



**Namalwa (Suing on Behalf of the Estate of Michael Namalwa Banga
- Deceased) v Mbanda & another (Environment and Land Case
90 of 2016) [2025] KEELC 5349 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5349 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND CASE 90 OF 2016**

**BN OLAO, J
JULY 17, 2025**

BETWEEN

**MARY OGOBA NAMALWA (SUING ON BEHALF OF THE ESTATE OF
MICHAEL NAMALWA BANGA - DECEASED) PLAINTIFF**

AND

CLEMENT POTEI MBANDA 1ST DEFENDANT

PAUL POTEI 2ND DEFENDANT

JUDGMENT

1. By an amended plaint dated 18th January 2018, Mary Ogoba Namalwa (the Plaintiff herein and suing as the legal Representative to the Estate of Michael Namalwa Banga - the deceased herein), impleaded Clement Poteli Mbanda and Paul Poteli (the 1st and 2nd Defendants respectively). She sought against the Defendants the following orders with respect to the land parcels No Bunyala/Bulemia/3877 and 2236 (the suit land):
 - a. An order directing the 1st Defendant to execute documents of transfer of the L.R No Bunyala/Bulemia/3877 and 2236 into the name of the Plaintiff forthwith and in default the Deputy Registrar of this Honourable Court do execute the said documents of transfer in favour of the Plaintiff and in the place of the 1st Defendant.
 - b. An order of permanent injunction restraining the Defendants whether by themselves, their agents, servants, employees, workers and/or anybody claiming through them from entering, staying, occupying, using and/or working on the L.R Bunyala/Bulemia/3877 and 2236 or a portion thereof or interfering with the Plaintiff's use and/or quiet enjoyment and occupation of the L.R No Bunyala/Bulemia/3877 and 2236.
 - c. Costs of the suit be provided for.



- d. A declaration that the 1st Defendant holds the L.R No Bunyala/Bulemia/3877 and 2236 in trust for the Plaintiff.
 - e. An order that the Defendants, their servants, workers and assigns be evicted from the L.R No Bunyala/bulimia/3877 and 2236.
2. The basis of the Plaintiff's claim as contained in his amended plaint and statement is that the suit land is a portion of the original land parcel No Bunyala/Bulemia/131 which was family land and that the 1st Defendant is a brother to the deceased who was the husband to the Plaintiff. That the said land parcel was registered in the name of the 1st Defendant on 2nd October 1985 to hold in trust on his own behalf and also on behalf of the Plaintiff's deceased husband. That the said land parcel was clearly demarcated on the ground and each beneficiary has their portions. That the 1st Defendant sub-divided the land parcel No Bunyala/Bulemia/131 to create several parcels of land including the suit land some of which he has already sold to third parties. That the 1st Defendant is the registered proprietor of the suit land and other resultant sub-division of the original land parcel No Bunyala/Bulemia/131. That the suit land includes portions meant for the Plaintiff's deceased husband Michael Namalwa Banga hence this suit.
 3. In addition to her statement and supporting affidavit both dated 2nd August 2016, the Plaintiff filed statements of her witnesses Jackline Namukuru Maube (pw3) And Joyce Ojwangi Obanda (PW4). The record shows that the Plaintiff testified twice. Firstly before Kaniaru J on 26th February 2019 when she was designated as PW1 then again before Omollo J on 1st March 2021 when she was designated as PW2. Then on 31st January 2023 when I took over the hearing of this suit, she was recalled specifically to produce a further list of documents dated 9th March 2022.
 4. In her statement dated 31st March 2017, Jackline Namukuru Maube (PW2) confirms that the original land parcel No Bunyala/Bulemia/131 was registered in the name of the 1st Defendant on 2nd October 1995 to hold in trust on his own behalf and also on behalf of her late husband John Maube Namalwa and on behalf of the Plaintiff deceased husband Michael Namalwa Banda. That the parcel of each beneficiary was clearly demarcated on the ground and she is in occupation of the portion demarcated for her late husband. However, the 1st Defendant has, since the demise of her husband, proceeded to demarcate the said land and created land parcels No Bunyala/Bulemia/3119, 3120 – 3588 and 3559. Thereafter, he sub-divided the land parcel NO Bunyala/Bulemia/3795, 3796, 3797 and 3798. The land parcel No Bunyala/Bulemia/3795 has been sub-divided to create land parcels No Bunyala/3877-3881.
 5. The 1st Defendant is currently the registered proprietor of the land parcels No Bunyala/Bulemia/3120, 3796, 3798, 3880 and 3877 which portions include those meant for the Plaintiff's family and her family.
 6. In her affidavit dated 22nd June 2020 Joyce Ojwang Obanda (PW3) avers that on or about 28th January 2003, the deceased Michael Namalwa Banda sold to her a portion of land measuring 30 x 68 "footsteps" out of the land parcel No Bunyala/Bulemia/131 at a consideration of Kshs.43,000 which was paid in instalments. That she took possession of the said portion which she has been using to grow maize, beans and finger millet. That the Defendants have now encroached onto the said portion which made her report the matter to the area Chief of Bunyala North Location who heard the dispute and decided that the 1st Defendant held the land parcel No Bunyala/Bulemia/131 in trust and should divide it among all the beneficiaries. That the 1st Defendant sub-divided the original land to create several parcels of land including the land parcels No Bunyala/Bulemia/3877, 3796, 3798 and 3120 which are registered in his



name and which include portions meant for the Plaintiff and the portion sold to her by the Plaintiff's deceased husband.

7. The Plaintiff also filed a list of documents dated 2nd August 2016 to which she annexed the following documents:

1. Copy of Limited Grant issued to her on 8th June 2016 in respect to the Estate of her late husband Michael Namalwa Banga in Busia High Court Succession Case No 43 of 2016.
2. Copy of register to the land parcel No Bunyala/Bulemia/131.
3. Copy of land sale agreement dated 3rd January 2005 between the deceased Michael Namalwa Banga and Joyce Ojwang Obanda.
4. Proceedings and verdict of the Chief in the dispute between Joyce Ojwang (PW3) and Clement Poteri MbandA (1st Defendant).
5. Copies of the register to the land parcels No Bunyala/Bulemia/3119, 3120-3558, 3559, 3795, 3796, 3797, 3798, 3877-3881, 3880 and 3877.

By a further list of documents dated 9th March 2022, the Plaintiff filed the following documents:

1. Green Card for Bunyala/Bulemia/2236.

And on 31st January 2023 when the Plaintiff testified before me, both Mr Bogonko counsel for the Plaintiff and Ms Maloba counsel for the Defendants agreed by consent to produce the report by Geoffrey Kamadi the County Surveyor BUSIA dated 29th March 2022.

8. The Defendants filed separate defences in response to the Plaintiff's claim.
9. In his defence dated 7th November 2016, the 1st Defendant pleaded that the suit land is his and that the Plaintiff has no interest in the same. He added that this suit has been filed in bad faith, is barred by the statute of Limitation and the Plaintiff has no interest through customary trust or otherwise. The suit should therefore be struck out.
10. The 2nd Defendant made similar averments in his defence of even date.
11. In his statement which is un-dated but filed on 19th September 2017, the 1st Defendant states that the land parcel No Bunyala/Bulemia/131 is his property which he inherited from his father MBANDA and he does not hold it in trust for anyone. Rather, that it belonged to him and his brothers John Mbanda, Michael Olumbe Mbanda, James December Mbanda And Akonya Akochi. He stated further that the deceased Michael Namalwa Banga had no land which he (1st Defendant) could have encroached upon. He urged the Court to dismiss the Plaintiff's suit adding that he was not willing to cede any portion of his land to the Plaintiff.
12. The 1st Defendant also filed an affidavit dated 2nd July 2020 in which he deposed, inter alia, that he has been the registered proprietor of the land parcel No Bunyala/Bulemia/131 measuring 7.4 Hectares (18.5 Acres) since 2nd October 1985 and his registration is indefeasible in the absence of fraud. He denied that he holds the said land in trust for the late Michael Namalwa Banga as alleged by the Plaintiff and if there was any trust, the same should have been captured in the register. Rather, that as the absolute registered proprietor of the suit land, he has the authority to sub-divide and sell the portions as no inhibition is registered thereon. That he transferred a portion to the 2nd Defendant who is his son. He denied having been a witness to the land sale agreement between the deceased Michael Namalwa



- Banga and Joyce Ojwang Obanda (PW3) and if there was such a transaction, then the deceased Michael Namalwa Banga had no authority to do so. That the Plaintiff has no authority to sue on behalf of Joyce Ojwang Obanda (PW3) who has a remedy to demand a refund of the Kshs.43,000 from the Plaintiff. That the land parcel No Bunyala/Bulemia/3877 rightly belongs to him and there is no valid reason why he should transfer it to the Plaintiff or to Joyce Ojwang Obanda (PW3). He denied having encroached on the land parcel No Bunyala/Bulemia/131 or the resultant sub-divisions including the land parcel No Bunyala/Bulemia/3877.
13. The 2nd Defendant did not file any statement but the Defendants filed a reply to the amended plaint in which they denied that the 1st Defendant holds the land parcel No Bunyala/Bulemia/2236 in trust for the deceased Michael Namalwa Banga as alleged by the Plaintiff. The 1st Defendant admitted that he is the proprietor of the land parcels No Bunyala/Bulemia/3877, 3800, 3696, 2120 and 2236 having followed due process.
 14. The hearing commenced before Kaniaru J on 22nd October 2018 who heard the Plaintiff's evidence. It then proceeded on 1st March 2021 when Omollo J took the further evidence of the Plaintiff and thereafter, that of Jacklina (jackline) Namukuru Maube (PW2) and subsequently that of Joyce Ojwang Obanda (PW3). Thereafter, and on the application by the Plaintiff, the County Surveyor Busia was directed to visit the land in dispute and confirm if the land parcel No Bunyala/Bulemia/131 had indeed been sub-divided into three (3) parcels and the occupation of the same on the ground. That report dated 29th March 2022 prepared by the County Surveyor Geoffrey Kamadi was subsequently prepared and filed herein on 29th March 2022.
 15. I took over the hearing on 31st January 2023 and the Plaintiff was recalled to testify and with the consent of the parties, the Surveyor's report dated 29th March 2022 was produced as evidence in this Court. The Plaintiff then closed her case and the defence case was listed for hearing on 21st March 2023.
 16. Despite several adjournments, the Defendants did not testify and on 3rd October 2024 MR J. V. Juma holding brief for Ms Maloba closed their case without testifying. The parties were then invited to file their submissions.
 17. The submissions were subsequently filed both by Mr Bogonko instructed by the firm of Bogonko Otanga & Company Advocates for the Plaintiff and by Ms Maloba instructed by the firm of Maloba & Company Advocates for the Defendants.
 18. I have considered the evidence by the Plaintiff and the submissions by counsel. As the Defendants did not testify in rebuttal of the claim against them, the Plaintiff's evidence is not controverted save for a defence which was not prosecuted.
 19. The Plaintiff's case, as per the amended plaint, is that the original land parcel No Bunyala/Bulemia/131 which was sub-divided to create the suit land as well as other parcels of land was family land which was registered in the name of the 1st Defendant to hold in trust for the Plaintiff's deceased husband Michael Namalwa Banga who was a brother to the 1st Defendant. Her case is that she occupies a portion of the original land parcel No Bunyala/Bulemia/131 now partitioned to create the suit land i.e land parcels No Bunyala/Bulemia/3877 and 2236 which the 1st Defendant has registered in his names and is encroaching thereon.
 20. The 1st Defendant filed a defence in which he denied that the original land parcel No Bunyala/Bulemia/131 or any of the resultant sub-divisions including the suit land is held by him in trust for the Plaintiff's deceased husband. He added that there is nothing on the register to show that the original land parcel No Bunyala/Bulemia/131 or the suit land was registered in his name to hold in trust for



the Plaintiff's deceased husband or the Plaintiff. The Defendant's counsel MS MALOBA also made the following submissions on the issue of trust at pages 1 and 2 of her submissions:

“My Lord on issue NO 1 above, we humbly submit that there was no trust created at the time of registration of land parcel No Bunyala/Bulemia/131 & 2236. There is no evidence tendered in support of that trust. The 1st Defendant has indefeasible title being a 1st registration. During his life-time, one Michael Namalwa Banga did not assert his rights on this trustee. The title the 1st Plaintiff held upon registration does not indicate that he was holding the same as a trustee and in the absence of proof, we urge the Court to find that there was no trust customary or otherwise created”.

On his part, Mr Bogonko counsel for the Plaintiff made the following submission on the issue of trust at paragraphs 1 and 2:

“That L.R Bunyala/Bulemia 3877 and 2236 measuring 4.4 Hectares are sub-divisional numbers of Bunyala/Bulemia/131 which is ancestral land and it was at the time of land adjudication registered in the name of the 1st Defendant to hold in trust for the Plaintiff's late husband.

According to the evidence on record, the Plaintiffs late husband has been in occupation in clearly demarcated portions comprised in the suit parcels of land after the original title L.R No Bunyala/Bulemia/131 was sub-divided into various sub-divisional numbers leaving L.R Bunyala/Bulemia/3877 and 2236 which ought to belong to the Plaintiff's late husband.”

The main issue for my determination in this dispute is whether the 1st Defendant holds the suit land in trust for the Plaintiff's late husband and whether the same should therefore be transferred to the Plaintiff's name and the Defendants, their agents, servants or any other person be enjoined from interfering with the Plaintiffs' occupation of the same.

21. It is common ground that the suit land being the land parcels No Bunyala/Bulemia/3877 and 2236 are registered in the name of the 1st Defendant. So too was the original land parcel No Bunyala/Bulemia/131 from which the suit land was hived. The Plaintiff's claim is hinged on the pleading that the original land parcel No Bunyala/Bulemia/131 has always been family land and that the 1st Defendant is a brother to her late husband Michael Namalwa Banga . All that is denied by the Defendants in their defence.
22. To begin with, the Defendants did not testify in rebuttal of the Plaintiff's case. They were content with filing their defence. It is trite law that pleadings are not evidence which can rebut the evidence of the opposing party. In the case of CMC Aviation Ltd -v- Cruisair Ltd (NO 1) 1978 KLR 103 [1976-80 I KLR 835], Madan JA (as he then was) stated that:

“Pleadings contain the averments of the parties concerned. Until they are proved or disapproved, or there is an admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of “evidence” in Section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain unproven. Averments in no way satisfy, for example, the following definition of “evidence” in Cassel's English Dictionary P 394”.



On that basis alone, this Court must accept, as proved, the Plaintiff's claim that the suit land is held by the 1st Defendant in trust for the Plaintiff's late husband. However, this Court will go further and consider the veracity of the Plaintiff's evidence to see if indeed a trust was proved.

23. The Plaintiff's case is that the original land parcel No Bunyala/Bulemia/131 and which gave rise to the suit land was family land and that she continues to occupy the suit land out of that trust relationship between the 1st Defendant and her late husband. Again, the claim of the suit land being family land is not controverted since no evidence was led to the contrary. So the trust being pleaded here is a customary trust. The Defendants pleaded that there is nothing on the register to the suit land to show that he holds it as a trustee. That has also been repeated by his counsel in her submissions. However, a customary trust is an overriding interest in land. It need not be registered. Section 28 (b) of the Land Registration Act provides that:

28: "Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register (a) (b) trusts including customary trust".

The register to the suit land shows that the land parcel No Bunyala/Bulemia/2236 was first registered in the name of the 1st Defendant on 2nd October 1985 while the land parcel No Bunyala/Bulemia/3877 was registered in his name on 11th July 2010. The Land Registration Act commenced on 2nd May 2012 after the said parcels of land had been registered in the name of the 1st Defendant. However, the Registered Land Act which preceded the new Act also provided in Section 28 as follows:

"The rights of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claim whatsoever, but subject –

- a. –
- b. Unless the contrary is expressed in the register, to such liabilities, rights and interest as affect the same and are declared by Section 30 not to require noting on the register:

Provided that nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee."

It is clear therefore, that although the 1st Defendant is the registered proprietor of the suit land, that does not absolve him from his other legal duty as a trustee.

24. That the suit land is family land is not disputed. There is no evidence to suggest that the 1st Defendant purchased the original land parcel No Bunyala/Bulemia/131 through his own funds and could therefore do whatever he wanted with it. Being family land, the concept of intergenerational equity demands of the 1st Defendant that he holds it for the benefit of other generations which of course include the Plaintiff and those after her – *Mbui Mukangu -v- Gerald Mutwiri Mbui C.a. Civil Appeal No 281 of 2000 [2000 LLR 4317 CAK]*.
25. Similarly, in the case of *Isack M'inanga Kiebia -v- Isaya Theuri M'lintari & Another 2018 eKLR [Petition No 10 of 2015]* the Supreme Court held that whether or not a claim to land by way of a customary trust is proved depends on the particular circumstances of each case. The Court identified



the following as some of the elements which the Court should look out for in a claim based on a customary trust.

- 1: The land question was before registration 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 circumstance;
- 5: The claim is directed against the registered proprietor who is a member of the family, clan or group.

I see all those elements in this case. Further, it is clear from the Plaintiff's un-controverted testimony that she is in occupation of a portion of the original land parcel No Bunyala/Bulemia/131. That is also confirmed by the report of the County Surveyor Busia dated 29th March 2022 and which was admitted as evidence with the consent of the parties. Due to it's relevant, I shall reproduce it wholly. It reads:

“RE: Surveyor's Report On P/NO

Bunyala/Bulemia/131 ELC Case No 90 of 2016.

The above subject matter refers.

The County Surveyor visited the land parcel Bunyala/Bulemia/131 on 10th September 2021 to confirm the existence of boundaries as the land is being used by the Plaintiff and the Defendants (and the families).

It was noted that there exists a very clear boundary amongst three families depicted by tall trees, sisal plants and barbed wire.

The three families utilize the land as follows:

1. Michael Namalwa Banga Family – 1.4 Ha.
2. Clement Poteli Mbanda – 4.5 Ha.
3. The Maube Family – 1.2 Ha.

It is of importance to note that Clement Poteli Mbanda has sub-divided the above land into many portions, transferred some portions to third parties and even charged other portions.

This information is hereby forwarded to you for perusal and further necessary action.”

The whole of the original land parcel No Bunyala/Bulemia/131 measures 7.4 Hectares as per the Green Card. The Plaintiff's case is that prior to his demise, her late husband had sold part of his entitlement to Joyce Ojwangi Obanda (PW4) who, though not a party in this case, testified as the Plaintiff's witness (PW4) and has stated in paragraphs 3 and 4 of her statement dated 22nd June 2020 and which she adopted as her evidence when she testified before Omollo J on 1st March 2020 as follows:

- 3: “That on or about 28th January 2003, one Michael Namalwa Banga offered to sell and I agreed to buy a portion of land out of L.R No Bunyala/Bulemia/131.”



4: “That the portions I was buying measured 30 x 68 footsteps and was demarcated on the ground.”

The Plaintiff conceded that indeed her late husband sold a portion of his land to Joyce Ojwang Obanda at Kshs.43,000 which the Defendants are encroaching upon. In her amended plaint paragraphs 4(b) and (c), she states:

(b) “That Michael Namalwa Banga sold a portion of his entitlement to one Joyce Ojwang Obanda at Kshs.43,000 which amount was paid in full and receipt thereof duly acknowledged by the said Michael Namalwa Banga and the 1st Defendant was a witness to the said sale agreement.”

(c) “That the portion sold to Joyce Ojwang Obanda was clearly demarcated on the ground and the 1st Defendant had no objection at all.”

The Plaintiff’s claim is in respect to the land parcel No Bunyala/Bulemia/2236 which, as per the Green Card, measures 0.37 Hectares and parcel No Bunyala/Bulemia/3877 measures 2.17 Hectares thus making a total of 2.54 Hectares. The Surveyor’s report shows that the 1st Defendant occupies 4.5 Hectares and since the whole of the original land parcel No Bunyala/Bulemia/131 measures 7.4 Hectares, this Court must find, which I hereby do, that the Plaintiff’s claim to the suit land which measures a total of 2.54 Hectares is justified and includes the portion which the Plaintiff concedes was sold to Joyce Ojwang’obanda who as I have said, is not a party in this case. Since the said Joyce Ajwang Obanda is not a party in this suit, this Court cannot make any award in her favour. However, both she and the Plaintiff have stated that the Defendants have encroached onto their portion of land. In paragraphs 9 and 10 of her affidavit dated 22nd June 2020, the said Joyce Ojwangi Obanda has deposed thus:

9: “That when Michael Namalwa Banga died, the Defendants encroached on the portion which I had purchased and which I was using.”

10: “That I made a report to the Area Chief Bunyala North location who heard the dispute and made a finding that Clement Poteli Mbanda was registered as proprietor of L.R. No Bunyala/Bulemia/131 as a trustee and that arrangement should be made for sub-division of the said land amongst all beneficiaries. Attached and marked JO-2 is a copy of the proceedings and verdict of the chief.”

The view I take of this matter is that if I ignore the entitlement of Joyce Ojwangi Obanda, though only a witness, to the suit land, this may result in other litigation over the suit land. This is a Court of law and also of equity and in a situation such as this where the Plaintiff is claiming the suit land by way of trust from the Defendants and also conceding that she owes another person, though not a party to the suit, a portion of the land which she claims, and in order to bring finality to the dispute, it would be proper for this Court in the final disposal orders, to make an order which will ensure that the final decree in favour of the Plaintiff includes what she owes JOyce Ajwangi Obanda. This Court must also take into account the fact that although the Surveyor’s report states that the Plaintiff’s family occupy 1.4 Hectares, it must be remembered that part of her claim is that the Defendants have encroached onto what is her entitlement as well as that of Joyce Ojwangi Obanda.

26. As the thrust of the Plaintiff’s claim is that the 1st Defendant holds the suit land in trust, that remedy can only be directed against the 1st Defendant who is the registered proprietor of the same. Indeed that is what she seeks. However, the remedy of injunction must be directed to both Defendants.

27. On the issue of costs, the parties are family. The order that commends itself to me in the circumstances is to direct that each party meets their own costs.



28. The up-shot of the above is that having considered the evidence herein, this Court makes the following disposal orders:

1. Judgment is entered for the Plaintiff against the Defendants in the following terms:
 - a. The 1st Defendant holds the land parcels No Bunyala/Bulemia/2236 and 3877 in trust for the Plaintiff.
 - b. That trust is hereby determined and the 1st Defendant shall within 30 days of the judgment surrender to the Land Registrar Busia the original titles to the land parcels No Bunyala/Bulemia/2236 and 3877 for cancellation.
 - c. Thereafter, the 1st Defendant shall execute all the necessary documents to facilitate the registration of a portion measuring 30 x 68 footsteps or it's equivalent in the name of Joyce Ojwangi Obanda and the remainder in the name of Mary Ogoba Namalwa in trust for the family of Michael Namalwa Banga .
 - d. In default of (a) above, the Deputy Registrar of this Court shall execute all such relevant documents on behalf of the 1st Defendant.
2. The Defendants whether by themselves, their agents, servants, employees, workers or any other persons claiming through them will thereafter be permanently enjoined from interfering with the portions registered in the names of the Plaintiff and Joyce Ojwangi Obanda.
3. The parties shall meet their own costs of this suit.

BOAZ N. OLAO

JUDGE

17TH JULY 2025

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 17TH DAY OF JULY 2025 BY WAY OF ELECTRONIC MAIL AND WITH NOTICE TO THE PARTIES.

Right of Appeal.

BOAZ N. OLAO

JUDGE

17TH JULY 2025

