



**Kabue & another v Kibue (Environment and Land Appeal
E042 of 2024) [2025] KEELC 2978 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 2978 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E042 OF 2024
A OMBWAYO, J
MARCH 28, 2025**

BETWEEN

JONAH KAMAU KABUE 1ST APPELLANT

GRACE WANGOI KABUI 2ND APPELLANT

AND

JANE NGUHI KIBUE RESPONDENT

JUDGMENT

1. Grace Wangoi Kabui and Jonah Kamau Kabue Suing as the administrators of the estate of Esther Wangari Kabue, herein referred to as the appellants moved the Magistrates Court Nakuru in CMELC E160 of 2021 against Jane Nguhi Kibue hereinafter referred to as the respondent seeking a declaration that the defendant holds the title Bahati/Kabatini Block1/1644 and all its subdivided titles in trust for herself and plaintiffs deceased mother. Moreover, they sought an order that the suit property and resultant subdivision be subdivided into two equal shares. They sought for the cost of the suit.
2. The facts of the case are that Esther Wangari Kabue (deceased) was a co-wife to Jane Nguhi Kibue. The former was married first. In the lower court, the appellants alleged that their mother got married to her deceased husband in the early 1960's and lived with the deceased at Burnt Forest in Uasin Gishu County while her deceased husband was working for gain in Eldoret Town and that in 1970's, their mother and her deceased husband jointly purchased a share at Ndeffo Company Ltd in Nakuru with a purpose of being allocated land and the share was jointly paid for in the name of her deceased husband.
3. The appellant's mother was allocated land at Ndeffo in 1984 and the same was duly registered in the same year and a title deed was issued. The appellants averred that sometimes in 1980's when their deceased father was working in Eldoret town he got married to the respondent and they stayed in Eldoret and that in 1997, there was post-Election Violence in Eldoret at the surrounding areas and mainly in Burnt Forest and the appellants' mother was relocated by her children to Nairobi while her



husband moved to the family land in Engashura/Ndeffo and settled there with the respondent. Their deceased father without informing the appellants' mother and without her consent transferred the family property Nakuru/Kabatini Block 1/1644 to the respondent in 1996 who in turn charged the title to AFC in 2013. That the appellants only knew of this transfer in 1999 when their sister passed away and the respondent resisted and or refused to allow them to bury the body at their family land.

4. The suit property was made an issue of discussion between their deceased father, their mother and the respondent and they all agreed to share the land equally considering that the respondent and the appellants father had sold their mother's inherited land in Muranga that had been left to her by their grandfather.
5. The respondent filed defense in response stating that the circumstances that culminated to her ownership of the suit property being Bahati/Kabatini Block 1/1644 were to the effect that she remains the registered owner of the suit parcel of land and as such, any contrary averments to the ownership or otherwise of the same and any other subsequent proprietary interests therein claimed are within the appellants whim to so elucidate and prove. According to the respondent, the said parcel was legally and procedurally transferred to her during the lifetime and subsistence of her late husband and as such, the appellants have no whatsoever proprietary rights and/or interest in the suit parcel. The appellant prayed that the suit be dismissed with costs.
6. The gist of the evidence of Grace Wangoi Kabui was that she was daughter to the 1st wife of the later Godfrey Kibue Gathuo known as Esther Wangari Kabuye who were married in the 1960s and both lived in Burnt Forest in Uasin Gishu County. Her father married the respondent later in the 1980s as his second wife. She further states that sometimes in 1970s her late mother and her late father bought shares in Ndeffo Farmers co ltd in Nakuru and in 1982 she was allocated a parcel of land and in 1984 she was issued with a title deed. That in 1997, there were post elections violence that affected the area of Burnt Forest and Eldoret that forced them to flee and relocate their mother to Nairobi. Their father and respondent moved to Nakuru and settled on the suit property. Prior to these happenings, her grandfather had allocated her deceased mother a piece of land in Murang'a, but the same was sold by her father and the respondent. In September 1999, her sister Elizabeth Muthoni passed on and that as they prepared to bury their sister they learnt that the land had been transferred to the respondent and that she refused to bury the deceased on the said land. The issue was discussed at a family meeting and it was resolved that the land be shared equally between the two wives. The chief wrote to their further with a desire that the matter be resolved but later in 2018, they discovered that the property had been transferred to the respondent and that she had taken a loan of ksh 300, 000 from the Agricultural Finance Corporation. Her father passed on without having subdivided the land as he had promised and therefore the respondent has failed to fulfil their fathers' wishes to subdivide the land into two parcels. The witness states that the respondent holds the land in trust for herself and the appellants.
7. PW2, Lucy Wachuka Gathuo testified that she was the sister to the later Godfrey Kabui the husband to the defendant and the plaintiffs' mother. She was housed by her brother on the farm in Uasin Gishu and later he requested her to move to the suit property in 1982. She stated that the suit property was bought by his brother and his late wife the mother to the appellants. She stayed in the suit property until 1999 when her brother ejected her from the land after selling her inheritance in Muranga and bought her a plot in Murunyu. According to the witness, the respondent forcefully transferred the suit property into her name. That a family meeting had decided that the land be subdivided and shared equally between the two wives and that her niece was buried on the land at her mother's side. She states that when the grandson to the respondent died, her brother subdivided the land into three portions, two for each wife and one as a family burial ground where he was later buried and his wife as well.



8. The defence called Jane Nguhi Kabue the respondent, who testified that she got married to the deceased Godfrey Kibue Gathuo sometimes back in the year 1979 and they lived together in Eldoret where he was working and later in Nakuru until his demise later in 2018. At the time of her marriage, the deceased had another wife and children who were living in burnt forest. That upon his retirement, they moved to his property situate at Engashura and known as Bahati/Kabatini Block 1/1644 where they lived until his passing on and she has since continued to live thereon. The deceased Godfrey Kibue Gathuo was buried on the suit property. Later, the plaintiffs' mother Esther Wangari Kabue died and her children forcibly buried her on the suit property next to their father as a way of laying claim to the property through claiming their mother's burial site.
9. The suit property was transferred to the respondent by her husband way back in the year 1996 and the same was perfected when a title deed was issued in her favor. She could therefore deal in the land in the manner that she pleased including charging it to banks to obtain loans. The deceased Godfrey Kibue Gathuo had bought the property through shares with Ndeffo Company limited on his own without any help from the deceased Esther Wangari Kabuye who was a house wife and had no means to earn a living. She was actually dependent fully on the deceased Godfrey Kibue Gathuo who was then gainfully employed in the government under the ministry of public works in Iten and could afford to solely purchase the impugned property. During the lifetime of the deceased Godfrey Kibue Gathuo, the appellants herein tried to arm-twist him into subdividing the property into two equal shares through various means including trying to deny him the right to bury one of his grandsons who died on the property. To do this, they tried to enlist the help of the local administration including the chief but their efforts bore no fruits as the deceased Godfrey was no longer the registered proprietor to the suit property and thus could not deal in it. Further, the deceased Esther Wangari Kabuye had been granted two other parcels of land by the deceased Godfrey located at Lorian Farm in Burnt Forest, Kiambaa and Kesses respectively. Despite this, the plaintiffs still wanted to take the little that had been given to respondent by her husband which is the suit land. On the issue of Muranga land having been sold, she states that she was not a party to the proceedings on how their father-in-law gave that property to Esther Wangari Kabuye if any was actually given. Further, that the deceased Esther Wangari Kabuye could not inherit her father-in-law while her husband, Godfrey Kibue Gathuo was still alive. She could only inherit if her husband was dead, which was not the case herein. Had their father-in-law actually meant for her to own the property, he would easily have had it transferred to her name before his demise. When their father-in-law died, the property formed Part of his estate and the deceased Godfrey Kibue Gathuo could inherit his share like any other beneficiary and proceed to deal with his share as he wished. The respondent believes that appellants have no claim whatsoever and only filed this suit as a way of frustrating her quiet use and occupation of the suit property.
10. The learned magistrate considered the evidence on record and rightly found that the issues for determination were the proprietorship of the suit land and whether fraud was established, whether trust was established and whether the prayers sought should be granted and with costs.
11. On the 1st issue, the learned Magistrate found that the facts of this case were similar to the facts in *Mburu vs- Muranye* where it was held Kuloba J as he was then:-

Now in this country, go to the country side, where the largest population resides, and see for yourself how people are so caring and mindful of one another's welfare. In the countryside, a lot of people are living on other people's land, thanks to the African milk of generosity and kindness. Our Way of living has always been to depend on one another for mutual survival and progress. This is at every level.



12. To us, if you want any help, if you want a cow, if you want a piece of land for as long as the owner does not immediately require it, you are given this things because the owner knows that it does not matter for how long you borrow this thing; he can always recover whatever he has lent to you and whatever he has let you use. There are many people who, by a gentleman's agreement, all over the country, are actually living on the land of their friends, their clansmen, neighbours or even void land sale agreement. They do not ever think of claiming or losing title, by adverse possession.... I would be surprised if anyone pretended to be ignorant of these things. And ignorance on the part of a judge would be a calamity for the innocent.
13. The keeping on our land of landless relatives, clansmen... for long periods of time until they are able to buy their own is a custom we all knew... the doctrine of adverse possession if not reasonably qualified and properly trimmed shall destroy the cherished ideals and sound cultural foundations, and destabilize the society".
14. The learned magistrate posed a question thus can it therefore be said that the registration was to merely hold in trust and not pass an absolute ownership to the respondent? The learned magistrate concluded that:-

In resolving this, though not substantially substantiated, it was alleged that the defendant's deceased father had settled his other family including the plaintiff in his parcels in Burnt Forest and Kesses. This is not largely disputed. It is similarly not in contest that the defendant's husband and plaintiffs' mother and so to their close relatives are buried in the suit parcel. This gives a glimpse of trust which though cannot defeat the registrable rights. In the end I do not see any trust formed but is clear that the defendant's husband who was the fore registered owner clear intention was that all his family members should be buried in the suit parcel, this explains the burying of the plaintiffs mother in the suit land."

15. In conclusion the learned magistrate declined to grant the prayers sought and ordered that the defendant to set aside the identified family burial site and grant the family a lifeline licence to the site. The learned magistrate concluded that based on his findings the appellants' suit succeeded. The appellants were aggrieved with this decision and appealed on grounds that the learned Magistrate erred in Law and in fact in holding against the appellants that the respondent does not hold the suit property in trust for their deceased mother.
16. Moreover, that the learned magistrate did not appreciate that no consent was obtained from Esther Wangari Kabue when the property was transferred to the respondent and that the respondent did not contribute towards the purchase of the property. The appellant contends that the learned magistrate did not appreciate the law for not holding that the suit property was transferred through fraud.
17. Furthermore, that the learned magistrate erred in law and fact in failing to hold that that the suit property was purchased by the appellants late mother and late father.
18. The appellants further contend that the learned magistrate erred in law and fact for not appreciating that the appellants' mother was never given two parcels of land in Lorian Burnt forest and Kesses and that the learned erred in not sharing the property and holding that the appellants were entitled to the suit property.
19. Lastly, that the learned magistrate erred in failing to analyze the fact properly, giving orders that were not sought, and delving in issues that were never pleaded.
20. The appellants prayed that the judgment delivered by Hon K. Kibellion on 17th July 2024 be set aside and the appeal be allowed on the terms that the respondent holds the suit property in trust for their



late mother and therefore the suit property should be shared into two equal shares with a burial site preserved. The appellants to be awarded costs.

Rival Submissions

21. When the matter came before this court the parties were directed to file submissions and both have complied. The gravamen of the appellants' submissions is that the appellant held the property in trust for herself and the appellants. That the property was jointly purchased by the appellants' mother and the deceased husband before the respondent was married. The appellants submit that a family meeting resolved that Mr Godfrey Kibue daughter of his first wife be buried on the suit land. That the deceased husband of two wives admitted that he had two wives. It was further agreed that the parcel of land be subdivided into two to be shared between the two houses of Mr Godfrey Kibue Gathuo. Mr. Gathuo agreed to subdivide the land into two and share it amongst his wives equally.
22. According to the appellants all this fact depicts a trust. That the land in question is family land and everybody has been married on the same. The appellants submit that a customary trust exists as the suit land was originally registered in the names of their father before being transferred to the respondent.
23. The appellants submit further that despite the suit property having been transferred to the respondent, the overriding intent that were not noted in the register can't be defeated and that therefore, they had discharged the burden of proof that there exist a customary trust in the suit property.
24. The appellant submits that the lower court dealt with issues that were not pleaded before it and that it had no jurisdiction to determine and that there is no evidence that the respondent contributed to the purchase of the land and that there appellants' mother did not give consent to the transfer of the land to the respondent.
25. The respondent on the other had submits that based on the pleadings, the appellants claim was premised on section 7 of the Limitation of Action Act Cap 22 laws of Kenya therefore time barred. On the issue of land, the respondent submits that she was the legally registered owner of the suit property without any act of fraud or illegality. That it was uncontested that the respondent remains the registered owner of the suit land. The green card clearly showed that she was the absolute registered owner of the land without any entry of a trust. The respondent submits that there is no evidence of fraud and on the issue of trust the respondent submits that the same was not proved. The appellants admitted that the respondent was the registered owner of the suit property and was in possession of the same. The appellants are not in possession of the same save a grave yard. The respondent submits that no customary law or rites can confer or create a trust not based on possession. The respondent urges this court to find that there was no element of trust proved by the appellants, ultimately, she submits that the appellants are not entitled to the orders sought.

Analysis and Determination

26. This being a first appeal this court has the duty to analyze the fact anew and arrive at its determination noting that this court did not hear the witnesses and therefore must be careful in its analysis.
27. The first appeal ought to be decided on facts as well as the law. The guiding principles in a first appeal were stated in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where it was stated that:

... 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 allowances in this respect.”



28. The filtered facts of this case are that the register for the parcel of land No Bahati Kabatini/ block 1/1644 was opened on the 19th September 1984. The land measures 0.65 hectares. It was first registered in the Government of Kenya as the first entry as it was common in those days in respect parcels of land purchased by groups or land buying companies. On the same date, it was registered in the names of the late Godfrey Kibue Gathuo and a land certificate was issued on the same date. On the 18th July 1996, the same was transferred to Jane Nguhi Kibue and a title deed issued on the same date in the names of Jane Nguhi Kibue. The documents from Ndeffo Company show that the property was purchased by Godfrey Kibue Gathuo alone. There is no evidence that any of his two wives contributed to the purchase. It is evident that purchase occurred before he married the second wife. There is evidence that part of the land was set aside for the burial of family members and that is where the appellants' mother their father and sister and the respondents granddaughter were buried. The appellants are claiming a customary trust whereby they are entitled to half of the property.
29. This court observes that until October 5, 2018, the law was that for one to prove a customary trust on land he had to prove actual physical possession or occupation. This was stated in the famous cases of *Esiroyo –vEsiroyo2* and *Obiero –v- Obiero* to the effect that the rights in land under customary law became extinguished upon registration of the land in question by virtue of section 28 of the Registered *Land Act* (repealed). In *Obiero*, the court (per Bennet, J) had held as follows:
- ...Section 28 of the Registered *Land Act* confers upon a registered proprietor a title 'free from all other interests and claims whatsoever,' subject to the leases, charges and encumbrances shown in the register and such overriding interests as are not required to be noted in the registered...rights arising under customary law are not among the interests listed in S. 30 of the Act as overriding interests."
30. Had the legislature intended that the rights of a registered proprietor were to be subject to the rights of any person under customary law, nothing could have been easier that for it to say so. In re-affirming the above decision, the court (Kneller, J) in *Esiroyo* had also held that the matter (claim of interest in registered land) is taken out of the purview of customary law by the provisions of the Registered *Land Act*...The rights of the defendant under customary law have been extinguished. Section 28 of the Registered *Land Act* confers upon a registered proprietor 'a title free from all other interests and claims whatsoever,' subject to the leases, charges and encumbrances shown in the register and such overriding interests not quoted in the register...Rights arising under customary law are not among the interests listed in Section 30 of the Act as overriding interests.
31. These two decisions which would later be transported in a number of succeeding judicial authorities – wholly or partially – could be summarized to mean:-
- a. that the registration of land under the Registered *Land Act* extinguishes customary rights to that land for all purposes;
 - b. rights under customary law or such rights as existed prior to registration are not overriding interests under Section 30 of the Registered *Land Act*; and
 - c. that the trust envisaged under the proviso to Section 28 of the Registered *Land Act* is the trust under English Common Law and doctrines of Equity. In other words, customary law is incapable of creating a trust to which a registered proprietor would be subject after registration.
32. It is on these grounds that the Supreme Court declared, unreservedly, that the decisions in *Obiero* and *Esiroyo*, together with the later decisions based on them, "were based on faulty conceptual and contextual premises." The Court went further to give the justifications by stating that they were "faulty



conceptually because, they did not take into account the complex nature of customary rights to land, and faulty contextually because, in interpreting Sections 27, 28 and 30 of the Registered *Land Act*, the courts paid little or no attention to the relevant provisions of the retired Constitution regarding trust land.

33. This decision was made in *Isaack M’Inanga Kebia vs- Isaaya Theuri M’ Lintara and Isaack Ntongei M’Lintara* in petition no 10 of 2015 as per Maraga, Ibrahim, Wanjala, Njoki SCJDS.
34. By reviewing Sections 115 (1) & (2), 116 (1) and 117 (2) of the repealed Constitution, the Court found that customary trust was firmly embedded in that Constitution and the courts ought not have agonized in reaching erroneous conclusions. The Court held, remarkably in my view, that: “In our considered view, the language of Section 117 (2) of the retired Constitution, was wrongly imported into sections 27, 28 and 30 of the Registered *Land Act* (now repealed) by the judges in the cited decisions. Had the judges’ view been informed by a proper appreciation of the nature, scope and content of the rights, interests and benefits to land under African customary law, subsisting before individualization of tenure, both the proviso to Section 28 and Section 30 (g) of the Registered *Land Act*, would have been contextually interpreted. In this regard, there would have been no difficulty in construing a “customary trust” under the proviso to Section 28...”
35. Having declared that resort should have been had to the repealed Constitution, the Court quickly turned to the thorny question in Section 30 (g) which had been the fulcrum before the Court of Appeal. In the Court of Appeal, the court found that with respect to one parcel of land, “the evidence on record was contradictory and thus could not provide conclusive proof that the Respondents had been in possession and occupation of the said parcel. As such, the Respondents could not found their claim upon Section 30 (g) of the Registered *Land Act* (now repealed).” But the Court of Appeal went further to hold that if the Respondents were basing their claim on the existence of a customary trust, then they could be protected, as long as the said trust was proved, adding that “to prove a trust in land (read customary trust), one need not be in actual physical possession and occupation of the land.”
36. The Supreme Court having determined this question to be of vital jurisprudential import and thus desiring settlement and certainty, found as follows:-

Flowing from our analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land 5 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 parts 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.

37. The Court went further to caution that each case, however, would be determined on its own merit and evidence and that the essential considerations being the nature of the holding of the land and the intention of the parties. It went on to prescribe certain tests which ought to apply, to wit:-
 - a. that the land in question was before registration, family, clan or group land;-
 - b. the claimant belongs to such family, clan or group;-



- c. 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;-
 - d. the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and
 - e. the claim is directed against the registered proprietor who is a member of the family, clan or group. It concluded by settling that “rights of a person in possession or actual occupation under
38. Section 30 (g) of the Registered Land Act, are customary rights,” thereby upholding the Court of Appeal’s decision herein before stated

The Supreme Court has declared that the findings in Esiroyo and Obiero were based on ‘faulty conceptual and contextual premises’ yet had largely been imbibed by the courts – mostly hook, line and sinker but in a handful occasions, with some caution.

39. The Court noted and commented on the legislative developments which have since taken place post the 2010 – Constitution. Among these is the enactment of the Land Registration Act which repealed the Registered Land Act. According to the Supreme Court, Parliament almost adumbrated the provisions of Section 28 of the repealed Registered Land Act in Section 25 of the Land Registration Act but with a caveat at Section 25 (2) thereof that “Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.” Similarly, the provisions of Section 30 (g) were amplified in Section 28 (b) of the new law where “trusts including customary trusts” have been identified as part and parcel of the overriding interests in land. In essence, therefore, even though the wording in the repealed Section 30 (g) of “the rights of a person in possession or occupation” is not anywhere near Section 28 of the new law, the Court held that these rights have been subsumed in “customary trusts” and which can be adduced by way of evidence, as arising, “although not exclusively, from the fact of rightful possession or actual occupation of the land.” In other words, far from downplaying rights arising as a consequence of customary trusts, the new laws seem to have magnified these rights to the extent of being overriding interests expressly recognized by statute and hence remain valid to date.
40. I have considered the evidence on record and guided by the Supreme Court decision and do find that the fact that the appellants were not in possession did not disentitle them of the rights to the suit property claimed under customary law. The land was subject to family meetings whereby it had been agreed that the parcel of land be subdivided into two and shared among the two wives of the deceased. The fact that the said was a burial site for the family of the late Godfrey Kibue Gathuo who agreed to have had two wives and who buried the whole family members on the suit property, the registration of the respondent as the absolute owner of the land did not take away the customary land rights of the appellants which were overriding interest that could not be taken away on registration of the respondent as the absolute proprietor.
41. The upshot of the above is that I do find that the learned magistrate did not consider the facts properly and erred in law and fact in holding that the respondent did not hold the property in trust for the appellants’ deceased mother as had demonstrated that the same was a family burial ground. Therefore ground no 1 of the appeal succeeds. Grounds no 2 , 3 and 5 of the appeal fail because the appellant have failed to demonstrate that the suit property was matrimonial property as there was no evidence of contribution that required the consent of their deceased mother for their father to transfer the land. The ground 4 of the memorandum of Appeal fails because fraud was neither pleaded nor proved. I agree with the appellants in ground 9 that the learned magistrate delved in issues that were not pleaded



and therefore not before him such as the issue of adverse possession. This in view of the fact that after heavily relying on the decision of Kuloba J in Mbiu V Muraya, the learned magistrate went on to observe:-

The circumstances as discussed above bear some semblance to this case. It was within everyones knowledge that the suit parcel of land was not registered in the names of the plaintiff mother. It was not an issue also that the suit property was in actual occupation of the defendant and that the registration of the parcel in favor of the defendant was done during the plaintiffs' father lifetime." The above excerpt indicates that the learned magistrate was determining the issue of adverse possession that was not placed before him.

42. Last but not least, this court finds that the learned magistrate granted orders that were not sought such as the setting aside the identified family burial site and prohibited the sale of the same and granted all family members a lifetime license to the site. This order was neither sought by the appellant nor the respondent.
43. The upshot of the above is that the appeal is allowed and the judgment delivered by Hon K. Kibellion on 17th July 2024 is hereby set aside. It is hereby declared that the respondent holds the suit property in trust for their late mother and therefore the suit property should be shared into two equal shares with a burial site preserved. Each party to bear own costs.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

THE JUDICIARY OF KENYA.

NAKURU ENVIRONMENT AND LAND COURT

ENVIRONMENT AND LAND COURT

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