



**Nyambuoro v Adera & another (Environment and Land Appeal  
E008 of 2023) [2024] KEELC 6323 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6323 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E008 OF 2023  
AY KOROSS, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**PAULO AUMA NYAMBUORO ..... APPELLANT**

**AND**

**JENIFA ADHIAMBO ADERA ..... 1<sup>ST</sup> RESPONDENT**

**SILAS ODHIAMBO ONYANGO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the judgment of the Hon. PM E. Malesi  
delivered on 27/09/2023 in Madiany PM ELC Case No. E002 of 2023)*

**JUDGMENT**

**Background of the appeal**

1. To understand the backdrop of this appeal, it is paramount to summarize the nature of the case that was before the trial court in which the appellant was the plaintiff and the respondents the defendants. The appellant and 1<sup>st</sup> respondent are relatives.
2. The dispute that was before the trial and now before this court is the appellant's alleged customary trust rights over land parcel no. Siaya/Ramba/1974 (suit property) that was succeeded by the 1<sup>st</sup> respondent from John and sold to the 2<sup>nd</sup> respondent who is the current registered owner.
3. In a plaint dated 20/02/2023, the appellant averred the suit property was initially ancestral land whose ownership could be traced to their patriarch one Adera who had two sons- Anduru and Nyambuoro. He described Anduru as his father and Nyambuoro as his Uncle.
4. He averred Anduru married Ochillo and sired 4 children- himself, John, Sera Aoko, and Kenyatta all of whom are deceased. However, upon Anduru's demise, in the late 1950s, Ochillo was inherited by Nyambuoro and she relocated to his homestead with all her children.



5. He stated at adjudication, Nyambuoro registered Siaya/Ramba/1938 (Nyambuoro's land) in his name while the suit property which belonged to Anduru's lineage was registered by Ochillo in John's name which he was to hold in trust for his siblings.
6. He asserted when he and John were minors, Ochillo tilled the suit property but when they were of age, a portion was given to each one of them with John moving into his portion when he married and himself upon the demise of Ochillo in the 1980s.
7. He was angst that the 1<sup>st</sup> respondent sold the suit property to the 2<sup>nd</sup> respondent after conducting probate proceedings on John's estate and he pleaded and particularized fraud against her.
8. He also pleaded customary trust and adverse possession and sought a declaration that the suit property was ancestral land and held in trust for himself and John and that John held 0.5ha in trust for him. In the alternative, a declaration of adverse possession of a portion measuring 0.5 ha be made in his favour and that this portion be registered in his name.
9. He also sought a declaration that the registration in the 2<sup>nd</sup> respondent's name was fraudulent and illegal, an order of cancellation of the suit property's title in the 2<sup>nd</sup> respondent's name or 0.5 ha thereof be transferred to his name and lastly, he sought costs of the suit.
10. The respondents spiritedly contested the appellant's claim and filed a joint defence dated 20/03/2023 in which they denied the appellant's claim in totality and put the appellant to strict proof thereof.
11. The matter was slated for hearing and both parties testified. The appellant produced documentary evidence in support of his case while the respondents did not produce any. As for witnesses, the appellant's case was led by 5 witnesses including a chief while the respondents did not call any witness other than themselves.
12. Upon closing parties' cases and submissions being filed, the learned trial magistrate in his impugned judgment recognized two issues as arising for resolution; whether the suit property comprised customary trust and whether the appellant was entitled to the suit property by operation of the doctrine of adverse possession.
13. On the 1<sup>st</sup> issue, the learned magistrate reasoned the appellant was born from the union of Ochillo and Nyambuoro and thus, he could only have a claim on Nyambuoro's land and not the suit property and dismissed his claim. On the 2<sup>nd</sup> issue, the learned trial magistrate found the appellant only utilized a portion of the suit property with Ochillo's permission and adverse possession could not suffice and dismissed his claim. Costs were awarded to the respondents.

### **Appeal to this court**

14. The above outcome did not go down well with the appellant and dissatisfied with the impugned judgment, the appellant moved this court on 10 grounds of appeal set out in the memorandum of appeal dated 2/10/2023.
15. However, a scrutiny of these grounds of appeal reveal they are repetitive and all challenge the trial magistrate's finding on the doctrine of customary trust. Additionally, they do not meet the threshold of Order 42 Rule 1 (2) of the Civil Procedure Rules.



16. The nature and form of a memorandum of appeal is set out in this Order 42 Rule 1 (2) of the Civil Procedure Rules in the following manner: -

“The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”

17. The essence of this law is to assist the court and parties in framing the issues and to identify the core grounds the appellant is aggrieved against. With due respect to the appellant, the grounds of appeal as charted out in the memorandum of appeal fell short of this law as they were not concise, were argumentative, and narratively stated the evidence.

18. Given the unconcise grounds of appeal, this court has condensed the appellant’s grounds of appeal into a singular ground; whether the learned trial magistrate erred in finding the appellant had not proved his claim of customary trust over the suit property.

19. In the memorandum of appeal, the appellant urged this court to set aside the impugned judgment and substitute it with an order allowing the appellant’s case on customary trust, the prayers sought in the claim to be allowed with the costs of the appeal and those of the lower court suit.

#### **Appellant’s submissions**

20. As directed by the court, the appeal was canvassed by written submissions and the appellant’s law firm on record M/s. Otieno Asewe & Co. Advocates filed written submissions dated 18/03/2024 in which one issue was identified as arising for determination; whether the appellant proved he was entitled to a portion of the suit property by customary trust.

21. In arguing the issue, counsel faulted the learned trial magistrate for reasoning that the mere inclusion of the name Nyambuoro in the appellant’s ID implied he was Nyambuoro’s son.

22. Counsel submitted Ochillo registered the suit property in John’s name to hold in trust for the appellant and relied on the Supreme Court of Kenya’s decision of Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another [2018] eKLR.

23. Counsel also waded into probate proceedings, which this court will not consider for two reasons- One, that was not an issue that arose before the trial to enable it to render a determination on it. On this, I rely on the Court of Appeal decision of Kenya Hotels Ltd vs. Oriental Commercial Bank Ltd (Formerly known as The Delphis Bank Limited) [2019] eKLR. Second, this court lacks jurisdiction to entertain succession proceedings.

#### **Respondents’ submissions.**

24. The respondents’ law firm on record Ms. Dola Magani & Co. Advocates filed written submissions dated 11/03/2024 and identified 3 issues for determination; whether the appellant is a beneficiary of the suit property, whether the orders sought should be granted, and what of costs.

25. In arguing all these issues together, counsel submitted the appellant is a distant relative of the 1<sup>st</sup> respondent and had no interest in the suit property and that the appellant had other parcels of land that were registered in his name.



## Issues for determination

26. Being a 1<sup>st</sup> appeal, the power of this court is set out in Order 42 Rule 32 of the Civil Procedure Rules. Being an appellate court, this court will not interfere with the impugned judgment save this court satisfies itself the learned trial magistrate misdirected himself and thus arrived at an erroneous decision, undoubtedly exercised his discretion wrongly and occasioned injustice by such erroneous exercise.
27. The role of an appellate court was aptly stated in the decision of *Watt v Thomas* [1947] AC, 484 at p 485 which was cited with approval in the Court of Appeal decision of Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR thus: -

“Lord Simon’s speech in *Watt v Thomas* [1947] AC, 484 at p 485 as follows:

“...an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide.

But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight...”

28. Reminding itself of the role of an appellate court, I have carefully considered the records and parties’ rival submissions, provisions of law and authorities relied upon and the singular issue that arises for determination is the singular condensed ground of appeal-whether the learned trial magistrate erred in finding the appellant had not proved his claim of customary trust over the suit property.

## Analysis and determination

29. Within the provisions of Section 28 of the *Land Registration Act*, trusts including customary trusts are recognized as overriding rights. These trusts are ordinarily not noted in the register. Consequently, a proprietor’s title is defeasible on grounds of customary trust. Within the provisions of Section 25 of the *Land Registration Act*, certain trusts can still be noted in the register.
30. Once so noted, such trusts, not being overriding interests, bind the registered proprietor on the terms noted in the register. Since the appellant’s trust was not registered in the suit property’s title, it follows his claim of customary trust was properly before the trial court.
31. As rightfully submitted by the appellant’s counsel, the apex court in *Isaack M’Inanga Kiebia* (Supra) settled the principles of customary trust. In this decision, the court analyzed previous decisions, repealed provisions of the Registered *Land Act* and those of the subsisting *Land Registration Act*, and in paragraph 52 held as follows: -

“...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...The categories of a customary trust are therefore not closed. ...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:

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.” Emphasis added.

32. The appellant has challenged the learned trial magistrate’s finding on customary trust particularly the finding that he was Nyambuoro’s son. In the relevant extract of the impugned judgment, the learned trial magistrate in dismissing the appellant’s claim of customary trust stated thus: -

“I am persuaded by the version given by the 1<sup>st</sup> defendant as I pause to consider the name of the plaintiff being Nyambuoro. This signifies that the plaintiff is a descendant of Nyambuoro as children would ordinarily take up the names of their fathers...I do not consider the evidence tendered as sufficient to prove that the suit property ancestral land... The plaintiff admitted to be staying on a piece of land which is registered in the name of Nyambuoro.”

33. In claims of customary trust, the court can never infer a trust and it is now settled that he who alleges customary trust must prove that it was the intent of the parties or family members that the parcel of land would be registered in trust for other family members and once this onus is discharged, then the court would render its decision on the intent.

34. This position was affirmed by the Court of Appeal in *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR thus: -

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

35. In claims of customary trust and as held in the case of *Isaack M’Inanga Kiebia* (Supra), the criteria for assessing customary trust is non-exhaustive and a one-size-fits-all approach cannot suffice. Accordingly, a case has to be determined on its merits, and quality of evidence that has been adduced before it.

36. It is settled law that he who alleges must prove and on evidentiary burdens, courts are usually guided by Sections 107-109 of the *Evidence Act*. In claims of customary trust which is a civil case, the balance of proof is usually that of balance of probabilities. These provisions of law were elucidated by the Court



of Appeal decision of *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR where the court stated: -

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

37. From the evidence, it is undoubted that the appellant and 1<sup>st</sup> respondent have close family ties and their relationship was not tenuous. It emerged before the trial court that the suit property was ancestral land and on ascertainment of rights under the *Land Adjudication Act*, the suit property was registered in John’s name.
38. Therefore, it was incumbent upon the appellant to discharge and prove that at the time of 1<sup>st</sup> registration under this Act, he could have been entitled to be registered as an owner but for some intervening circumstances, he was not.
39. Although he testified that Nyambuoro was the one who was present during adjudication, he did not disclose the circumstances of his absence since from adduced evidence, he was born on 01/01/1954, registration was done on 3/8/1976 and therefore, an adult of 22 years capable of making his own decisions including registration.
40. John too was born in 1947 as evidenced by his death certificate meaning at 1<sup>st</sup> registration, he was an adult of 29 years old and competent in pursuing his registration over Anduru’s land. In my view, being adults, both of them were adept in determining their rights over ancestral land as required by the Act.
41. Be that as it may, it was undisputed evidence that Ochillo was married to Anduru, and upon his demise, she was married to Nyambuoro. Though the appellant testified that he was Anduru’s son, the 1<sup>st</sup> respondent rebutted this evidence and testified all of Ochillo’s children except John were Nyambuoro’s children.
42. The appellant’s evidence having been rebutted, the legal and evidential burden shifted to the appellant to prove he was Anduru’s son as his case would have failed had he not proved his sonship as derived from Anduru.
43. Establishing this relationship was very critical to the case and it was incumbent upon the appellant to prove his parentage such as by producing his birth certificate and having failed to so do, he did not dislodge the 1<sup>st</sup> respondent’s evidence that he was Nyambuoro’s son. This burden of proof was elaborated in Halsbury’s Laws of England, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14 thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14 The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”



44. Having failed to prove he was Anduru's son, I do not find fault in the learned trial magistrate's reasoning and final determination. The finding of the trial magistrate was in tandem with the appellant's pleadings that at adjudication, the ancestral land was divided into two; Nyambuoro's land which belonged to Nyambuoro's lineage, and the suit property which belonged to Anduru's lineage.
45. I note that the observation by the learned trial magistrate on the appellant's ID card as bearing the name of Nyambuoro was an obiter dictum and therefore, did not affect the outcome of the case.
46. Ultimately, I find and hold that this appeal is devoid of merit. I hereby dismiss it and uphold the judgment of the learned trial magistrate delivered on 27/09/2023. Since it is trite law costs follow the event, costs of this appeal are awarded to the respondents.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 26TH DAY OF SEPTEMBER 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

**26/9/2024**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

In the Presence of

Miss. Aguko for the appellant

Mr. Dola Indindis for the respondents

Court assistant: Ishmael Orwa

