



**Kigacha (Suing as the administrator of the Estate of Laban Kinzi Kigasia) v Bulimu
(Civil Appeal 228 of 2019) [2026] KECA 785 (KLR) (24 April 2026) (Judgment)**

Neutral citation: [2026] KECA 785 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 228 OF 2019
MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA
APRIL 24, 2026**

BETWEEN

**PROFENA NDECHE KIGACHA (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF LABAN KINZI KIGASIA) RESPONDENT**

AND

JASON INGIDA BULIMU RESPONDENT

*(Being an appeal from the Judgment of the Environment and Land Court of Kenya at
Kakamega (N.A. Matbeka, J.) dated 9th April, 2019 in ELC Case No. 444 of 2014 (Formerly
HCCC No. 50 of 2001 as consolidated With Kakamega HCCC No. 126 of 2011 (O.S))*

JUDGMENT

1. By a plaint dated 8th May 2002, in Kakamega HCCC No. 50 of 2001, the respondent averred that he was the registered absolute proprietor of all that piece or parcel of land known as No. TIRIKI/HAMISI “A”/338 measuring approximately 0.37 hectares (hereinafter ‘suit property’), having purchased the same from one Muhindi Onyango on 2nd March, 2001. The respondent averred that upon acquisition, he took possession and commenced utilization of the suit property. The respondent further contended that the appellant, without any colour of right, wrongfully trespassed into a portion thereof and began utilizing it. Despite demands by the respondent that the appellant cease the acts of trespass, the appellant allegedly refused and/or neglected to comply and proceeded to erect structures thereon unlawfully and forcefully.
2. Consequently, the respondent sought a declaration that he is the rightful owner of the suit property; an order of eviction directed at the appellant with respect to the suit property; an order of injunction restraining the appellant or his agents from interfering in any manner with the suit property; and, costs of the suit.



3. The appellant, in a statement of defence dated 12th June, 2002, denied that he was a trespasser as alleged, and averred that he had been living on the suit property which he inherited from his late father, Charles Basu Mujuanda. The appellant stated that if the respondent indeed purchased the suit property from Muhindi Onyango, his late step-brother, then the said Muhindi Onyango fraudulently acquired title to the suit property, and could not therefore pass good title to the respondent.
4. In a separate suit (HCCC No. 126 of 2011), and by way of originating summons dated 26th September, 2011, the late Laban Kingi Kigasia, whose estate the appellant is the administrator sought a declaration that he had acquired prescriptive rights to the suit property through adverse possession. The appellant averred that the suit property originally belonged to his late father, Charles Basu Mujuanda. He contended that Muhindi Onyango was his step brother, and that during land adjudication, he took advantage of the fact that he was older than the appellant, and had the suit property registered in his name. He averred that Muhindi Onyango did not stand to inherit the suit property as he moved out and went to live with his biological father in Sabatia. The appellant averred that after he found out that Muhindi Onyango had sold the suit property to the respondent in 2001, he registered a caution against the title in January 2001, but that the same was removed without his knowledge in September, 2001. The suit property was subsequently transferred to the respondent. The appellant stated that he had been in occupation of the suit property for a period of over twelve years, and that he has built his home on the suit property.
5. In response, the respondent filed a replying affidavit dated 22nd November, 2011. He deponed that the suit property was never owned by the appellant's father, Charles Basu Mujuanda, but rather was registered to Muhindi Onyango, who sold it to the respondent in 2001. He contended that Muhindi Onyango was actually the appellant's younger brother, and could not have taken advantage of the appellant as alleged. He averred that after adjudication in 1973, up until 2001, Muhindi Onyango was the sole registered proprietor of the suit property, and his ownership was never challenged by the appellant. He stated that the purported trust was never registered against the title to the suit property. He contended that the appellant's home was erected on the adjacent parcel of land known as L.R. No. Tiriki/Hamisi/"A"/339, and not on the suit property. The respondent pleaded that when he purchased the suit property in September 2001, he took immediate possession and has been utilizing the same peacefully and exclusively ever since.
6. The two suits were consolidated and heard together as one.
7. The case was heard by way of viva voce evidence. The respondent (PW1) testified that he was the registered owner of the suit property, and that he purchased the same from Muhindi Onyango by a sale agreement dated 2nd May, 2001. He stated that when he purchased the suit property, the appellant was not living on the said parcel of land, and that he took possession in 2002. He testified that the appellant resided on the adjacent parcel number 339, and that he instituted the suit against the appellant when he trespassed upon the suit property. He recalled that the appellant had tried to purchase the suit property from his step-brother, but he did not actualize the purchase. PW2, Risheba Muhindi, widow of the late Muhindi Onyango, told the court that her late husband sold the suit property to the respondent. She stated that her late husband purchased the suit property from one Shitembula in 1968. It was therefore not ancestral land. She stated that the appellant did not reside on the suit property. He had tried to purchase the suit property from her late husband, but did not manage to do so.
8. On the other hand, the appellant (DW1) testified that the suit property originally belonged to his late father, and that he was born on the suit property. He stated that Muhindi Onyango was his step-brother, and that he fraudulently became the registered owner of the suit property, as the appellant



and his father were away during land adjudication. He denied ever trying to purchase the suit property from his step-brother.

9. DW2, DW3, DW4, DW5 and DW6, testified that they came from the same village as both parties. They gave evidence to the effect that the suit property originally belonged to the appellant's father, and that though the appellant resided on the adjacent parcel number 339, he cultivated on the suit property, and had buried his kin thereon.
10. At the end of the trial, the learned trial Judge found in favour of the respondent. The learned trial Judge found that Muhindi Onyango was the first registered owner of the suit property, and that the appellant failed to establish that he held the same in trust for him. The learned trial Judge determined that no evidence was led to establish fraud on the part of the respondent. He therefore held good title. The appellant's claim of adverse possession was dismissed for lack of merit. The respondent was declared the rightful owner of the suit property, and an order of permanent injunction was issued against the appellant restraining him from dealing in any manner with the suit property.
11. The appellant, dissatisfied by this decision, lodged an appeal before this Court. She has proffered four (4) grounds of appeal. She averred that the learned Judge erred in law and fact: by failing to find that the suit property was originally family land; by failing to appreciate that the appellant established that Muhindi Onyango held the suit property in trust for himself and other family members, and that his title was subject to the provisions of Section 28 of the repealed Registered *Land Act*; by failing to find that consent from the Land Control Board was not procured before the suit property was transferred to the respondent; and lastly, by relying on the purported sale agreement between Muhindi Onyango and the appellant, in finding that the appellant tried to purchase the suit property from Muhindi Onyango.
12. The appeal was heard by way of written submissions. Mr. Muma learned counsel appearing for the appellant reiterated that the suit property originally belonged to the appellant's father, and that Muhindi Onyango held the suit property in trust for and on behalf of the beneficiaries of the estate of Charles Busu Mujuanda. He urged that the appellant raised the issue of fraud in her defence statement, although the particulars of fraud were not indicated. He averred that the learned Judge failed to consider the appellant's evidence on fraud, particularly that Muhindi Onyango was fraudulently registered as the owner of the suit property during land adjudication, as the appellant and his late father were away. He faulted the trial court for failing to make a finding on fraud.
13. It was the appellant's further submission that the suit property was family land, especially noting that the appellant's late father and other relatives were buried in the suit property.

Counsel urged that Muhindi Onyango, by virtue of being the elder brother, was entrusted with the suit property, and held it for the benefit of other family members, including the appellant. He submitted that no evidence was led to prove that Muhindi Onyango purchased the suit property from one Shitembula as alleged. He asserted that the respondent was not an innocent purchaser for value as he was aware that the suit property constituted the appellant's family land, at the time he purchased the same. Counsel argued that the suit property being agricultural land, the purported sale was subject to the consent of the Land Control Board. He submitted that this issue was brought out by the appellant when she testified, and that no evidence was led by the respondent to establish that he obtained the said consent.
14. In rebuttal, Mr. Shiloya, for the respondent, submitted that Muhindi Onyango was the first registered owner of the suit property, and that the evidence on record established that he purchased the same from a third party, one Shitembula. He contended that the appellant's father never owned the suit property. It could therefore not be classified as family land. It was his submission that the appellant failed to establish the allegation that Muhindi Onyango held the suit property in trust for the appellant.



He argued that the appellant's late father did not at any point during his lifetime challenge Muhindi Onyango's title to the suit property. He pointed out that if indeed the suit property was ancestral land, the appellant would not have attempted to purchase the same from his step-brother, Muhindi Onyango. He submitted that the sale of the suit property to the respondent, and its subsequent transfer thereof would not have gone through if the consent of the Land Control Board was not obtained. He invited us to dismiss the appeal for lack of merit.

15. This being a first appeal, our duty was well stated in *Selle and Another v. Associated Motor Boat Co. Ltd* [1968] E.A. 123, where the court observed as follows:

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact, if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mhamed Sholan*, (1955) E.A.C.A. 270)”

16. Having evaluated the record of appeal, as well as submissions by parties to the appeal, the issues arising for our determination can be summed up as follows:

- i. Whether the suit property constituted family land, and was held in trust by one Muhindi Onyango, before it was transferred to the respondent;
- ii. Whether the consent of the Land Control Board was obtained before the suit was transferred to respondent.

17. The appellant's principal contention was that the suit property was ancestral or family land, and that Muhindi Onyango held it in trust for himself and other family members. The guiding principles on customary trust were succinctly set out by the Supreme Court in *Kiebia v M'lintari & another* [2018] KESC 22 (KLR), where the Court held that for a customary trust to be established, the claimant must demonstrate, inter alia: that the land was before registration family, clan or group land; that the claimant belongs to such family, clan or group; that the relationship between the claimant and the registered proprietor is such that the latter is reasonably expected to hold the land for the benefit of the former; and that the claim is directed against the registered proprietor who is a member of the family, clan or group.

18. This Court, in the case of *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] KECA 118 (KLR) held thus:

“It is settled that the onus lies on a 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 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.’ See *Gichuki vs. Gichuki* [1982] KLR 285 and *Mbothu & 8 Others vs. Waitimu & 11 Others* [1986] KLR 171.”



19. Applying the above principles to the present appeal, we are satisfied that the appellant failed to satisfy the requisite evidentiary threshold. First, there was no credible evidence that the suit property was family or ancestral land prior to its registration. The respondent's evidence, corroborated by that of Muhindi Onyango's widow (PW2), was that Muhindi Onyango acquired the suit property independently from a third party. That evidence was not rebutted. Secondly, there was no evidence led as to the circumstances of land adjudication, to support the claim that Muhindi Onyango was registered as proprietor in a representative capacity. The appellant's bare assertion that Muhindi Onyango took advantage of her absence during adjudication was not supported by any evidence. No adjudication records, objections, or proceedings were produced to support the allegation that the registration was irregular or undertaken in a representative capacity.
20. Thirdly, the conduct of the appellant was inconsistent with the existence of a trust. The evidence that he attempted to purchase the suit property from Muhindi Onyango negates the existence of a beneficial interest. A person claiming land under a trust cannot, at the same time, treat the registered proprietor as the absolute owner capable of selling the land to him. Fourthly, the appellant did not demonstrate possession or occupation of such a nature as would give rise to a trust. The evidence on record indicates that her homestead is situate on the adjacent parcel No. 339, and that any use of the suit property was at best intermittent cultivation. Such use does not, without more, establish a customary trust. Fifthly, and significantly, there was no evidence that the appellant's late father, from whom the claim is derived, ever asserted any interest in the suit property during his lifetime. This prolonged inaction significantly weakens the appellant's claim of existence of trust.
21. Although the appellant alluded to fraud both in his defence and submissions, we note that no particulars of fraud were pleaded as required by law. It is trite that allegations of fraud must not only be specifically pleaded, but must also be strictly proved to a standard higher than that ordinarily applicable in civil cases, that is, a balance of probabilities. This Court in the case of *SO& another v Nathan M Murugu & 6 others* [2019] KECA 709 (KLR) observed as follows:

“Where in a civil case fraud is pleaded, by dint of Order 22 rule 4(1) of the Civil Procedure Rules, it is mandatory to particularize the instances of fraud and how they were committed. In *Vijay Morjaria V. Nansingh Madhusingh Darbar & Another* [2000] eKLR, Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.””
22. See also the decision of this Court in *Odhiambo v Wanyanga & another* (Civil Appeal E073 of 2020) [2025] KECA 1621 (KLR).
23. In the present appeal, there is no doubt that the appellant did not comply with the requirement of stating the particulars of fraud in her pleadings. The appellant, in her evidence, merely made general allegations that Muhindi Onyango fraudulently procured registration during land adjudication. No particulars were set out, nor was any evidence adduced to substantiate the alleged fraud. In those circumstances, the allegation of fraud was for dismissal, and we are satisfied that the learned trial Judge cannot be faulted for so holding.
24. From the foregoing, the appellant's challenge to the respondent's title rested on unproven allegations of customary trust and fraud. As already demonstrated, the appellant failed to establish the existence



of a trust within the parameters set out in *Isack M’Inanga Kiebia v Isaaya Theuri M’lintari* (supra), and equally failed to plead and strictly prove fraud as required by law. In the absence of proof of either trust or fraud, there was no legal basis upon which the title of Muhindi Onyango, being the first registered proprietor, could be impeached, or upon which the respondent’s derivative title could be defeated. It follows that the respondent’s title was valid and indefeasible, and the learned trial Judge cannot be faulted for so holding.

25. Finally, the appellant faulted the trial court for failing to find that consent of the Land Control Board was not obtained prior to the transfer of the suit property to the respondent. A perusal of the record shows that the question of Land Control Board consent did not form part of the appellant’s pleadings, nor was it substantively raised in her testimony before the trial court. The appellant did not, in her testimony, lay any factual basis to challenge the validity of the transaction on account of want of consent. It is trite that parties are bound by their pleadings, and a court of law cannot determine issues that were not specifically pleaded and canvassed at trial. Further, no evidence was tendered to demonstrate that the transaction between the respondent and Muhindi Onyango lacked the requisite consent. The appellant merely alluded to the issue in submissions, which cannot take the place of evidence. In the circumstances, we find no merit in this ground.
26. In the result, we are satisfied that the appellant has failed to demonstrate any error in law or fact on the part of the learned trial Judge. Accordingly, the appeal lacks merit and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF APRIL, 2026.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR.

