



**Mabonga (As a Recognised Agent of an Approved Agent of Joshua Mabonga Macheso) v Simiyu & 4 others (Environment and Land Case E001 of 2025) [2026] KEELC 2053 (KLR) (15 April 2026) (Judgment)**

Neutral citation: [2026] KEELC 2053 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND CASE E001 OF 2025**

**CK NZILI, J  
APRIL 15, 2026**

**BETWEEN**

**ISAAC MACHESO MABONGA (AS A RECOGNISED AGENT OF AN APPROVED AGENT OF JOSHUA MABONGA MACHESO) ..... PLAINTIFF**

**AND**

**ISAAC WAFULA SIMIYU ..... 1<sup>ST</sup> DEFENDANT**

**EDWARD MAKOKHA SIMIYU ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**THE MANAGEMENT COMMITTEE WEONIA FARMERS CO-OPERATIVE SOCIETY LTD (REPRESENTED BY THE CHAIRPERSON, SECRETARY & TREASURER) ..... 1<sup>ST</sup> INTERESTED PARTY**

**THE COUNTY LANDS REGISTRAR ..... 2<sup>ND</sup> INTERESTED PARTY**

**HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> INTERESTED PARTY**

**JUDGMENT**

1. The plaintiff brought this suit as an approved and recognised agent of Joshua Mabonga Macheso, the owner of Land Title No. Saboti/Sikhendu Block 8/Weonia/41, measuring 3.6 acres, which he had purchased its shares, from the 1<sup>st</sup> interested party in the counterclaim. He has sued the 1<sup>st</sup> and 2<sup>nd</sup> defendants, who are his nephews, whose mother used to live on the suit land as a caretaker, but despite notice of termination of their licence, have refused to yield vacant possession and instead embarked on acts of destruction of the suit premises, denying him loss of user and occupation thereof. The plaintiff prays for:

a. Eviction.



- b. Permanent injunction.
  - c. General damages for trespass.
2. By an amended defence and counterclaim dated 20/3/2023, the 1<sup>st</sup> and 2<sup>nd</sup> defendants deny that the plaintiff is the absolute owner of the title to the suit land, or that the plaintiff ever owned or purchased any shares for the same from the 1<sup>st</sup> interested party as at the time he was still in school and a minor, unlike their late mother who duly purchased them.
3. The 1<sup>st</sup> and 2<sup>nd</sup> defendants aver that their late mother was indeed a sister to the plaintiff, but deny that she was living on the suit land out of any marital problem with her husband. The 2<sup>nd</sup> defendant admits that he lives on his own parcel of land, hence did not forcefully or otherwise impose himself on the land or commit the alleged acts of destruction.
4. The 1<sup>st</sup> and 2<sup>nd</sup> defendants aver that they occupy the land as of right since it belongs to their late mother, initially, the 1<sup>st</sup> defendant, hence should not be evicted therefrom, for they cannot be termed as trespassers. The 1<sup>st</sup> and 2<sup>nd</sup> defendants aver that they have enjoined the 1<sup>st</sup> interested party to enable the court to determine how the title to the suit land was acquired; otherwise, the plaintiff's suit is time-barred.
5. By way of a counterclaim, the defendants aver that their mother had duly paid deposits for registration and purchased shares at Weonia Farm upon complying with the terms and conditions issued by the 1<sup>st</sup> interested party, then directors, only that for security purposes and trust, she obtained receipts for the same in the names of the plaintiff herein, who was in school at the time, and did not have a clue or knowledge or capacity to pay for the same.
6. The 1<sup>st</sup> and 2<sup>nd</sup> defendants aver that the plaintiff took advantage of their mother's gender and illness to secretly steal the receipts and all other documents relating to Plot No. 356 Weonia Farm now Plot No. 41 measuring 3.5 acres and in collusion with some crooked or wayward directors of the 1<sup>st</sup> interested party and the officers of the 2<sup>nd</sup> interested party, secretly and fraudulently altered the farm register or records in his favour to deprive their mother of her right of ownership.
7. The 1<sup>st</sup> and 2<sup>nd</sup> defendants aver that the plaintiff acts were fraudulent, and in breach of the trust bestowed on him by his late sister, to include his name as a bona fide shareholder, presenting himself to the said officers in that capacity, stealing and or forcefully taking away the said ownership documents, refusing to avail or surrender the documents stolen to them and or purporting to use orthodox means to disentitle or evict them from land lawfully belonging to their late mother.
8. The 1<sup>st</sup> and 2<sup>nd</sup> defendants blame the 1<sup>st</sup> and 2<sup>nd</sup> interested parties for fraudulent or through misrepresentation or breach of trust preparing an area list and land documents to include the name of the plaintiff, while aware that the genuine shareholder, was their late mother, succumbing to political pressure, colluding to prepare the list and issue titles, discriminating their late mother who was weak then, vulnerable and on account of her gender and breaching the trust entrusted to them by the original farm members.
9. The 1<sup>st</sup> and 2<sup>nd</sup> defendants counterclaimed for:
  - a. A declaration that the plaintiff obtained title to the suit land fraudulently, which should be cancelled and issued in their favour.
  - (b) Permanent injunction.



10. By way of reply to the defence and defence to the counterclaim, the plaintiff insists that he was the bona fide registered owner of the suit land with effect from 24/5/2017, whose title deed was issued on 30/1/2023, having bought shares from the 1<sup>st</sup> interested party. The plaintiff avers that while in school, during weekends, he used to make sisal and ad castor oil, which he sold after dropping out of school to several homesteads, hence he had the financial capacity to acquire shares from the 1<sup>st</sup> interested party.
11. The plaintiff denies that the deceased sister was a member of the 1<sup>st</sup> interested party or that he unlawfully obtained receipts or documents relating to Plot No. 356 in favour of the said deceased sister. The plaintiff denies the alleged fraud, misrepresentation, or breach of trust in the defence and counterclaim.
12. The court record shows that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> interested parties were served with the 1<sup>st</sup> and 2<sup>nd</sup> defendants' amended defence and counterclaim. Only the 1<sup>st</sup> interested party entered an appearance on 13/10/2023 through the law firm of David Ingosi & Co. Advocates.
13. A third-party notice was also issued and served upon the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The court record has no responses by the interested parties to the third-party notices or the main suit, despite leave granted on 16/9/2025 to comply with Order 11 of the Civil Procedure Rules.
14. At the hearing, Isaack Wafula Simiyu testified as PW1. He relied on both an order dated 17/4/2019 and witness statements dated 24/1/2019 and 27/1/2022 as his evidence in chief. PW1 told the court that he bought shares from the 1<sup>st</sup> interested party and became its registered member, equivalent to 3.6 acres of its land. After this, in 1974, he said he erected a semi-permanent house therein, following which he brought his own mother to live therein as a caretaker.
15. PW1 said that the late Elizabeth Simiyu was allowed to stay on the land following marital problems with her husband, the late Chief Jacob Simiyu, who had chased her from the matrimonial home, and they were unable to reconcile. PW1 said that his mother passed on in 1995, after which his sister remained therein for he had nowhere else to go. PW1 said that he then gave his sister an option to farm on the suit land to get money and buy her own plot, which she accepted until 2017, when he was summoned by the Assistant County Commissioner, Kiminini, that the sister was claiming the land to be hers.
16. PW1 said that again on 8/1/2019, the area chief summoned him to his office, where he met several county officers, human rights activists, the county survey, and the personal assistant to the area Member of the County Assembly, who demanded that he surrender all the documents relating to the plot, failure of which they would obtain them by force. PW1 said that the defendants have no right to claim the land, for he worked overtime during school-going age to obtain money for the shares.
17. PW1 relied on a bundle of receipts as P. Exhibit No. 1(a) - (j), share certificate dated 24/10/2006, certificate of official search issued on 26/3/2019, area list, employers letter dated 22/2/2019, final area list, chief's letter dated 9/4/2019, agricultural officer's letter dated 11/3/2019, certified copy of green card, and copy of title deed issued on 30/1/2023 as P. Exhibits No. (2), (3), (4), (5), PMFI-(6), (7), (8), (9), and (10) respectively.
18. PW1 told the court that his father is 78 years old and he was representing him as next friend due to his old age and health complications. PW1 said that his father stays in another plot elsewhere, which he obtained the title for in 1993. PW1 said that his father cleared form four in 1970 at the age of 24 years, hence in 1974, he was an adult, capable of paying for the shares as per P. Exhibit No. 1(a)-(j). He could not tell the issuer or officials of the receipts from the 1<sup>st</sup> interested party. Similarly, the plaintiff could



not ascertain the alterations to particulars in the said receipts generally and, in particular, the names, sizes, plot number, and the address used.

19. PW1 confirmed, however, that the defendants and their late mother have been the exclusive occupants of the suit land since 1974, though as mere licensees, not bona fide owners. PW1 said that with respect to the 2<sup>nd</sup> defendant, force and violent entry into the land occurred in 2019. PW1 said that all the documents on the land belong to his father. PW1 said that attempts to amicably settle the issue through the clan elders were unsuccessful on 14/2/2009 after his cousin invaded the whole land.
20. PW1 admitted that the late grandfather was also buried on the suit land. He denied that his father held the title deed in trust; otherwise, his late aunt was a permissive user of the land. PW1 denied that his father obtained the title deed fraudulently or through misrepresentation.
21. Edward Makokha Simiyu testified as DW1. He relied on a witness statement dated 24/2/2025 as his evidence in chief. He told the court that he is the son of the late Esther Nasimiyu Simiyu, born in 1974. DW1 said that his late mother bought the suit land where they have lived to date. DW1 said that his late mother, after acquiring shares for the land, registered them in the name of his young brother, the father of the plaintiff, for security purposes.
22. DW1 said that they had lived on the land peacefully until 2009, when his uncle started laying a claim over it. After his mother passed on, DW1 said that his uncle obtained a court order to stop the burial of the body in the suit land, yet his late grandmother had also been buried there. DW1 said that attempts to mediate over the matter were unsuccessful. DW1 told the court that the plaintiff has never lived on the land. DW1 told the court that all developments on the suit land belong to his late mother. He termed the title deed held by the plaintiff as fraudulently and secretly obtained. DW1 told the court that his biological father was Jacob Simiyu.
23. Isaac Wafula Simiyu testified as DW2. He relied on a witness statement dated 20/2/2025, largely associating himself with the testimony of DW1. DW2 produced an agreement dated 14/2/2009, the chief's letter dated 27/2/2017, and a letter dated 19/3/2019 as D. Exhibit Nos. (1) - (3), respectively. DW2 told the court that he lives on Plot No. 27B, which he acquired through his father-in-law.
24. Bismack B. Nyongesa testified as DW3. He confirmed that he owns Parcel No. 331 and that Esther Nasimiyu has been his neighbour since 1974.
25. Joy Nafula Isaac testified as DW4. She told the court that the late Esther Nasimiyu and Jacob Simiyu are her siblings. According to her, the late Esther Nasimiyu was the one who bought shares for the land at Kshs.1,020/=, in 1974 when Joshua was in form two. DW4 told the court that after their late father passed on, all of them were given shares of his estate, and Joshua was the one who acquired the ancestral land in Bungoma. She told the court that the dispute over this land arose in 2005 when her elder brother allegedly took away all the documents for the land from her late sister, which indicated his name as a trustee, yet he has never occupied the land.
26. DW4 said that her late sister, after divorcing Jacob Simiyu, settled on the land and was blessed with DW1 and DW2. DW4 confirmed that she used to live on the suit land with her late sister, who had made the payment for the shares to acquire the land.
27. The plaintiff relies on written submissions dated 24/2/2026, in which he isolates three issues for the court's determination. On ownership status, the plaintiff submits that he has pleaded and proved through his testimony that he is a recognised and approved agent of his father vide Power of Attorney registered on 27/3/2019, and an order of this court dated 24/4/2019, hence he has the capacity to bring the suit on behalf of the registered owner of the land now trespassed into by the defendants.



28. The plaintiff submits that his father had the financial capacity to acquire shares to buy the land after dropping out of school as Member No. 41 in both the initial and the final area list, receipts, a share certificate, and a title deed before the court. The plaintiff submits that his father was the initiator of all development on the suit land with effect from 1973, whereby his mother was the caretaker and later his sister until his mother passed on in 1995, and was buried therein as per Bukusu traditions.
29. The plaintiff submits that, going by the replying affidavit of his late sister, to his father, sworn on 6/5/2019 in response to his application dated 24/4/2019, she had attached a dubious share certificate issued by a splinter group purporting to be from officials of the 1<sup>st</sup> interested party, and terming his receipts as stolen from her house and saying that his father's name was inserted in the said documents in a fiduciary capacity.
30. The plaintiff submits that the late sister and the defendants have tendered no agreement to show that the late Esther Nasimiyu Simiyu and his father had an agreement of trusteeship. The plaintiff termed the evidence of DW1, 2, 3, and 4 as unsupported by any documentation to prove the element of trust or payment of the shares to acquire the land by the late Esther Nasimiyu Simiyu.
31. As to the evidence of DW4, the plaintiff submitted that she had not filed and served a witness statement to him, but her evidence of theft of documents was not supported by any OB report. The plaintiff submits that the evidence by the defendants fell short of Section 112 of the *Evidence Act* to prove participation or facilitation to acquire the land by the late Esther Nasimiyu Simiyu, or to support any alleged fraud, forgery, or misrepresentation by the father to acquire a title deed.
32. The plaintiff submits that the defendants have been unable to impeach the title held by his father for the suitland under Section 26(1) of the *Land Registration Act* and Article 40(1) of *the Constitution*, since he has produced a copy of the green card, title deed, original area list, letter from the employer, final area list, chief's letter and a letter from the agricultural officer Sikhendu ward, unlike the defendants to substantiate his claim that his father lawfully, procedurally and regularly acquired the title.
33. The defendants rely on written submissions dated 26/2/2026, isolating four issues for the court's determination. On locus standi, the defendants submit that the Power of Attorney held by the plaintiff does not give him the power to file the suit as it is, general in nature, and in the amended plaint dated 27/1/2022, the donee has projected himself as the plaintiff without specifying if he is suing on behalf of Joshua Mabonga Macheso, the donor of a duly registered Power of Attorney. Reliance is placed on *Gatatha Farmers Co. Ltd -vs- Chemtingei & Others; Kaitet Tea Estate [1977] Ltd & Another [2023] KEELC 20564[KLR]*, *Land Registration Act* 2012, and the Land Registration (General) Regulations 2017, Form No. LR A5, *Cornel Shisanya -vs Ngambeni Nursery School & Others [2014] eKLR*, *Anthony Maina Njiiri -vs- National Bank of Kenya [2010] eKLR*, and *Kombo (Suing as holder of Power of Attorney for Richard Kombo) -vs- Ingonga [2024] KEELC 668 [KLR]*.
34. The defendants, therefore, urge the court, guided by the cited authorities, to find that the purported plaintiff acted contrary to the tenor and interests of the Power of Attorney, hijacked the proceedings without proper foundation or leave of the court, and hence is a busybody lacking locus standi, rendering the suit incompetent ab initio.
35. On proof of the case, the defendants submit that the title to the suit land is not absolute or indefeasible since its acquisition is under challenge as per Section 26 of the *Land Registration Act*, on account of trusteeship and out of illegal or forged documents to defeat the rights or interests of the late Esther Nasimiyu Simiyu.
36. Guided by the law case of *Chombo & Others -vs- Nyuni [2024] KEELC 4197[KLR]*, *Dina Management Ltd -vs- County Government of Mombasa & Others [2023] KESC 30 [KLR]*, *Munyu*



- Maina -vs- Hiram Gathiha Maina [2013] KECA 94 [KLR], and Chase International Investment Corporation & Another -vs- Laxman Keshra & Others [1978] KLR 143, the defendants submit that courts have a duty to investigate the root of title by looking beyond the registered title to verify its legality, procedural correctness, and its history of acquisition.
37. In this case, the defendants submit that the court has to look at the key aspects, such as going behind the register, checking for fraud or illegal procedure, investigating whether the title was acquired via an illegal or corrupt scheme, tracing the chain of ownership, and scrutinising or reestablishing the validity of the original documents.
38. The defendants submit that where two competing claims over title arise, each party, as held in Presbyterian Foundation -vs- Kibera Siranga Self Help Group Nursery School [2023] KLR, and Mas Construction Ltd -vs- Sheikh & Others [2025] KECA 349 [KLR], must show the origin of ownership with nothing to cast doubt on the title.
39. The defendants submit that the plaintiff, under Sections 112 and 117 of the *Evidence Act*, had the burden of proving how he acquired the title and, in this instance, substantiate the question as to the good faith of the transaction. The defendants submit that the proper course could have been to ensure that the actual donor of the Power of Attorney appears in court to shed light on how the title was acquired, or call other witnesses such as the Land Registrar. The defendants, guided by Presbyterian Foundation -vs- Kibera Siranga Self Help Group Nursery School (supra), urge the court to find that the plaintiff is not only unreliable but also a doubtful witness.
40. The issues calling for determination are:
1. If the plaintiff has the capacity to bring this suit.
  2. If the plaintiff has proved that the defendants are trespassers on the suit land, to be entitled to relief of eviction and a permanent injunction
  3. If the defendants have tendered to impeach the title for Saboti/Sikhendu Block 8/Weonia/41 on account of fraud and breach of trust.
  4. Whether the defendants are entitled to the reliefs sought in the counterclaim.
  5. What is the order as to costs?
41. This suit commenced before the Chief Magistrates' Court in 2019, before it was transferred to this court. By an order dated 24/8/2019, issued in Kitale Chief Magistrates Misc. Appl. No. 4 of 2019, the plaintiff was approved as the recognised agent of the 2<sup>nd</sup> applicant to enable him to file a suit on his behalf in respect of land title No. Saboti/Sikhendu Block 8/Weonia/41.
42. The plaintiff thereafter filed a plaint dated 24/4/2019. In the said plaint, the plaintiff describes himself as the recognised and approved agent of Joshua Mabonga Macheso. In paragraphs 1 and 4, the plaintiff describes himself as an adult male of sound mind and the absolute proprietor of land title No. Saboti/Sikhendu Block 8/Weonia/41 measuring 3.6 acres for a title, yet to be issued by the 1<sup>st</sup> interested party, purchased by him through buying shares in 1973, to which his sister, then a 1<sup>st</sup> defendant, and her son, the then 2<sup>nd</sup> defendant, had been allowed to stay in as caretaker of his mother, who passed on in 1995.
43. The plaintiff averred that the 1<sup>st</sup> defendant had then turned against him, claiming that the plot belonged to her, and in which the 2<sup>nd</sup> defendant had forcefully entered and planted crops, without his consent, after destroying his items as per the agricultural officer's report in 2019.



44. The plaintiff asked that the defendants be evicted from his land. In the said plaint, which was later amended on 27/1/2022, there is no place where the plaintiff described himself as bringing the suit as a holder of a duly executed power of attorney.
45. Locus standi refers to the power to sue or be sued in a court of law. In the said amended plaint, the plaintiff also replaced the initial 1<sup>st</sup> defendant with the current 2<sup>nd</sup> defendant. In paragraph 6A, the plaintiff describes the 1<sup>st</sup> and 2<sup>nd</sup> defendants as his nephews, whose mother, Esther Nasimiyu Simiyu, now deceased, had marital problems with her husband and was allowed to stay in the suit property as a caretaker, and that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had forcefully entered the land, had turned against him to claim that the suit property as belonging to their late mother, caused destruction therein and denied him use of the land for one year, causing him loss and damage.
46. Order 4 Rule (1)(a) of the Civil Procedure Rules provides that where the plaintiff or defendant is a minor or a person of unsound mind, a statement to the effect must be particularised. Order 4 Rule (4) of the Civil Procedure Rules provides that a plaintiff must specify the capacity in which he sues.
47. Order 9 Rule (2) of the Civil Procedure Rules provides that the recognised agents of parties are subject to approval by the court, such as one holding a power of attorney or an affidavit sworn by the party authorising them to make such appearances and applications to do such acts.
48. The defendants challenge the capacity of the plaintiff to institute the suit. It is submitted that a Power of Attorney is not in compliance with the law. Reliance was placed on Gatatha Farmers Company Limited -vs- Chemtingei (supra), Cornel Shisanya -vs- Ngambeni Nursery School (supra), Anthony Maina Njiiri -vs- National Bank of Kenya (supra), Kombo (Suing as holder of POA for Richard Kombo) vs Ingonga (supra).
49. In Cornel L. Shisanya vs Irene Juliet Otinga & Others [2014] KECA 686 [KLR], the issue was whether the applicant was properly appointed as a recognised agent under Order 9 Rule 2 of the Civil Procedure Rules to represent a sickly old lady as a family friend before the Court of Appeal. The court said that there was no provision in the Court of Appeal Rules for representation by a recognised agent. In Cornel L. Shisanya vs Ngambeni Nursery School (supra), the court held that a general power of attorney does not confer locus standi to act as a substitute for the plaintiff.
50. A power of attorney is a legal instrument through which one person authorises another person to act on their behalf in certain legal, financial, property, or personal matters. A power of attorney derives its validity from proper execution, stamping, and registration under the law before the Land Registrar.
51. In Johnson Githaiga Nderitu & Others -vs- Nicholas Nderitu Muita & Others [2013] KECA 93 [KLR], the court said that evidence has to be led to determine the capacity to sue on whether a donee can exercise a power of attorney to the exclusion of the donor and successfully challenge the authority of the donor.
52. In Euton Njuki Makungo -vs- Republic & Others [2014] KECA 445 [KLR], the issue was whether the appellant had locus standi to represent the registered proprietor of the suit property while alive. The court said that since a power of attorney could be registered under Cap 285 in the Registry of Documents and in the land registry relating to the property that a subject matter of the transaction, the appellant had no locus standi to initiate the judicial review proceedings.
53. What the plaintiff has availed before the court is a document dated 25/2/2019. Evidence of payment of registration fees and stamp duty is missing on its face. It is alleged to have been registered over title No. Saboti/Sikhendu Block 8/Weonia/41 on 27/2/2019. The signatures of both the donor and the donee



- are missing. It does not refer to any appointment to pursue this suit. The defendants have challenged the power of attorney on several grounds, which the plaintiff has not addressed.
54. In *South Nyanza Sugar Co. Ltd -vs- Shadrack Manga* [2020] eKLR, the court cited *Kenneth Nyaga Mwiye -vs- Austin Kiguta & Others* [2015] eKLR, that the appellant had a duty to prove the contents of the power of attorney, its legality, and authenticity. The court said that if the disputed contents are not proved, then such contents remain as such, unproven, despite the mutual production of the documents.
  55. The court cited *Jack J. Khanjira & Another -vs- Safaricom Ltd* [2012] eKLR, that it is for the court to oversee the scope and extent of the function of a recognised agent and to assure itself that they are not overstepping the boundaries of the law. Other than the power of attorney, the plaintiff did not formally introduce that capacity in the plaint. Equally, the plaintiff did not seek leave of court to join or change his capacity in the pleadings apart from a recognised agent as per the misc. court order. I find that the capacity of the plaintiff is not clearly defined.
  56. The plaintiff seeks the eviction of the defendants from the suit land, terming them as trespassers therein. He also seeks a permanent injunction and general damages. In *Mburu -vs- Kariuki & Another Civil Appeal 15 of 2020[2026] KECA 529 [KLR]* (13<sup>th</sup> March 2026) (Judgment), similar reliefs like in the instant suit had been sought by the 1<sup>st</sup> respondent. The appellant had challenged the alleged trespass on account of being the registered owner of the land. The trial court held that the title in possession by the appellant was not good and proceeded to cancel the same. On appeal, the court reiterated, guided by *County Government of Kwale & Others -vs- Rahim Khan & Others* [2023] KECA 308, that a counterclaim is a case in its own right, completely different from the plaintiff's case, and it will fall or succeed on its own merits, it is a form of a cross-suit in which the parties transpose roles.
  57. The court cited *Ann Wairimu Wanjohi -vs- James Wambiru Mukabi* [2021] eKLR, that parties should specifically state their claim by properly pleading the facts relied upon, and the relief sought, as the pleadings are the primary documents that guide the court and the parties concerning the claim and the contesting position of the parties.
  58. The court said that although it is desirable that, where necessary, the pleadings should be amended to bring in all the issues. In *Odd Jobs -vs- Mubia* [1970] E.A. 476 and remain good law, that as cited in *Herman P. Steyn -vs- Charles Thys* [1997] KECA 395 [KLR], the limited circumstances where an unpleaded issue is crucial to the matter in issue, the court may determine a suit on the unpleaded issues, provided both parties have clearly addressed the unpleaded issue in their evidence or submissions and left the matter for the determination of the court.
  59. In this suit, both the plaintiff and the defendants addressed the court on the capacity of the plaintiff to bring this suit in relation to the registered owner. The plaintiff has said he is the next friend and holder of a power of attorney for his father said to be old and suffering from an undisclosed disease. P. Exhibit No. (3) is the certificate of official search for the suit land issued on 26/3/2019. P. Exhibit Nos. (9) and (10) are copies of the green card, a title deed showing that the title deed was issued on 30/1/2023. The share certificate for the land produced as P. Exhibit No. (2) was issued on 24/10/2006. The payment receipts were produced as P. Exhibit No. 1(a) - (g). The defendants take issue with the said receipts for various contradictory particulars.
  60. Trespass is a tort governed by Section 3(1) of the *Trespass Act*. To prove trespass, a claimant must demonstrate proprietary interest in the land in question and intrusion onto it without any consent, authority, or justification. See *Clerk & Lindsell on Torts*, 21<sup>st</sup> Edition, page 1345, and *Church Commissioners for Kenya of ACK -vs- Wayuga* (supra).



61. In Mohamed -vs- BOM Pentrose Community School (supra), the court said that once a title challenge is raised, the evidentiary burden shifts to the person claiming proprietorship to demonstrate that the title was lawful, regular, and free from any illegality, the reason being that under Section 26(1) of the Land Registration Act, indefeasibility of title to immovable property pertains only in the absence of fraud, misrepresentation or other unlawful conduct in its acquisition.
62. The court cited Munyu Maina -vs- Hiram Gathiha Maina [2013] eKLR, that when the instrument of title is under challenge, the registered owner must go beyond the instrument and prove legality of how he acquired the title and show that the acquisition was legal, formal, and free from any encumbrances, including any, and all interests which need not be noted in the register.
63. The court further cited Chemney Investments Ltd -vs- Attorney General & Others [2018] eKLR and Funzi Development Ltd & Others -vs- County Government of Kwale [2014] eKLR, that courts cannot recognise and protect title to land based on indefeasibility of title or sanction any illegality or give seal of approval to an illegality or illegally obtained title, since as held in Dina Management Ltd -vs- County Government of Mombasa (supra). Article 40(6) of the Constitution limits the property right, as no extending them to any property found to have been unlawfully acquired.
64. The court further cited MFI Office Solutions -vs- Landlord Ltd & Others [2025] KECA 1200 KLR, and Presbyterian Foundation -vs- Kibera Siranga Self Help Group Nursery School (supra), that to call upon title holders to prove the root of their title, there must be credible allegation to believe that the acquisition of property may not have been made through the proper channels, since the root of title is the deed to which the title to a property is ultimately traced to prove that the owner has a good title, and that when there is a competing interests as to which is a good title, each party has to give evidence of the title, starting with a good root of title, coupled with an unbroken chain of ownership.
65. The court held that to be a good title, a document must deal with or show the origin of the ownership, the whole legal and equitable interest in the land in question, it must recognise a recognisable description of the property, and lastly, it must not contain anything that casts any doubt on the title.
66. Applying the foregoing case law to the instant suit in the amended defence and counterclaim dated 20/3/2023, the defendants deny the alleged trespass, forceful entry and occupation of the suit land, imposition onto the suit land, alleged purchase or ownership of any share to acquire the title to the suit property from the 1<sup>st</sup> interested party, plead that their late mother is the one who bought the shares for the suit land from the 1<sup>st</sup> interested party in the name of their uncle to hold in trust for her sister for security reasons, aver that their uncle secretly stole and fraudulently and misrepresented himself as the bona fide owner of the land in breach of trust and proceeded to obtain the title to the suit land despite knowledge of or aware of their late mother's interest of occupation, use, and possession of the land since 1973 to date with a view of evicting them from the land.
67. In reply to the amended defence and defence to the counterclaim, the plaintiff admits that the title to the land in the name of his father was registered and issued on 24/5/2017 and 30/1/2023, respectively. He denies the alleged trust, fraud, or illegality in acquiring the title.
68. The plaintiff relies on a demand letter dated 18/2/2019 and 5/4/2019 written to the initial defendants. In the one dated 18/2/2019, it is admitted that Joshua Macheso had allowed the late Esther Nasimiyu Simiyu to enter the land as his sister. P. Exhibit No. 1(a) - (h) are in the name of Joshua Mabonga Macheso. Joshua Mabonga Macheso was never listed as a witness in the list of witnesses dated 24/4/2019, filed by the plaintiff. In the application dated 24/4/2019, the deponent to the supporting affidavit was Isaac Macheso Mabonga attaching a power of attorney and an order, copy of official search, share certificate, letter of confirmation, area list, receipts, demand notices, agricultural and



- assessment reports as annexures marked IMM-1(a) and (b) - (7) respectively, which the plaintiff relied on as exhibits in his testimony as PW1.
69. Esther Nasimiyu Simiyu, as the 1<sup>st</sup> defendant, swore a replying affidavit on 6/5/2019 denying that the plaintiff was a recognised or approved agent of his brother Joshua Mabonga Macheso.
  70. She swore on oath that she was the one who acquired a share certificate from the 1<sup>st</sup> interested party and inserted the name of her brother then a minor as security and made all the payments under that name, which the said brother later stole from her house, where she had exclusively lived, with effect from 1972, and that she even reported the matter to the chief's office and the county government, who established that the said brother took advantage of her gender and illness to defraud her of the land. The deponent annexed a chief's letter dated 27/3/2017 and a letter from the county government dated 19/3/2019, now produced as exhibits by the defendants.
  71. Instead of Joshua Mabonga Macheso refuting those serious allegations, the plaintiff swore a further affidavit on 24/5/2019, as if he were Joshua Mabonga Macheso. After amending the plaint on 27/1/2022, following the death of the 1<sup>st</sup> defendant, the plaintiff included the 1<sup>st</sup> defendant without leave of the court or letters of administration for the estate of the late Esther Nasimiyu Simiyu.
  72. In the witness statement dated 27/1/2022, the plaintiff purports to speak on behalf of Joshua Mabonga Macheso without any authority to plead, sue, or defend the counterclaim brought by the initial 1<sup>st</sup> and 2<sup>nd</sup> defendants dated 6/5/2019, later amended on 20/3/2023, alleging fraud, breach of trust, and misrepresentation. Strangely, the 1<sup>st</sup> and 2<sup>nd</sup> defendants also sought to advance the claim of the initial 1<sup>st</sup> defendant without letters of administration.
  73. In the reply to defence and defence to the counterclaim dated 2/6/2023, the plaintiff also continued to advance the claim by his father without stating if he is a holder of a power of attorney, and or establishing the source of his information, as PW1 told the court that his father is aged 78 years old and has never lived on the suit land.
  74. The plaintiff was not the one who was issued the receipts, share certificate, and or ownership documents to the suit land. PW1 was not privy to the manner, nature, and procedures in which shares were being bought from the 1<sup>st</sup> interested party and how the land came to the name of his father, Joshua Mabonga Macheso. PW1 told the court that there was no trust, fraud, misrepresentation, or illegality in the manner in which his father acquired an interest or title to the suit land. According to him, the defendants and their late mother were mere licensees on the suit land.
  75. Trespass, as held in Warrakah (Suing as the Administrator and Legal Representative of the Estate of Gakweli Mohamed Warrakah - Deceased) -vs- Mwatsami (Civil Appeal E015 of 2020) [2024] KECA 579 (KLR) (24 May 2024) (Judgment) occurs when a person enters upon land in possession of another without permission.
  76. In Muthiora -vs- Marion Muthama [2022] KECA 28 [KLR], the court cited M'Ikiara M'Mukunya & Another -vs- M'Mbijiwe [1984] eKLR, that to prove trespass, one has to show he had the right to immediate exclusive possession which the intruder has violated.
  77. In Margaret Iminza Luyayi -vs- Moses Opudo Mudaka [2019] eKLR, the court said that there was no wrongful entry or violation of the plaintiff's right to possession since it was the plaintiff who had invited the defendant to the suit land as a man friend. The onus, as held in Ochako Obinchi -vs- Zachary Oyoti Nyamongo [2018] eKLR, is on he who alleges trespass to prove that he is the owner of the suit land and that the defendant has invaded the same without any justifiable cause.



78. A case is won on the strength of one's evidence and not on the weakness of the defendant's case. See James Henry Mundiar t/a Kabarak Development Services -vs- Tradewheel Kenya Ltd[1987] eKLR.
79. The plaintiff is not the registered owner of the suit property. He was not born by the time the defendants' late mother was allowed to occupy the land in 1973. It is only his father who can explain how his name was entered into the register of shareholders of the 1<sup>st</sup> interested party at a tender age, and the manner in which the late sister and the defendants gained entry into and have exclusively occupied the suit land with effect from 1972 to the present.
80. Until 2019, there was no evidence that the defendants and their mother had been given a notice of eviction or asked to yield vacant possession of the land to the registered owner, if at all, Joshua Mabonga Macheso's right of ownership had been violated by the defendants.
81. The plaintiff told this court that he was not privy to the issuance of P. Exhibit No. 1(a)-(g) - (8). He could not ascertain, verify, clarify, and answer to any cross-examination questions regarding the age, schooling, discrepancies in the particulars of the documents and the complaints by the initial 1<sup>st</sup> defendant regarding the disappearance and stealing of the receipts for payments by his father leading to meetings at the chief's office and at the County Executive Member for Land before the title deed was issued in 2023, during the pendency of this suit.
82. Sections 154 - 164 of the *Evidence Act* provide that a witness may be asked any question to test his accuracy, veracity, or credibility in relation to the matter in question. See Stellenbosch Farmers' Winery Group Ltd -vs- Martell & Kie 2003 (1) SA 11 (SCA). The plaintiff failed to call his father or any witness from the 1<sup>st</sup> interested party who were the makers of P. Exhibit No. 1(a)-(g).
83. Failure to call crucial witnesses to clarify the alleged discrepancies, contradictions, and inconsistencies in the plaintiff's evidence, regarding material facts as submitted by the defendants, weakened his claim. Though under Section 143 of the *Evidence Act*, there is no requirement on the number of witnesses to call to prove a fact in issue, a claimant is duty-bound to call evidence of a necessary witness to establish the facts. Failure to call a necessary witness may make the court draw an inference that the evidence of the uncalled witness would have been adverse to the claimant's case. See Korir -vs- Njoki & Another Civil Appeal No.34 of 2020 [2023] KECA 439 [KLR] (14<sup>th</sup> April 2023) (Judgment).
84. The defendants have, on the other hand, tendered evidence on the circumstances in which the title held by Joshua Mabonga Macheso was subject to trust. Whoever wants the court to give judgment on any legal right or liability, dependent on the existence of a fact which he asserts, must prove that those facts exist. In Kimweli -vs- Kimweli Civil Appeal No. 660 of 2019 [2022] KECA 1394 [KLR] (16<sup>th</sup> December 2022) (Judgment), the court said that a court of law can only weigh up the proved facts without concerning itself with speculating on evidence that was never adduced or which does not follow by reasonable inference from the proved facts.
85. Trust is a matter of fact to be proved through evidence, demonstrating the intention to create one, as held in Gichuki -vs- Gichuki [1982] eKLR. The 1<sup>st</sup> and 2<sup>nd</sup> defendants allege that it is their late mother namely, the initial 1<sup>st</sup> defendant who paid for and obtained share certificate in the name of his young brother in 1972 for security purposes and settled on the land, after she became estranged only for the said brother to turn around and take advantage of her gender, and illness to collect the title in breach of the trust and through misrepresentation.
86. In Shah & 7 Others -vs- Mombasa Bricks & Tiles Ltd & 5 Others Petition No. E020 of 2022 [2023] KESC 106 [KLR] (28<sup>th</sup> December 2023) (Judgment), the court said that a constructive trust was a right traceable from the doctrines of equity which arises with relation to a legal title to property, when a



party conducts himself in a manner to deny the other party beneficial interest in the property acquired, or when a party already a trustee takes advantage of his position for his own benefit, where there is unconscionable conduct, and whenever justice and good conscience required the court to guard against unjust enrichment. See *Fit-Tight FA-Steners Limited -vs- Akiba Bank Limited* (Civil Appeal 218 of 2019) [2026] KECA 139 (KLR) (30 January 2026) (Judgment).

87. The defendants have called evidence to establish the circumstances under which the late Esther Nasimiyu Simiyu, a sister to the registered owner, entered into, took possession of, exclusively used, and possessed the suit land until she passed on during the pendency of this suit. The said evidence is consistent with what the initial 1<sup>st</sup> defendant swore on oath before she passed on. As held in *Evan Nyakwara -vs- Cleophus Bwana Ongaro* [2015] eKLR, the burden of proving a particular fact under Sections 109 and 112 of the *Evidence Act* is on he who asserts the existence of those facts.
88. In *Rural Development Services Ltd -vs- African Cotton Industries Ltd* (Civil Appeal E062 of 2021) [2026] KECA 653 (KLR) (25 March 2026) (Judgment)), the court said that the finding of a constructive trust is a mechanism meant to avert an injustice as an equitable remedy imposed by the court in situations of fraud or mistake or where it could be unjustifiable for the owner to retain title, making the legal owner a trustee.
89. In this suit, the evidence of the defendants as regards trust and its breach by the registered owner of the suit land was not rebutted, challenged, or discounted by the registered owner of the land. As held in *Roche -vs- Roche & Another* Civil Appeal No. 177 of 2019 [2025] KECA 1637 [KLR] (3<sup>rd</sup> October 2025) (Judgment), trust is an overriding interest under Section 25 of the *Land Registration Act*, which binds the registered owner of title, such as that of the person in actual possession or occupation of the land.
90. The defendants have tendered evidence that they have been, alongside the defendants' late mother, on the land since 1972, and their grandmother, whose remains were also interred in the suit land.
91. Courts can imply a trust to give effect to the intention of the parties as held in *Peter Ndungu Njenga -vs- Sophia Watiri Ndungu* [2000] eKLR, and *Twalib Hatayan Twalib Hatayan & Another -vs- Said Saggat Ahmed Al Heidy* [2015] eKLR.
92. Registering a son to hold land in trust for the family was a common occurrence in the 1980s, as held in *Githae -vs- Mwai & Others* Civil Appeal No. 230 of 2018 [2015] KECA 1563 [KLR] (3<sup>rd</sup> October 2025) (Judgment), citing with approval *Kihari -vs- Kihari* [1994] eKLR.
93. I think the title held for the suit land is subject to an overriding interest of the defendants and their late mother. The upshot is;
  - a. The plaintiff's suit fails. It is dismissed with costs.
  - b. The defendants' amended defence and counterclaim dated 20/3/2023 is allowed.
  - c. A declaration is hereby issued that the entire land and the title for L.R. No. Saboti/Sikhendu Block 8/Weonia/41 is subject to the overriding interests of the defendants and their late mother's estate exclusively.
  - d. The registered holder of the title shall, within (2) two months, surrender the L.R. No. Saboti/Sikhendu Block 8/Weonia/41 to the Land Registrar for cancellation for registration in the name of the initial 1<sup>st</sup> defendant; in default, the Deputy Registrar of the court shall sign the transfer documents.



e. A permanent injunction shall issue restraining the title holder, his agents, and associates, or anyone claiming through him, including the plaintiff, from interfering with the initial 1<sup>st</sup> defendant and the defendants' use, possession, and occupation of the same until the land is transferred to their late mother's estate.

f. Costs of the main suit and the counterclaim to the defendants.

94. Orders accordingly.

**JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT  
AT KITALE ON THIS 15<sup>TH</sup> DAY OF APRIL 2026.**

**HON. C.K. NZILI**

**JUDGE, ELC KITALE.**

In the presence of:

Court Assistant - Dennis

Bororio for the plaintiff present

Miss Keya for the 1<sup>st</sup> and 2<sup>nd</sup> defendants present

Defendants present

No appearance for the interested parties

