



**Namwoso v Waswa (Environment and Land Appeal E018 of 2024)
[2025] KEELC 5666 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5666 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E018 OF 2024**

EC CHERONO, J

JULY 24, 2025

BETWEEN

LINUS WEKESA NAMWOSO APPELLANT

AND

VALERIA NAKUMICHA WASWA RESPONDENT

JUDGMENT

Introduction

1. Vide a Memorandum of Appeal dated 22/04/2024, the Appellant who was the Defendant in the former case before the subordinate court (hereinafter referred to as the ‘former suit’) preferred this appeal challenging the judgment by Hon. T M Olando (PM) delivered on 17/04/2024 in Bungoma CM-ELC No. E036 of 2021 wherein the learned trial Magistrate allowed the Defendant/Respondent’s claim for half of the suit land.

Background

2. The Respondent instituted the former suit by way of a plaint dated 16/11/2021 wherein she averred that the Appellant is the registered proprietor of Land Parcel no. E.Bukusu/N.Kanduyi/255 (hereinafter referred to as “the suit land”) measuring approximately 7.6ha wherein she occupies and utilizes with her family. That the suit land was initially registered in the name of Andrea Namwoso Nelibo who passed on leaving behind his sons namely Mark Waswa Namwoso, Linus Wekesa Namwoso, Edward Wafula Namwoso and Maurice Wafula Namwoso. That she is the wife of Mark Waswa Namwoso and that prior to the demise of Andrea Namwoso Nelibo, he had shared his properties leaving the suit land to her and her husband Mark Waswa Namwoso. She stated that Maurice Wafula Namwoso was given Land Parcel No. E.Bukusu/N.Kanduyi/301 while Edward Wafula Namwoso and Linus Wekesa Namwoso (the Appellant) were allocated a farm in Kitale measuring 9 acres.



3. That a succession cause was filed and upon determination, the Appellant was issued with a certificate of title for the suit land which was to be transferred to her but the Appellant failed to do so. She averred that the Appellant therefore hold the suit land for her in trust. She sought for the following orders in her plaint;
 - a. Declaration orders in terms of paragraph 11 above. The Plaintiff's claim against the Defendant is for a declaration order to the effect that the Defendant is holding Land Parcel No. E. Bukusu/N. Kanduyi/255 measuring approximately 7.6ha in trust for the Plaintiff and her family and the Plaintiff and her family are properly in occupation and the Defendant by himself, agent and or servant be restrained from interfering with the occupation and utilization by the Plaintiff in respect of land parcel no. E. Bukusu/N. Kanduyi/255 and the Defendant do execute all the relevant documents to effect the transfer of Land Parcel No. E. Bukusu/N. Kanduyi/255 to vest the ownership to the plaintiff and in default the same be executed by the executive officer of the court.
 - b. Costs of the suit.
4. Upon being served with the plaint and Summons to enter Appearance, the Appellant filed a statement of defence dated 26/09/2021 wherein he admitted the kinship described by the Respondent in the plaint and added that indeed he was the registered proprietor of the suit land. He admitted the mode of sharing by their late father to the extent of the share allocated to his brothers Maurice Wafula Namwoso and Edward Wafula Namwoso but denied that his brother Mark Waswa Namwoso and his family were allocated the suit land. He admitted instituting a succession cause for the estate of his father and obtaining the registration of the suit land in his name as stated in the plaint. However, he denied the allegation that he was meant to transfer the suit land to the Respondent and her family. He questioned the Respondent's Locus Standi and urged the court to dismiss the suit.

Evidence Before the Trial Court

5. When the former suit came for directions, the parties agreed to have it proceed by way of viva voce evidence with the Appellant calling two witnesses while the Respondents also called two witnesses.
6. PW1 Valeria Nakumicha Waswa adopted her witness statement dated 16/06/2021 as her evidence-in-chief. She produced four out of five items contained in her list of documents as P-Exhibit 1,2,3 & 5. She testified that she was married in the year 1966 and that her husband died in the year 1980 leaving her on the suit land and at the time, the Appellant was living in Kitale. She testified that the succession cause filed by the Appellant was insincere as the chief did not include her name as a beneficiary after the Appellant told him that she was deceased.
7. PW2 Geoffrey Chebet Waswa adopted his witness statement dated 16/06/2021 as his evidence-in-chief. He testified that he is a son to Mark Waswa Namwoso and the Respondent. He testified that he resides in the suit land and that the Appellant came to live in the land in the year 2011. That he filed an objection in the Succession Cause and the court asked the family members to mediate but no agreement was reached. He also could not tell the status of the succession cause.
8. DW1 Linus Wekesa Namwoso adopted his witness statement dated 24/02/2023 as his evidence-in-chief. He produced the eight items contained in his list of documents as D-Exhibit 1-8. In cross-examination, he testified that he has been living in the suit land since 1962. In re-examination, he stated that he came to the land in the year 2003 after he filed the succession proceedings. He denied being allocated land in Kitale and stated that the same was allocated to his brother Edward Wafula Namwoso.



9. DW2 Maurice Wafula Namwoso adopted his witness statement dated 24/02/2023 as his evidence-in-chief. He confirmed that the Respondent resides in the suit land. He stated that he is the administrator of the estate of the Respondent's Husband and that she is to go to her husband's land plot no.299 where her co-wife resides. The witness testified that the Appellant came to the suit land in 2011.
10. Upon analysing the evidence by the parties and their witnesses, the trial court found that the Plaintiff/ Respondent had proved her case to the required standard and awarded her half of the suit land.
11. Aggrieved by the impugned judgment, the Appellant preferred the present appeal on the following grounds;
 - a. The Trial Magistrate erred in law and I fact by allowing the Respondent's claim which had not been proved on a balance of probabilities.
 - b. The Trial Magistrate erred in law and in fact by failing to dismiss the Respondents claim for failing to demonstrate how or why she should be declared the proprietor holding in trust for the family as pertains to his Land Parcel no. East Bukusu/ North Kanduyi/255.
 - c. That the Trial Magistrate erred in law and in fact by failing to appreciate the cogent evidence tendered by the Appellant save for the appealing sufficient documentary evidence from a ruling subject to the objection proceedings vide Bgm CMC Succ No. 129 of 2019.
 - d. The trial magistrate erred in law and in fact by failing to thoroughly interact with the expert reports which reports were satisfying before arriving to his decision since the Respondent is on the verge of pursuing succession of her deceased husband vide Bgm H P&A 2 of 2020.
 - e. The Trial Magistrate erred in law and in fact by overlooking them hence failing to realise that the respondents claim is null and void, misrepresentation of facts thus a waste of courts time aimed at frustrating the Appellant's lawful and peaceful use of his land.
 - f. The Trial Magistrate erred in law and in fact by failing to interact, frame issues and facts for determination hence arriving at the wrong decision.
12. The Appellant sought to have the appeal allowed and an order be issued reversing the trial magistrate's decision plus costs of the appeal and the former suit.

Submissions on the Appeal.

13. When this appeal came for directions, the parties agreed to have the same be canvassed by way of written submissions.
14. The Appellant filed submissions dated 09/05/2025 where he submitted on three issues. The first issue is whether the Appellant acquired title to the suit land lawfully in which he answered in the affirmative and produced a certificate of tile. He further submitted that his interest as a proprietor is protected under Section 26 of the [Land Registration Act](#) No.3 of 2012 which provides that a certificate of title is to be held as conclusive evidence of proprietorship. That the certificate of title produced as an exhibit as not been challenged.
15. On whether he holds the said title in trust for the Respondents, the Appellant submitted that he produced a certificate of confirmation of grant on how he acquired the title to the suit land and that there is no indication that he was to hold the same in trust for the Respondent and her family. He stated that he has produced evidence to the effect that the Respondent is a widow and beneficiary of one Mariko Waswa Namwoso and that the land under succession is East Bukusu/ North Kanduyi/



299 wherein her claim ought to lie. In conclusion, he submitted that the Respondent's suit filed before the trial court was one for dismissal.

16. The Respondent on the other hand filed submissions dated 08/05/2025 and submitted that the suit before the trial court was proper and that she proved the same to the required standard. She argued that various grounds of the appeal are misleading, particularly on the claim that the trial court diverted from an expert's report.

Analysis and Determination.

17. I have considered the Memorandum of Appeal, the record of appeal, the submissions by both parties and the relevant laws. In *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123, the court held;

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

18. From the Record of appeal as well as the submissions by the parties and the cited authorities, it is my view that the single issue that commends for determination in this appeal is @Whether the Respondent/Plaintiff's claim that the Appellant held the suit land in trust for himself and the Respondent was proved to the required standard?.

19. The Respondent who instituted the former suit before the trial court claimed that the Appellant who was the registered proprietor of the suit land holds the same in trust for her and her family. It was her claim that the suit land was gifted to her deceased husband namely Mariko Waswa Namwoso by his late father Andrea Namwoso Nelibo and that she has been in possession, occupation and use of the land for a considerable period of time. That he entrusted the Appellant with the succession processes on the understanding that he would facilitate a transfer of the suit land in her name upon completion.

20. The Appellant on the other hand averred that the suit land was allocated to him by his father and that he rightfully acquired title to the land upon successfully undertaking succession for the estate of his late father. He averred that his brother Mariko Waswa Namwoso was allocated L.R No. E.Bukusu/N.Kanduyi/299 and that the Respondent's claim lies elsewhere.

21. It is trite that trust is one of the overriding interests recognized under the *Registered Land Act (Repealed)*. Sections 27 and 28 of the said *Act* provided that the rights of a registered proprietor of a registered land under the *Act* were absolute and indefeasible, and were only subject to the rights and encumbrances noted on the register or the overriding interests which were set out under section 30 of the *Act*. Section 30(g) of the *Act* provided for customary trusts. Customary trust is also recognized under Section 28 (b) of the *Land Registration Act*, 2012 which provides for overriding interests as may subsist on the land and affect it without it being noted on the register.

22. In order for a customary trust to be recognized as an overriding interest in respect of a registered land, the person alleging the existence of such a trust must satisfy the court of the existence of certain elements. These elements were enunciated by the Supreme Court in *Isack M'inanga Kiebia v Isaaaya Theuri M'lintari & Another* [2018] eKLR as follows:

“ a. The land in question was before registration, family, clan or group land.



- b. The claimant belongs to such family, clan, or group
 - c. 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.
 - d. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
 - e. The claim is directed against the registered proprietor who is a member of the family, clan or group.”
23. The apex court in the above case further held that; evidence must be led to prove the existence of such a trust; the court will make a determination on the basis of the evidence before it as to the existence or otherwise of such a trust as binds the registered proprietor; and each case has to be determined on its own merits and the quality of the evidence presented before the court.
24. Further, the Court of Appeal in *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR held:
- “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.”
25. Again, in the case of *Mbui Mukangu vs Mutwiri Mbui* CA. No. 281 of 2000, the Court held;
- “For one to establish a claim in Customary trust one had to prove that they are in actual Physical possession or occupation of the parcel of land”
26. Upon evaluating the evidence on record, it is not in dispute that the Respondent has been in continuous and uninterrupted occupation of the suit land for a considerable period of time. She stated that she resided in the suit land with her husband, Marko Waswa Namwoso until his demise in the year 1980 and was buried on the land. It was further submitted that the initial registered owner of the suit land Andreas Namwoso Nelibo who died in 1984 acquiesced to the occupation of Marko Waswa Namwoso in the suit land during his lifetime. Guided by the principles set out in *Supreme court decision* above, it is my view that such long-standing possession and occupation of ancestral land, gives rise to an inference of a customary trust.
27. Notably, the Appellant did not contest the Respondent’s long stay, use and occupation of the suit land. On the contrary, the evidence on record reveals that the Appellant was not in occupation of the land but only came in 2011 after initiating succession proceedings. In my mind, the Appellant’s claim appears to be an afterthought, aimed at displacing the Respondent from land she has occupied as of right under family custom and implied trust.
28. In view of the foregoing, it is my opinion that the Appellant’s conduct was deceitful and his belated claim does not displace the equitable interest that had accrued to the Respondent by virtue of her prolonged occupation, the burial of her late husband on the land, and her continued use and possession of the same with the knowledge and consent of the larger family. In my considered view, all the elements set out in the Supreme court case of *Isaack Kiebia* (*supra*) have been met: that is the nature of the holding of the land and the intention of the parties is that the said holding was for the benefit of the Respondent and her family.



29. In view of the foregoing, I am satisfied that the present appeal is devoid of merit and the same is hereby dismissed.
30. This being a family dispute, I order each party to bear their own costs of this appeal and the costs before the trial Court.
31. It is so ordered.

DATED, SIGNED AND DELIVERD AT BUNGOMA THIS 24TH DAY OF JULY, 2025.

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HON. E. C CHERONO

ELC JUDGE

In the presence of;

Appellant-present.

Respondent.

Bett C/A.

