



**M’Mbie & another v Bururia (Environment and Land Appeal
E010 of 2024) [2025] KEELC 5591 (KLR) (21 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5591 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E010 OF 2024**

BM EBOSO, J

JULY 21, 2025

BETWEEN

JEREMIAH M’MBII 1ST APPELLANT

LAWRENCE MUTWIRI JEREMIAH 2ND APPELLANT

AND

JENIFFER MUKWAMUGO BURURIA RESPONDENT

*(Being an Appeal arising from the Judgment of the Chief Magistrate Court at Chuka
(Hon J M Gandani), delivered on 7/6/2024 in Chuka CMC E & L Case No. 10 of 2015)*

JUDGMENT

Introduction

1. This appeal challenges the Judgment rendered by the Chief Magistrate Court at Chuka (Hon J. M. Gandani, CM) on 7/6/2024 in Chuka CMC E & L Case No 10 of 2015. The two key questions that fell for determination in the trial court were: (i) Whether the respondent had proved that land parcel number Kiera/E.Magutuni/397 was ancestral/family land that was previously held by the respondent’s father and was subsequently held by the appellants in trust; and (ii) Whether the respondent had proved that she was entitled to two (2) acres out of the said land on account of the trust or at all. These are the two key issues that fall for determination in this first appeal. I will outline a brief background to the appeal and summarize the parties’ submissions before I analyse and dispose the two issues.

Background

2. Through a plaint dated 9/2/2015, the respondent instituted Chuka CMC E & L Case No 10 of 2015 against the appellants, seeking: (i) an order decreeing the appellants to give her 2 acres out of the suit land as per the will of her late father; (ii) an order decreeing the executive officer of the court to execute



instruments effecting a transfer of the 2 acres to the respondent in the event the appellants failed to do so; (iii) an order stopping the appellants from selling the suit land during pendency of the suit; (iv) an order awarding her costs of the suit and interest thereon.

3. The case of the respondent was that, the 1st appellant was her biological brother. She contended that they were sired by the late M'Mbururia Njeru M'Rimunya who died in 1977. She stated that the suit land was ancestral land that belonged to their late father, M'Mbururia Njeru M'Rimunya (hereinafter referred to as "the late M'Rimunya"), adding that in 1996, the 1st appellant was registered as proprietor of the suit land to hold it in trust. She added that in 2011, the 1st appellant transferred the entire suit land to his son, the 2nd appellant. Aggrieved by the transfer, she lodged a caution against the title. It was the case of the respondent that prior to the death of their father, he gave to her two (2) acres out of the suit land through a will. She contended that she had a right to get two (2) acres from the suit land as a beneficiary of her late father's property and as one of the dependants of her late father.
4. The appellants filed a joint statement of defence dated 30/6/2015 in which they contested the respondent's claim, terming the respondent's suit as an abuse of the process of the court. They contended that the 1st appellant was registered as the sole proprietor of the suit land and that the 1st appellant subsequently transferred the suit land to his son (the 2nd appellant). The appellants added that the caution registered on the suit land by the respondent was procured illegally and maliciously. They urged the court to decree lifting of the caution.
5. During trial, the respondent testified as PW1 and closed her case without calling any witness. She adopted her witness statement dated 28/10/2022 in which she stated that the suit land was "family and or ancestral land," adding that both her and the 1st appellant were beneficiaries of the suit land. She stated that in accordance with the will of their late father, the 1st appellant was to give her 2 acres but he had instead transferred the entire suit land to the 2nd appellant in 2013 leaving her landless.
6. The two appellants testified as DW1 and DW3 respectively. In addition, they led evidence by Jackson Bundi who testified as DW2. The evidence of DW1 was that, he bought the suit land from one M'Muga M'Kanyi, adding that their late father died in 1970. He stated that he gathered and consolidated the suit land in 1996 during the land adjudication and consolidation exercise and he was subsequently registered as the sole proprietor of the suit land. He denied the allegation that the respondent had been living on the suit land, adding that the respondent lived in her matrimonial home in Mungero Village. He added that he transferred the suit land to his son (the 2nd appellant) in 2011 and that his son lives on the suit land with his family.
7. The trial court considered the parties' pleadings, evidence and submissions and rendered the impugned judgment in which it held that the respondent had established, on a balance of probabilities, that the suit land belonged to her late father. The trial court further held that the respondent was entitled to the 2 acres she was claiming and entered judgment in favour of the respondent as prayed in the plaint.

Appeal

8. Aggrieved by the judgment of the trial court, the appellant brought this appeal, advancing the following verbatim grounds:
 - “ 1) That the learned trial magistrate erred in law and fact by finding in favour of the respondent when trust was not pleaded and proved as required.
 - 2) That the learned trial magistrate erred in law and in fact in ignoring clear authorities provided by the appellant contrary to the principle of stare decisis.



- 3) That the trial magistrate erred in law and in fact by failing to appreciate that the 1st appellant was the 1st registered owner of that land parcel number Kiera/E.Magutuni/397 thereby arriving to a wrong conclusion.
 - 4) That the learned trial magistrate misapplied fact and law by arriving to (sic) conclusion that the 2nd appellant acquired land parcel number Kiera/E.Magutuni/397 fraudulently contrary to the evidence adduced by the parties and the submissions of the appellants.
 - 5) That the learned trial magistrate erred in law and in fact by introducing the issue of fraud which was not pleaded and or litigated upon by the parties.
 - 6) That the learned trial magistrate erred in law and fact by not finding that the 1st appellant legally, procedurally and willingly transferred land parcel number Kiera/E. Magutuni/397 to the 2nd appellant in accordance with the law of the land.”
9. The appellants prayed for an order allowing the appeal and setting aside the judgment of the lower court. They also prayed for costs of the appeal.

Appellants’ Submissions

10. The appellants filed written submissions dated 29/3/2025 through M/s Angela Nyagah Advocates. The submissions focused on only five grounds. On the contention that trust was not specifically pleaded and proved, counsel for the appellants cited Order 2 rule 10 of the Civil Procedure Rules and submitted that a claim founded on trust must be specifically pleaded and proved by cogent evidence. Counsel relied on the decision in the case of Wilson Kenyenga v Joel Ombwori (2001) eKLR. Counsel argued that the trial magistrate’s conclusion that the suit land was held in trust was legally unfounded because the necessary pleadings and the mandatory evidential requirements were not demonstrated.
11. On the contention that the trial court ignored the principle of stare decisis, counsel submitted that the doctrine of stare decisis requires that lower courts adhere to established precedents and binding authorities. Counsel cited the pronouncements in the cases of Kidero & 4 Others v Waititu & 4 Others (Petition 18 & 20 of 2014) eKLR and Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) Petition E018 of 2023(2024)KESC 34 (KLR). Counsel submitted that the trial magistrate erred by disregarding binding authorities on proof of trust, thereby violating the principle of stare decisis.
12. On the allegation that the trial court failed to recognize the 1st appellant as the first registered proprietor of the suit land, counsel argued that the trial court misinterpreted the evidence adduced by the parties in the suit by concluding that the first registered owner of the suit land in the land register, M’Mbii M’Bururia, was the father of the respondent. Counsel argued that from the evidence adduced by the respondent during cross-examination, it was clear that their late father’s name was M’Bururia Njeru M’Rimunya. Counsel further argued that the respondent confirmed in her evidence in cross-examination that the name “M’Mbii” (which was misspelt by the trial magistrate as “Ntombe”) was the appellant’s name and not their late father’s name. Counsel added that the trial magistrate erred by failing to appreciate the registration records which demonstrated that the 1st appellant was the first registered proprietor of the suit land.
13. On the trial court’s finding of fraud in the acquisition of the suit land by the 2nd appellant, counsel submitted that fraud had to be specifically pleaded and established by clear evidence. Counsel relied on the pronouncements in the case of Vijay Morjaria v Nansingh Madhusingh Darbar & another



(2000)eKLR and *Kinyanjui Kamau v George Kamau* (2015)eKLR. Counsel argued that allegations of fraud must be substantiated by unequivocal evidence, especially in cases where the transfer instrument is executed by the sole registered owner. Counsel contended that there was no credible evidence of fraud.

Respondent's Submissions

14. The respondent filed written submissions dated 18/4/2025 through M/s Ojwang Sombe & Co Advocates. Counsel for the respondent identified the following as the issues that fell for determination in the appeal: (i) Whether the trial court erred in law and in fact by allowing the respondent's case; (ii) Whether the trial court erred in dismissing the appellant's counterclaim; and (iii) Who should bear costs of the appeal.
15. On whether the trial court erred by allowing the respondent's suit, counsel submitted that the respondent was a beneficiary of the estate of their late father. Counsel argued that the 1st appellant transferred the suit land to the 2nd appellant without following due process of transmission, leaving the respondent, who was her sister, landless. Counsel contended that the irregularity was perpetuated through fraud. Counsel submitted that the respondent cautioned the land to protect her proprietary rights.
16. Counsel further submitted that the appellants pleaded in their defence that the suit land belonged to the 1st appellant but during cross-examination he was unable to demonstrate how he acquired the suit land. Counsel added that during trial, the 1st appellant stated that he purchased the suit land from one M'muga M'Kanyi but never produced any documentary evidence to support the allegation.
17. Counsel argued that the 2nd appellant testified that he had received the suit land from his father, adding that there was no clarity in the green card on the process through which the 1st appellant acquired the suit land. Counsel added that the green card indicated that on diverse dates in January 2018 (sic), the 2nd appellant procured a transfer of the suit land from "their father M'Mbii M'Bururia," hence the allegations that the 1st appellant purchased the suit land were false.
18. Counsel submitted further that the 1st and 2nd appellants colluded to fraudulently deny the respondent her share of the suit land. Counsel added that the 1st appellant conceded during cross-examination that M'Mbii M'Bururia was the 1st registered owner of the suit land contrary to his evidence-in-chief that he purchased the suit land.
19. On whether the trial court erred in rejecting the appellants' defence, counsel submitted that the evidence on record indicated that at no point did the 1st appellant become the sole registered owner of the suit property to warrant him to transfer it to the 2nd appellant.

Analysis and Determination

20. I have read and considered the original record of the trial court and the record filed in this appeal; the grounds of appeal; and the parties' respective submissions. I have also considered the relevant legal frameworks and the jurisprudence relevant to the key issues in the appeal. The two key issues that fall for determination in this appeal are: (i) Whether the respondent proved that land parcel number Kiera/E.Magutuni/397 was ancestral/family land previously owned by her late father and was subsequently held by the appellants in trust; and (ii) Whether the respondent proved that she was entitled to two (2) acres out of the suit land on account of the trust or at all. I will dispose the two issues sequentially in the above order. Before I do that, I will briefly outline the principle that guides this court when exercising jurisdiction as a first appellate court.



21. The task of a first appellate court was summarized by the Court of Appeal in the case of Susan Munyi v Keshar Shiani (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”

22. The principle was similarly outlined in Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

23. Did the respondent prove that the suit land was ancestral/family land previously owned by her late father and was subsequently held by the appellants in trust? Section 28 of the [Land Registration Act](#) recognizes a customary trust as an unregistrable overriding interest against a registered title. Under Sections 107 and 109 of the [Evidence Act](#), the party alleging existence of a customary trust against a registered title bears the burden of proving existence of the trust.

24. The guiding criteria on the nature of evidence that is required to establish existence of a trust under Section 28 of the [Land Registration Act](#) was outlined by the Supreme Court of Kenya in Isack M’Inanga Kiebia v Isaaya Theuri M’Lintari & another (2018) eKLR as follows:

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant (sic) as a trustee are:

1. The land in question was before registration, family, clan or group land.
2. The claimant belongs to such family, clan or group.
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.

25. The respondent’s first obligation in ventilating her claim was to plead the foundation of her entitlement to the two (2) acres that she claimed. Her second obligation was to lead evidence proving, on a balance of probabilities, existence of a customary trust in her favour in the holding of the suit land by the appellants.



26. The respondent made averments in her plaint to the effect that the suit land belonged to her late father, M'Bururia Njeru M'Rimunya, and that her late father had, by way of will, directed that she be given 2 acres out of the suit land. She did not plead particulars of the will. She did not state whether the will was written or oral. She did not disclose the date of the will. At the hearing, she did not prove existence of a will, oral or written.
27. While it is not in dispute that in appropriate circumstances, a trust can properly be inferred from the pleadings and from the conduct of the parties, it remains the duty of a claimant to adhere to the rules of pleading and to discharge the burden of proof by clearly adducing evidence demonstrating existence of a trust. Order 2 rule 10 of the Civil Procedure Rules required the respondent to plead and set out the particulars of the foundation of her claim and invite the appellants to answer the claim. The respondent failed to discharge that obligation.
28. The most significant default committed by the respondent relates to her obligation to discharge the burden of proof. Sections 107 and 109 of the *Evidence Act* placed the burden of proof on the respondent. The two Sections provide as follows:
- “107 Whoever desires any court to give judgment as to any legal right or liability
(1). 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.”
- “109 The burden of proof in a suit or proceeding lies on that person who would fail
 if no evidence at all were given on either side.”
29. The respondent's claim was a challenge against a registered title. Given the fact that the respondent was invoking an unregistrable overriding interest in form of a customary trust, she had an obligation to present evidence proving existence of a customary trust as contemplated under Section 28 of the *Land Registration Act*. She pleaded that the suit land belonged to her late father, M'Bururia Njeru M'Rimunya. She did not, however, lead any evidence to prove ownership of the suit land by her late father.
30. The suit land was registered on 29/10/1996 as a culmination of the statutory land adjudication and consolidation exercise. Every person who had an interest in a particular parcel of land in the adjudication section was accorded an opportunity to ventilate his/her interest in the land. The respondent did not explain why she did not ventilate her interest or that of her late father in the suit land during the land adjudication and consolidation exercise. She stated that her late father died in 1977 but she did not explain why she never pursued a share of the suit land through succession relating to her late father's estate.
31. The respondent contended in her plaint that her late father bequeathed to her two (2) acres out of the suit land by way of will. No evidence of any will, oral or written, was tendered by the respondent. She entered the witness box and adopted her written statement. She stated that her late father bequeathed her “the farm”, adding that the 1st appellant chased her from “the farm.” She asked the court to give her the land. She concluded her evidence-in-chief by stating that the 1st appellant transferred the suit land to the 2nd appellant. Her nine sentence witness statement which she adopted did not contain much in terms of establishing a trust. She did not call any other witness to establish the alleged will; the alleged bequeathal of two (2) acres by her late father; and the alleged trust. An evaluation of the evidence which she tendered reveals that she did not appreciate the magnitude of the evidential burden placed



on her by the law as a requirement for annulling or altering a land registration (Section 26 of the [Land Registration Act](#)), moreso a first registration procured after the vigorous exercise of land adjudication.

32. The trial court relied on the first entry in the proprietorship section of the land register as evidence of irregular transfer of the suit land from the respondent's father to the 2nd appellant. An examination of the evidence on record indicates that this was a misdirection. The respondent was categorical in her evidence that her late father was called M'Bururia Njeru M'Rimunya. She never averred nor led evidence indicating that "M'Mbii M'Bururia" was the name of her late father. During cross-examination, she confirmed that "M'Mbii" (which the trial court captured as "Ntombe") was the 1st appellant's name. Indeed, she prosecuted her claim from the position that the 1st appellant was the first registered proprietor of the land and that the 1st appellant held the land in trust. It was therefore an error on part of the trial court when it held that M'Mbii M'Bururia was the respondent's father and that the respondent's father was the immediate past registered proprietor of the suit land. She misinterpreted the evidence when she made a finding to the effect that there ought to have been succession and transmission and that in the absence of transmission, the 2nd appellant did not acquire the suit land properly.
33. In the absence of proof of a trust, the trial court erroneously inferred a trust in the following words:
- “The plaintiff further claimed that her father indicated that you (sic) should be given two acres from the land. In effect she was claiming that this was customary land and a trust had been created there under. The plausible conclusion then appears that the defendant must have held the land on behalf of also the plaintiff.”
34. The above inference had no evidential basis. For the above reasons, it is the finding of this court that the respondent failed to prove that the suit land was ancestral land held in trust.
35. Did the respondent prove that she was entitled to the 2 acres that she claimed? Having failed to prove ownership of the suit land by her late father, and having failed to prove bequeathal and trust - which were the foundations of her claim for the two (2) acres, she cannot be said to have proved entitlement to the two (2) acres that she claimed.
36. Before I dispose the appeal, I will make a brief observation on reference to “counterclaim” by one of the parties. The appellants only filed a defence. They did not plead a counterclaim. However, while urging the trial court to dismiss the respondent's suit, they urged the court to lift the caution registered against the title. If they wanted an order lifting the caution, they ought to have pleaded a counterclaim to that effect. I will say no more on the issue.
37. For the above reasons, this court finds that the respondent did not prove her claim on a balance of probabilities to warrant a finding in her favour. The inference and the finding which the trial court made in the respondent's favour were without evidential basis. Consequently, this appeal succeeds. The judgment and orders of the trial court are set aside wholly and are replaced with an order dismissing the respondent's suit.
38. Taking into account the fact that no plea was made in this appeal in relation to the costs of the suit in the lower court, and further taking into account the fact that the errors leading to this appeal were committed by the trial court, parties will bear their respective costs in both courts.

DATED, SIGNED AND DELIVERED VIRTUALLY AT CHUKA THIS 21ST DAY OF JULY, 2025.

B M EBOSO [MR]

JUDGE



In the Presence of:

Ms. Nyagah for the Appellants.

Ms. Ocholla for the Respondent

Court Assistant – Mr. Mwangi

