



**Muhingira v Moherai & 2 others (Civil Appeal 230 of 2019)
[2025] KECA 1164 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1164 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 230 OF 2019
HA OMONDI, LK KIMARU & JM NGUGI, JJA
JUNE 20, 2025**

BETWEEN

PETER MUHINGIRA APPELLANT

AND

CHARLES MOHERAI 1ST RESPONDENT

ELIAS BOKE 2ND RESPONDENT

NDERA MOGENA 3RD RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisii (S. Okongo, J.) delivered by (J. M. Mutungi, J.) on 15th April 2016 in Case No. 621 of 1993)

JUDGMENT

1. This is an appeal arising from the judgment and decree of Okongo, J. dated 15th April, 2016 in the Environment and Land Court (ELC) Case No. 621 of 1993. By the said judgment and decree, the ELC allowed the claim by Charles Moherai, Elias Boke, Ndera Mogen, and Rioba Mogen, the respondents' against Joseph Mwita Mogen and Peter Muhingira, the appellant herein by declaring that Joseph Mwita Mgen, was the registered proprietor of land parcel No Bukira/Bwisaboka/609, which he was to hold in trust for himself, and the respondents; that the sale of a portion of the said parcel by the said Joseph to the appellant; and the subsequent registration of that portion as of land parcel No. Bukira/Bwisaboka/880 was unlawful; and that each party would bear its own costs of the suit, hence this appeal.
2. The matter revolves around 18 hectares of land in Bukira/Bwisaboka/609, the suit property herein. It was the respondent's case that the parcel of land was initially family land. During the process of land adjudication, the suit land was registered in the name of Joseph Mwita Mogen [Joseph] an uncle to the Charles Moherai [Charles] and Elias Boke [Elias] and a brother to the Ndera Mongena [Ndera]. It was the respondent's case that Joseph was supposed to hold the suit property in trust for



himself, his brothers Ndera and Rioba Magera [deceased] and the father of Charles and Elias. Instead, the respondent asserts that Joseph subdivided the land into two portions, one half was sold to the appellant, who later charged it to Industrial and Commercial Development Corporation (ICDC) to secure a loan, and registered Bukira/Bwisaboka/879 in his own name.

3. Charles, Elias and Ndera filed a suit against the appellant and Joseph Mwita Magena where they sought:
 - i. A declaration that Joseph was registered as the proprietor of Bukira/Bwisaboka/609 to hold half share thereof in trust for the family of his deceased brother the respondents.
 - ii. A declaration that if the half share sold to appellant was the one the respondents were entitled to then such sale was unlawful and fraudulent in the circumstances.
 - iii. An order directing either of the appellant to transfer nine hectares to the respondents.
 - iv. A permanent injunction restraining any of the appellant from interfering with the respondents' quiet enjoyment of such parcel of land as the court will order they are entitled to.
 - v. This honourable court to order the execution of all necessary documents by the executive officer if any party herein ordered does not so execute.
 - vi. Costs of the suit.
4. Joseph did not file a defence. In his defence, the appellant denied that Joseph was registered as the proprietor of the suit property to hold the same in trust for the respondents and averred that he purchased a portion of the suit property from Joseph in 1982 and the same was registered in his name as plot No. 880. He averred that he enjoyed quiet possession of plot No. 880 until 1993 when the respondents made attempts to trespass thereon for which trespass, they were arrested, charged, convicted and sentenced to serve 7 months imprisonment vide Migori Magistrates Court Criminal Case No. 2431/93. The appellant averred that the respondents had brought the suit in collusion with Joseph intending to defeat his rights over plot No. 880.
5. During the hearing, Charles who testified as PW1 told the court that Plot No. 609, referred to as the suit property, was ancestral land originally owned by his grandfather. He further stated that the land was considered family property shared among his father, uncles, and step-uncle; that in 1993, Joseph informed him that he had sold a portion of the suit property measuring 100 feet by 100 feet to the appellant. Subsequently, Charles discovered that Plot No. 609 had been subdivided into plots Nos. 879 and 880 and were registered in the names of Joseph Mwita and Peter Muhingira, the appellant herein, respectively.
6. Charles further emphasized that neither he nor his family members were informed or consulted before the sale of the portion of the suit property to the appellant; and claimed that the original property was jointly owned by Joseph and his brothers including his deceased father; and that Joseph held the title in trust for the family.
7. Despite the appellant being registered as the owner of Plot No. 880 as early as 1982, Charles asserted that the appellant had never occupied the land but instead, had only constructed a building at a nearby shopping centre where he operated a mill.
8. Elias Boke testified as PW2. He confirmed that Charles is his brother; and they were living on Plot No. 609, which he described as family land. He stated that in 1993, they discovered that Joseph had subdivided the land and sold part of it to the appellant. He added that their father died when he was



young; he supported Charles' claim that Joseph held the land in trust for the family of Mogena Marwa, who were occupying it.

9. PW3, Ndera Mogena, a brother to Joseph stated that during the land adjudication in 1970, he was in Kericho and when he came back from Kericho in 1979, he found that land adjudication had already taken place; and the family land had been registered in the name of the Joseph. Ndera insisted that Plot No. 609 was owned by their father Mogena Marwa, and that their father had not distributed the land among his children before he passed away. He further confirmed that he was aware that his brother Joseph had sold part of the land to the appellant.
10. In his defence, Joseph admitted having sold a 100x100 feet portion of family land to the appellant for Kshs. 6,000, of which, he said, only Kshs.2,000 was paid. He claimed the appellant fraudulently transferred plot No. 880 to his name and denied selling any land beyond 100x100 feet. Joseph admitted that the sale was done without his brothers' or the other respondents' presence or consent. He acknowledged signing a transfer by thumbprint but maintained it was only for the commercial plot. He denied selling 9 hectares of land for Kshs.16,400 or receiving such an amount.
11. On his part, the appellant testified as DW2 and stated that in 1980, he purchased part of the suit property from Joseph for Kshs. 16,400/=. The land was surveyed, subdivided, and he took possession, using part of it for a poshomill and part for farming. He testified that he peacefully occupied the land (now Plot No. 880, 8.57 ha) until 1993, when the respondents entered and started cultivating it. It was his contention that the sale had Land Control Board approval, and the transfer was registered in 1982 after a caution was lifted. The appellant insisted that the respondents had their own land, and when they invaded his land, he reported to the criminal justice system, where they were convicted of illegally invading his plot. The appellant further stated that he had since charged the land to I.C.D.C. for a loan.
12. In its judgment, the learned judge was satisfied the respondents had established a trust relationship between them and Joseph with regard to the ownership of the suit property and that the same was held in trust for himself and the respondents. Being a trustee of the suit property, the learned Judge found that Joseph could not lawfully sell a portion thereof to the appellant without the consent and/or permission of the respondents who were beneficiaries of the trust as such, the sale of a portion of the suit property to the appellant was carried out in breach of the trust and was, thus, illegal.
13. The learned judge declared the sale of a portion of all that parcel of land known as Bukura/Bwisaboka/609 by Joseph to the appellant which is registered as Bukira/Bwisaboka/880 unlawful.
14. Aggrieved by the judgment, the appellant has raised 3 grounds of appeal in his memorandum of appeal dated 8th October 2019, faulting the learned judge for making orders in respect of Bukira/Bwisaboka/609 yet the parcel had been subdivided to Bukura/Bwisaboka/879 and 880, finding that trust had been proved and in finding the sale of a portion of land parcel no. Bukura/Bwisaboka/609 unlawful.
15. In support of the appeal, the appellant contended that the cause of action was based on breach of trust. He argued that despite the respondents having not pleaded particulars of breach of trust, the learned judge found that there was a breach of trust in the circumstances.
16. It is further contended that it is not in dispute that the suit land was registered in the name of Joseph Mwita and that no encumbrance had been registered against his title. Further, the said Joseph Mwita entered into a sale agreement with the appellant and a transfer of the portion sold to the appellant was effected and thus the appellant is a bonafide purchaser for value.



17. The appellant contends that the learned judge erred in holding that land parcel No. Bukira/Bwisaboka/609 was held in trust since the title was non-existent as it had been subdivided creating Bukira/Bwisaboka/880 the appellant's parcel.
18. Opposing the appeal, it was submitted for the respondents that it is clear from the court's finding that the respondent's claim was based on trust. Relying on the case of Isack Kieba M'inanga vs. Isaaya Theuri M'lintari & Another SCOK No. 10 of 2015, the respondent maintains that the suit property was registered in the name of Joseph Mogen a family member of the respondents to hold in trust for them.
19. Regarding the failure to plead and particularise the breach of trust, it is submitted that the same is not fatal to the respondent's claim as it is merely a procedural technicality curable under Articles 159[1] of *the constitution*.
20. It is submitted further that it is a fact that Land Parcel No. Bukira/Bwisaboka/879 and 880 emanated from the original L/R No. Bukira/Bwisaboka/609 which was unlawfully and illegally subdivided hence the subsequent transactions were null and void. The respondents laid sufficient evidence that the registration of the suit land in the name of the appellant did not extinguish the respondents' rights and/or interest and neither did it relieve Joseph of his duties and obligation as a trustee.
21. This is a first appeal. The duty of this Court, in addition to considering submissions by the appellants and the respondents, is to analyze and re-assess the evidence on record and reach an independent conclusion. This approach was adopted in Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others [2015] eKLR, where the Court cited the case of Selle vs. Associated Motor Boat Co. [1968] EA 123 and held as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
22. Having reviewed the evidence that was before the ELC, the grounds of appeal, the submissions by respective counsel and the applicable law, the issues that fall for consideration are whether the transfer of the suit property to the appellant was unlawful, and whether the suit land was held in trust for the 2nd and 3rd respondent.
23. Turning to the germane issues for determination, the first question is whether the 2nd and 3rd respondents established to the required standard that Joseph held the suit land in trust for them and their family. The definition of a constructive trust was at length demystified by this Court in Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR, where it was held:

“ According to the Black's Law Dictionary, 9th Edition; a trust is defined as:

1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person



(trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the *Trustee Act*, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...

“...Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. Halsbury’s Laws of England vol 16 Butterworths 1976 at para 1452).”

24. As the trial Judge held, it was clear from the evidence that the property in dispute was a morphosis of a subdivision from land parcel number Bukira/Bwisaboka/609. The trial Judge held that

“There is unchallenged evidence that 1st and 2nd plaintiffs’ deceased father, the 3rd and 4th plaintiffs, and the 1st defendant were brothers. There is also unchallenged evidence that during the land adjudication at Bukira/Bwisaboka, the 1st and 2nd plaintiffs’ father was deceased while the 3rd Plaintiff was away in Kericho. It appears from the evidence on record that it was only the 1st defendant who was present at home. Having regard to the relationship between the parties and the circumstances under which the 1st defendant was registered as proprietor of the suit property, I am persuaded that the 1st defendant was to hold the suit property in trust for himself and his brothers.”

25. It is clear from the evidence adduced by the respondents that a trust had been created. It is also evident that the record does not bear the sale agreement between the appellant and Joseph. Infact, DW1 Joseph Mwita in his evidence maintained that he sold the appellant land measuring 100ft by 100ft at an agreed consideration of Kshs. 6,000/=. The appellant paid only Kshs. 2,000/= and was to pay the balance upon the transfer of the property in his name. However, the appellant did not pay the balance but moved and caused the suit land to be transferred to his name. On being cross-examined, Joseph admitted that neither his brothers nor the respondents were present when he sold the suit land nor did he seek their consent; and that what he sold to the appellant was part of the family land which had not been subdivided. He maintained that what he sold was land measuring 100ft by 100ft only.

26. On his part, the appellant maintains that he purchased 9 acres from Joseph and paid the full price. However, the Court cannot verify the said allegations by the appellant. It was incumbent upon the appellant to include all material from the trial in his Record of Appeal but he failed to include a copy of the agreement whose actual text he wished to rely on.

27. Section 3 (3) of the *Law of Contract Act* provides as follows:

3. No suit shall be brought upon a contract for the disposition of an interest in land unless:
 - a. The contract upon which the suit is founded:
 - i. Is in writing;
 - ii. Is signed by all the parties thereto; and
 - b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”



28. This Court, in the case of Esther Ndengi Njiru & Another vs. Leonard Gatei Mbugua [2020] eKLR, held as follows:

“...Additionally, the appellants who had no sale agreement between themselves and Waiharo did not call Waiharo as their witness to substantiate the sale and legality of title (if at all) that he transferred to the appellants. It is on the basis of the evidence adduced and the non-denial of the respondent’s claims against Waiharo that the judge found that Waiharo “...did not hold a valid title to the suit property which he could sell and transfer”.

29. In the absence of sale agreements and other relevant documentation regarding the transactions, the appellant had no valid defence and the absence of the agreement can only be held against him. The learned trial judge was right to declare the said transaction null and void.

30. Section 28 of the *Land Registration Act* No 3 of 2012 provides:

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) Trust including customary trust.

31. We find that the learned judge did not err in holding that the respondents had established a trust relationship between them and Joseph with regard to the ownership of the suit property. The Supreme Court of Kenya considered at length the issue of customary trust in the case of Isack M’Inanga Kiebia vs. Isaya Theuri M’Lintari & Another [2018] eKLR, and had this to say:

“

“52. Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered *Land Act*. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other part of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. 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 as a trustee are: A trust was an equitable remedy which was



an intervention against unconscionable conduct. Where the circumstances of the case were such that it would demand that equity treated the legal owner as a trustee, the law would impose a trust. It was imposed by law whenever justice and good conscience required it.”

- i. The land in question was before registration, family, clan or group land.
- ii. The claimant belongs to such family, clan, or group.
- iii. 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.
- iv. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
- v. The claim is directed against the registered proprietor who is a member of the family, clan or group.

58. What are we to make of these changes? Several interpretations are plausible. It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register.

However, by retaining the proviso to Section 28 of the Registered *Land Act* (now repealed), in Section 25 of the *Land Registration Act*, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered *Land Act*, have now been subsumed in the “customary trusts” under Section 25 (b) of the *Land Registration Act*. Thus, under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land.”

32. The learned judge was right in finding that Joseph held the suit land in trust for the respondents. The land was family registered in the name of Joseph to hold trust for his brothers and their progeny. As was customary, Joseph was registered in trust for his siblings during the Land Adjudication process when his siblings were absent. This history and the explanation given by the respondents persuaded the trial court.
33. As opposed to the appellant’s assertion that he purchased the suit land from Joseph who was the registered owner, the respondent’s version is a more plausible explanation. The appellant’s allegation was unsubstantiated and not backed by any evidence. That being the case, the respondents’ claim bears the elements in *Isack M’Inanga Kiebia vs. Isaya Theuri _M’Lintari & Another* (supra). The land subject matter was family land; the respondents belonged to the said family, as a brother and nephews to the registered owner who held the land in customary trust an overriding interest whose particulars need not appear in the register.

Ultimately, we hold and find that this appeal lacks merit and is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF JUNE, 2025.

H. A. OMONDI



.....
JUDGE OF APPEAL

L. KIMARU

.....
JUDGE OF APPEAL

JOEL NGUGI

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

