying the essential element[s] that underpinned the plea of customary trust. In this regard, the totality of evidence that was tendered before the trial court was deficient and incapable of proving the claim of customary trust.

44. Before concluding on this issue, it is important to underscore that proof of trust, including customary trust, is dependent on the quality of evidence tendered. The evidence must be consistent, credible and compelling. Absent evidence, the plea of trust, including customary trust, dissipates into thin air; or collapses.

45. In the case of **Kazungu Fondo shutu vs Japhet Noti charo 2021 KECA,** the Court of Appeal stated thus**:**

28. The concept of trust must however, be proved. This Court in the case of ***Mumo v Makau [2002] 1EA.170,*** *held that "**trust is a question of fact to be proved by evidence….."*** *See also* ***Kanyi Muthiora v Maritha Nyokabi Muthiora, Nairobi Court of Appeal No.19 of 198***

29. In ***Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR****, this Court dealt with the issue of trust at length. The Court referred* ***Twalib Hatayan Twalib Hatayan & Anor v Said Saggar Ahmed Al-Heidy & Others [2015] eKLR*** *and re-stated the law on trusts as follows: -*

> ***"According to Black's Law Dictionary, 9th Edition, a trust is defined as***
>
> ***"1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."***
>
> ***Under the Trustee Act, "… the expressions' trust' and 'trustee' extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property…"***
>
> ***In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories: constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrongdoing. …***
>
> ***It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treat the legal owner as a trustee, the law will impose a trust. A constructive trust***

will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. …

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ...

This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts, where unknown intentions may be left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another is immaterial(see Snell's Equity at p.177) (supra)."

31. As earlier stated, the existence of a trust is a question of evidence. In the ***Juletabi*** *case (supra), the court held that the onus lies on the party relying on the existence of a trust to prove it through evidence. That is because:* ***"The law never implies, the Court never presumes a trust, but [only] in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention***

of the parties to create a trust must be clearly determined before a trust will be implied."

32. The onus to prove the existence of a trust lay squarely on the Appellants. ***Section 107*** *of the* ***Evidence Act*** *further provides that:* ***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."***

46. Flowing from the foregoing, my answer to issue One [1] is fourfold. Firstly, the plea of customary trust as against the suit property and resultant sub-division[s] was not properly pleaded and particularized. In this regard, the claim of customary trust as against the suit property offended **Order 2 Rule 10 of the Civil Procedure Rules.**

47. Secondly, the Appellant did not establish or prove that the proceeds of the sale of LR Igoji/ Kiangua/253, [if at all], were deployed to purchase the suit property. In any event, evidence abound that the suit property was purchased in 1978. The suit property was purchased long before Igoji/Kiangua/253 was sold. For good measure, the latter parcel was sold in 1979.

48. Thirdly, the Appellant did not demonstrate that the suit property comprises ancestral land. On the contrary, the Appellant admitted that the suit land was purchased. The suit land does not trace its origin to ancestry or family background.

49. Finally, the Appellant did not tender any plausible evidence to demonstrate customary trust against the suit property or the resultant subdivision[s]. The plea of trust is evidence-based. The evidence must be qualitative, coherent and compelling. The court cannot be called upon to presume or infer trust based on a hypothesis.

50. The second issue that falls for consideration is whether the Learned Trial Magistrate misapprehended and misapplied the law on customary trust. I start by acknowledging that the Learned Trial Magistrate addressed her judicial mind to various decisions, including the Evergreen case of ***Kiebia v M'lintari & another [2018] KESC 22 (KLR;*** **Mumo v Makau [2002] 1EA.170; and** ***Arvind Sha & 7 others Vs Mombasa Bricks and tiles Limited 2024 KESC.***

51. Secondly, the Learned Trial Magistrate thereafter appreciated the evidence that was tendered. The Learned Trial Magistrate understood that the plea of customary trust was being raised against Igoji/ Kiangua/253, and thereafter the plea was being exported to the suit property and the resultant sub-division[s].

52. Quite clearly, the Learned Trial Magistrate drew the dichotomy between the land which was claimed to be family/ancestral land, vis-à-vis the suit property, the latter of which was purchased.

53. Furthermore, the Learned Trial Magistrate addressed her legal mind to the assertion that the suit property was purchased using the proceeds of the sale of LR Igoji/ Kiangua./253. To this end, the trial court correctly held that the sale agreement, which was tendered, showed that the suit property was purchased in 1978, long before the sale of LR Igoji/Kiangua/253.

54. The other critical aspect that was appraised by the trial magistrate relates to the elements underpinning proof of customary trust. The trial court heavily borrowed from the Supreme Court **Kieba vs Lintari & anor[supra].** The Learned Trial Magistrate illuminated the elements that were expounded upon by the Supreme Court.

55. Finally, the Learned Trial Magistrate addressed her mind to the standard of proof. She correctly held that the onus/obligation of proving the plea of customary trust fell on the shoulders of the Appellant. Moreover, the trial magistrate found that the Appellant had failed to tender credible evidence.

56. I have reviewed the Judgment of the trial magistrate. The Judgment is well structured, well-reasoned, and well-grounded. There is no discernible error of principle. To this end, I do not agree with the submissions of Learned Counsel for the Appellant that the Learned Magistrate mis-apprehended; and mis-applied the law as pertains to customary Trust. Simply put, the submissions are not consistent with findings of the Court.

57. Additionally, I find and hold that the conclusion and findings which were arrived at by the trial magistrate are anchored by the evidence on record. The findings are neither perverse nor inconsistent with the totality of the evidence.

58. *In a nutshell*, and bearing in mind the principle espoused in the case of ***Mwanasokoni vs Kenya bus service limited 1985 eklr; Jabane vs Olenja 1986 eklr and Ephantus Mwangi vs Duncan Mwangi Wabugu 1984 eklr***, I

conclude that the findings of the trial court are well grounded. They are hereby affirmed.

Final orders

59. Flowing from the analysis contained elsewhere herein before, the final orders of the court are:
    - ***(i)*** ***The Appeal be and is hereby Dismissed***
    - ***(ii)*** ***The Judgment of the Learned Trial Magistrate dated 17.7.2025 and the consequential decree arising therefrom are hereby affirmed.***
    - (iii) ***The Costs of the Appeal are hereby awarded to the Respondent***.
60. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF MARCH, 2026.

OGUTTU MBOYA, FCIArb;CPM[MTI-EA]

JUDGE

In the presence of-:

Naserian: Court Assistant

Mr. Ondari for the Appellant.

Ms. Mutema for the Respondent