



**Ondora v Ondoro (Land Case E007 of 2023)
[2025] KEELC 5387 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5387 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
LAND CASE E007 OF 2023
AE DENA, J
JULY 17, 2025**

BETWEEN

ANASTACIA AWINO ONDORA PLAINTIFF

AND

GERALD ADAMS OWINO ONDORO DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit on 17th November 2023 by a plaint dated 16th November 2023 and seeks the following orders; -
 - a. A declaration that the Defendant holds 0.85 HA out of land parcel North/Ugenya/Doho/169 in trust for the plaintiff and her children.
 - b. The Defendant do transfer 0.84 HA out of land parcel North/Ugenya/Doho/169 to the plaintiff in default the Deputy Registrar of this court do sign all the necessary documents to effect the transfer on behalf of the Defendant
 - c. Injunction restraining the Defendant and all who claim through him from charging, disposing of, cultivating or in any other way dealing with 0.84 HA of land, the share of the plaintiff
 - d. Costs.
2. The defendant responded to the suit by way of Defence and Counterclaim dated 17th September 2024. It is his case that he was registered during adjudication as the sole proprietor of the suit property which he did not inherit. That the plaintiff's deceased husband was registered as proprietor to a different parcel North/Ugenya/Doho/188 but due to her greed the plaintiff moved her home to the suit property after the demise of her husband. The defendant seeks orders of eviction against the plaintiff and a permanent injunction barring the plaintiff from interfering with the suit property.



Evidence Of The Parties

3. The plaintiff Anastacia Awino testified as PW1. She testified that the defendant Jerald Owino is her step son. She adopted the witness statement dated 16/11/23 as her evidence in chief and produced the documents in the list of documents dated 16/11/23. According to PW1 witness statement parcel North/Ugenya/Doho/169 [suit property] initially belonged to her father-in-law Akwom Akwom had two sons Ondora Akwom and Rakara. Ondora was the plaintiff's husband. She told the court that Rakara was given land elsewhere in Nyalenya by AKWOM. The plaintiff's husband remained in Doha and Akwom gave him the suit property.
4. According to the witness statement her husband had two wives, herself and Elizabeth who was the 1st wife. Elizabeth had 8 children comprising 2 sons and 6 daughters. The plaintiff had 5 children comprising 3 sons and 2 girls. That the defendant was the last born to Elizabeth. That both herself and Elizabeth initially lived in Funyula with their husband. Her husband moved together with his family to Doho in 1979 upon being given land there by his father AKWOM. They have lived in Doho since then to date.
5. According to the witness statement at Doha her house was to the left side of Elizabeth's house and they cultivated in the same manner. PW1 also testified that her husband was alive during demarcation when the land was demarcated, numbers and certificates issued. It took two years for registration to be done. The plaintiff's husband was sick and admitted in hospital at Funyula and being weak and illiterate authorized the defendant to register the land on his behalf.
6. It is PW1's evidence that her husband, being illiterate, kept the title knowing it was in his name until 1994 when it was discovered the title was in the defendant's name. That the defendant apologized at a family meeting where it was also agreed the land would be divided among the children instead of rectification of the title. That her husband died in 1996. That in 2022 the defendant started unnecessary wrangles calling the plaintiff's children squatters and cultivating anywhere disregarding the earlier arrangements. It is her evidence that the defendant holds ½ the share of the suit property on trust for the plaintiff and her children.
7. On cross-examination the witness reiterated the land was divided into two equal halves, one for the 1st wife and the other for the 2nd wife. And she occupies one half. That the 1st defendant belongs to the 1st wife's portion. That her husband does not have any other land other than the suit land. All her children were born in the suit land. The shares were equal regardless of the number of children each wife bore.
8. PW1 clarified in re-examination that each wife knew her portion and cultivated accordingly.
9. PW2 was Stephen Ochieng Ondora, the plaintiff's son. The witness adopted his witness statement dated 14/01/25. He stated he was not aware of other land belonging to the plaintiff as alleged by the defendant. He told the court the land parcel no. 188 was for farming where both his father's wives cultivated.
10. Cross-examined PW2 confirmed his father held parcel 188 registered in his father's name. The witness stated he was not aware the two parcels were registered on the same day 18/01/1974. He confirmed he was 4 years old in 1974 and that his elder brother is the one who told him about the issues surrounding the registration of the defendant as proprietor. He testified that his father is the one who subdivided the land into two halves in the middle and everyone has remained on their side.
11. The witness told the court the division was by a trench and was not undertaken through a survey. The plaintiff has never lived in the parcel 188 including himself.



12. The plaintiff's case was marked as closed.

Defence Case

13. DW1 was Gerald Adan Owino Ondoro the 1st defendant. He adopted his witness Statement dated 17/09/24 and produced the documents in the list of documents dated 17/09/2024. The list was amended with leave of the court during the hearing to read Defendant's list instead of Plaintiffs list. According to the witness statement DW1 testified that he is the registered owner of suit land since adjudication in 1974. That the plaintiffs husband was adjudicated LR. North/Ugenya/Doho/188 the same year. That DW1 mother constructed her home in the suit property and was buried in the suit property within his sons land. It is his evidence that the plaintiff had her home constructed on North/Ugenya/Doho/188 and has been residing there with her family as the land is registered in her father in laws name.
14. DW1 averred that the plaintiff was claiming the two parcels of land yet he DW1 has only one being North/Ugenya/Doho/169. That the plaintiffs father-in-law features nowhere in the green card of the suit property and DW1 is the 1st registered proprietor. The witness denies that the land was ancestral land. That the Funyula narrative is far-fetched since parcel 188 was located near to the suit land within the same location and village. His further evidence is that the plaintiff forcefully constructed another house in DW1 land in the year 2016 and not 1979 as claimed. That the size of the encroachment by the plaintiff is only a homestead occupying 0.2Ha
15. DW1 urged the court to remove the plaintiff so that she may go to her shamba which is parcel 188 to enable him utilize his land in peace.
16. Cross examined DW1 stated the plaintiff was his father's 2nd wife who had three [3] wives. He confirmed he produced the green card for parcel 188 which is registered in the name of 5 people including his father Ondoro Okuom. He agreed PW2 was born around 1970 and Ondoro Okuom died in 1996. He conceded all of them live in parcel 169 including the plaintiff to date. He affirmed both families cultivate on parcels 188 which has no households at all. That Plot 169 never used to belong to his father and who just used to stay there as people in the old days used to. It is his evidence that he has never come to court to have them removed from the land because they were living well until they started blaming and abusing him. To him they were squatters.
17. On inquiry by the court whether the rest of his siblings and specifically the males including PW2 were given land, DW1 told the court none of them got land or titles. [this to me was clear indication the Ondoro gave his land was for the wives. Even the DW2 conceded he was never given land]
18. DW2 was Wellington Oluoch Ondora a resident of Doho. He adopted his witness statement dated 17/9/2024 as his evidence in chief. According to the witness statement the defendant is the registered proprietor of parcel 169 having obtained it by way of adjudication. To date no one has lodged a complaint regarding ownership dispute either officially against the title. He confirmed the plaintiff is the daughter in law of Akwom the original proprietor of parcel 188 where her share belongs.
19. The witness testified in cross examination the plaintiff is the wife of Ondoro Akuom. That in 1974 he was a trainer in directorate of personnel management [DPM] and was not given land during demarcation. He was the 1st born son. His father didn't give him land. His father remained with plot 188 but was buried in parcel 169. The witness confirmed he understands luo customs where the younger son takes care of his father and remains in the homestead of the father. He testified parcel 169 belonged to his father but he surrendered it to the younger son the defendant and opted for plot 188. He conceded the title for parcel 188 includes many people including his father but who did not have a



structure therein. The witness asserted Plot 188 belongs to him as the 1st son as listed by his father and was going to be registered in his name. DW2 agreed he should accommodate the 2nd wife. His evidence was that to date the plaintiff stays on parcel 169 but temporarily since she belongs in plot 188.

20. DW2 confirmed that at the time of his father's death in 1996 the plaintiff was still staying in plot 169. He reiterated he was the head of the family and plaintiff could relocate to parcel 188. That his father didn't divide plot 169 into two that the plaintiff is just a person who invaded the land. He reiterated he does not recognize the plaintiff.
21. The defence case was closed at this juncture with no cross examination.

Submissions

22. After the close of the defendants case the court issued directions on filing of submissions. Parties complied. The court has considered the submissions.

Issues For Determination

23. I have carefully considered the pleadings, examined the evidence together with the submissions of the rival parties and analyzed the law applicable. The following issues commend determination.
 1. Whether the defendant holds 0.85 ha out of the land parcel North/Ugenya/Doho/169 in trust for the plaintiff and her children.
 2. Whether the Plaintiff is entitled to the reliefs sought.
 3. Whether the orders sought in the counterclaim should issue in favor of the defendant plaintiff in the counterclaim.
 4. Who should bear the costs of the main suit and counterclaim

Analysis And Determination

24. The plaintiff claim is based on the doctrine of trust as is apparent in the 1st declaratory relief sought by the plaintiff. I will therefore firstly discuss the law applicable thereto.
25. The provisions of Section 2 of the *Community Land Act* define customary land rights to mean rights conferred by or derived from African Customary law, customs or practices provided such rights are not inconsistent with the law or constitution or any written law.
26. The Court of Appeal in the case of *Twalib Hatayan and Another v Said Saggar Ahmed Al Heidy and 5 Others* [2015] [eKLR] described the constructive Trust as follows

“A constructive Trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a Trustee, the law will impose a trust. A constructive Trust will automatically arise where a person who is already a trustee takes advantage of his position for his own benefit....”



27. The Supreme Court of Kenya in the case of Isack M’Inanga Keibia v Isaaya Theuri M’Lintari & Another [2018] eKLR rendered itself on recognition of customary land rights thus; -

“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.”

28. The Supreme Court above enumerated the elements that would qualify a claimant as a trustee as follows;-

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.

29. The burden of proof lies on the party pleading trust to prove its existence see Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR. Indeed Section 107 of the *Evidence Act* Chapter 80 of the laws of Kenya stipulates that whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.

30. The burden of proof therefore lay on the plaintiff to prove that the defendant held the designated portion in trust for her and her children. I will therefore proceed to review the plaintiffs case against the criteria set out by the Supreme Court hereinabove.

31. Was the land in question before registration, family, clan or group land? The plaintiff claim is directed at a portion of the suit property North/Ugenya/Doho/169. PW1 produced as part of her documents in proof a copy of Green Card of North/Ugenya/Doho/169 and a copy of official search of North/Ugenya/Doho/169 in the name of the Defendant Gerald Adams Owino Ondora. DW1 also produced Copy of registration for LR North/Ugenya/Doho/169, Copy of title deed for LR North/Ugenya/Doho/169 and Copy of official search certificate for LR North/Ugenya/Doho/169 confirming registration in the name of Gerald Adams Owino Ondora the defendant in the year 1974.

32. The above confirms that the land is registered.

33. The next limb was for the plaintiff to prove that the land was before the above registration family land. The plaintiffs case is that the suit property parcel 169 before adjudication belonged to the family patriarch Akwom her father inlaw.

34. Both DW1 and DW2 confirmed everyone lived in the suit land No. 169 the wives of Ondoro and their children. It is also confirmed that the plaintiff lives in the suit property todate. This is further supported by the evidence that there were no structures or homesteads in plot 188 which was used for



farming purposes for the entire family. The intention is very clear that plot 169 was for the occupation of everyone in the family of Okuom. This is further corroborated in the fact that the defendants never took any step to remove the plaintiff from the land. Infact DW1 confirms his own mother was buried here just like Ondoro. There was no good explanation given as to why Ondoro was buried in plot 169 and not plot 188 where it is alleged be belongs. Additionally, it also emerged through DW2 that as per Luo customs the young son remains in his fathers boma and which in my view means plot 169 where the defendant lives was the fathers boma.

34. The only conclusion this court could draw was that the suit land belonged to the family before registration.
35. The other requirement is for the claimant to prove she belongs to such family and her relationship to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous. The plaintiff case is that she is the daughter inlaw of Akuom having been married to Akuoms son and that the defendant is her step son. This evidence was corroborated by PW2 Steven Ocheing Ondora. PW2 evidence was that he was the plaintiffs son. DW2 admitted PW2 was born in 1970 before the death of Ondoro Okuom. DW2 further confirmed in cross examination the plaintiff is the wife of Ondoro Akuom. DW1 consistently referred to the plaintiff as the daughter in law of Akuom. Infact in the entire proceedings none of the witnesses denied the fact that the plaintiff is a family member by virtue of marriage in the family of Akuom.
36. Arising from the foregoing it is clear that the plaintiff established that she was a member of the family of Akuom by dint of marriage. Further that her claim as per the pleadings is directed to the defendant who it is not in dispute is her step son born of the 1st wife Elizabeth and that the suit property 169 is registered in his name as evidenced in the green cards produced.
37. Clearly from the foregoing the plaintiff has met all the requirements enumerated in the case of Isack M’Inanga Keibia v Isaaya Theuri M’Lintari [supra] for this court to impose a trust.
38. But I must address the defendant’s case. It is submitted that the issue of trust does not arise. DW1 asserted that he is the registered owner at demarcation. He produced in evidence Copy of registration for LR North/Ugenya/Doho/169; Copy of title deed for LR North/Ugenya/Doho/169 and Copy of official search certificate for LR North/Ugenya/Doho/169. My review of the green card shows the 1st edition of the parcel file was opened on 18/1/74 and Land Certificate was issued on 30/10/74 under the name of Owino Ondora. The title produced is dated 7/06/2022 and bears the names of Gerald Adams Owino Ondora [the defendant herein] as the absolute registered proprietor. I noted entries 4 and 5 of 7/6/22 in favor of the defendant. The search dated 30/11/23 confirms the entries 4 and 5.
39. DW1 produced title for parcel LR North/Ugenya/Doho/188 which he stated is where the plaintiff and her family belong because this is where the plaintiffs husband features in the title. It is submitted that the two parcels 188 and 169 were registered on the same day and it is likely that the Andora Okuom and the defendant went together to the land registry for the registration exercise and each person knew that one was getting 188 and another 169 as they had to produce some particulars for that registration. During the oral evidence no evidence was led to this effect by the defendant and therefore the hypothesis remains a mere hypothesis.
40. Moreover while it is stated that the plaintiff belongs in 188, DW2 told the court in oral evidence is that he is taking over the said land and which will be subdivided and made an invitation for the plaintiff to move there. It is very clear from the green card that parcel 188 belongs to various proprietors and its subdivision is not a matter for this forum as long as the plaintiff has satisfied that a trust can be imposed against the title 169.



41. A question has been posed on behalf of the defendant to wit if the plaintiff's husband wanted her in plot 169 why did he allow the defendant to be registered on the same instead of the plaintiff or joint. I have already enumerated in my analysis why it is clear from the evidence the plaintiff has established her nexus to warrant invocation of a trust against the property LR North/Ugenya/Doho/169.
42. It is now established that a trust is an overriding interest against a registered title. In the case of *Shah & 7 Others Vs Mombasa Bricks & Tiles Ltd Limited & 5 Others* [Petition 18 [E20] of 2022] [2023] KESC 106 KLR; *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* [2023] KESC 106 [KLR], the Supreme Court of Kenya pronounced itself thus; -
86. We have found that the doctrines of equity are part of our laws by virtue of Section 3 of the *Judicature Act*. And while *the Constitution* entitles every person to the right to property at Article 40, this right is not absolute. Article 24 provides that a right cannot be limited except by law. We have also established that, while Sections 25 and 26 of the *Land Registration Act* provide for the rights of a proprietor and that the certificate of title is conclusive evidence of proprietorship, Section 28 provides that the registration is subject to overriding interests. One of these overriding interests is trust, which includes constructive trust.
87. We have also established that constructive trusts can arise in various circumstances, including in land sale agreements. Trust is an equitable remedy which is an intervention against unconscionable conduct. Where the circumstances of the case are such that it would demand that equity treats the legal owner as a trustee, the law will impose a trust. It is imposed by law whenever justice and good conscience require it. On this issue and for the reasons given above, we therefore find that a constructive trust can be imported into a land sale agreement to defeat a registered title.'
43. Applying the above to the present case what was clearly discerned by this court during the hearing and evidence led is one household ganging against the plaintiff and her children with DW2 coming out very strongly against the plaintiff when it is admitted by DW1 that he never took any action to remove the plaintiff from the land yet they termed her as a squatter. For me equity would intervene and I have elsewhere in this judgement found in favor of importing a trust against the title issued in the name of the defendant.
44. The next issue would be in view of the findings above is the plaintiff entitled to the orders sought. The size of the portion claimed by the plaintiff is contested. PW1 evidence is that the suit property was divided into two equal for both wives and their children. The defendant stated in his oral testimony the size of the encroachment by the plaintiff is only a homestead occupying 0.2Ha. It has also emerged that the identification of the boundary is through a trench that was dug but was not informed by any survey. I have noted the defendant's submission that the plaintiff has not produced any survey report to guide the court in confirming that she actually occupies the 0.85 HA.
45. In view of the above it would be prudent that the exact occupation of the plaintiff and her children on the suit property be ascertained and which shall include the area she uses for cultivation thereon. This court by dint of Section 13 [5] of the *Environment and Land Court Act* is empowered to make any order and grant any relief as the court deems fit and just.
46. The upshot of the foregoing is this court makes a finding that the plaintiff has proved her case on balance of probabilities against the defendant. Judgement is hereby entered for the plaintiff against the defendant in the following terms; -
1. A declaration that the Defendant holds the portion in occupation by the plaintiff out of land parcel North/Ugenya/Doho/169 in trust for the plaintiff and her children.



2. The Land Surveyor Ugenya and the Land Registrar Ugenya shall visit the suit property North/Ugenya/Doho/169 within 90 days of this judgement and ascertain and survey the portion of the land in occupation of the plaintiff and identify the exact boundaries and cause to be excised the said portion.
3. The above exercise shall be conducted in the presence of the Chief Doho Sublocation and the defendant.
4. Pursuant to [2] the Defendant do transfer the excised portion out of land parcel North/Ugenya/Doho/169 to the plaintiff and her children within 45 days of [2] in default the Deputy Registrar of this court do sign all the necessary documents to effect the transfer on behalf of the Defendant.
5. A permanent injunction hereby issues restraining the Defendant and his agents from in any way interfering with the plaintiff's use and enjoyment of the portion as shall be registered in her name pursuant to the orders of this court.
6. The costs of the survey exercise and registration shall be borne by the plaintiff
7. The counterclaim is hereby dismissed with no orders as to costs.
8. This being a suit that involves family members each party shall bear its costs of this suit.

DELIVERED AND DATED AT SIAYA THIS 17TH DAY OF JULY 2025.

HON. LADY JUSTICE A.E. DENA

JUDGE

17/07/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

No appearance for the plaintiff

No appearance for the Defendants

Court Assistant: Ishmael Orwa

