



**Lumwe & another v Tsuma & 2 others (Environment & Land Case
30 of 2019) [2025] KEELC 4619 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 4619 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 30 OF 2019**

**EK MAKORI, J
MARCH 27, 2025**

BETWEEN

STRINGER MUZUNGU LUMWE 1ST PLAINTIFF

TSUMA TUJI 2ND PLAINTIFF

AND

SHIDA TUJI TSUMA 1ST DEFENDANT

KARISA TUJI TSUMA 2ND DEFENDANT

KAHINDI TUJI TSUMA 3RD DEFENDANT

JUDGMENT

1. The main suit, of significant importance to the Plaintiffs, commenced by way of a plaint dated 16th May 2019, seeks against the Defendants recovery of the following reliefs:
 - a. A declaration that the Defendants hold all that parcel of land situated at Mwapula/Magogoni village within Kilifi County, in the Republic of Kenya, containing approximately 68.22 acres by measurement and known as Title No.Mwapula/Magogoni/690 in trust for the Plaintiffs and for an Order to the Land Registrar, Kilifi Land Registry, to specifically note in the register of the suit property that the Defendants hold Title No.Mwapula/Magogoni/690 in trust for the Plaintiffs;
 - b. An Order of Inhibition inhibiting the registration of any dealings on Title No.Mwapula/Magogoni/690 without the prior written consent of the Plaintiffs;
 - c. Costs of this suit and interest thereon at Court rates;
 - d. Any other relief that this Court may deem just to grant.



2. The Defendants denied the claim by a statement of defence filed on 5 July 2019, by which they pleaded that they are registered as absolute owners of the suit land and that they do not hold the land in trust for the Plaintiffs. This denial significantly sets the stage for the current legal dispute.
3. The Plaintiffs' case, deeply rooted in a customary trust in the land, is that although the suit land is owned in common with the Defendant's family, during the adjudication exercise, only the Defendants' family unit was registered as the absolute owners of the suit land, in total exclusion of the Plaintiffs' family units.
4. At the hearing of the suit, the 2nd Plaintiff testified as PW1. He adopted his written statement dated 16 May 2019 as his testimony and produced a certificate of the official search for the suit land as Exhibit No. 1 and the Defendants' advocate's demand letter dated 22 February 2018 as Exhibit No. 2. The Plaintiffs further called one witness, Kalama Mupe Kalama, who testified as PW2.
5. The Plaintiffs' case is that the suit land is not just a piece of property, but their ancestral land, which the Defendants also hold. PW1 testified that they are all descendants of the late Tuji Tuma, who is their family patriarch and original owner of the suit land.
6. In his testimony, PW1 narrated the family trees of the Plaintiffs and Defendants. He testified that he was the son of the late Tuji Tsuma, who was the son of the late Tsuma Tuji Tsuma. The 1st Plaintiff, on the other hand, is the son of the late Mzungu Lumwe Tuji, who was also the son of the Lumwe Tuji Tsuma.
7. PW1 testified that the Defendants are their cousins, as they are the sons of Tuji Tsuma Tuji, who is one of the sons of Tsuma Tuji Tsuma, a brother to Lumwe Tuji Tsuma.
8. PW1 testified that the respective families used to cultivate the suit land together as one family but that during the adjudication exercise, no representative from the Plaintiffs' family units was present. As a result, the Defendants were registered as the sole, absolute owners of the suit land, a decision that the Plaintiffs view as unjust.
9. The Plaintiffs testified that they were not aware of the registration until sometime on 3rd April 2019 when they searched the land registry, which disclosed that the suit land had already been registered in the Defendants' name. The Plaintiff testified that they were taken by surprise when a prospective purchaser of the suit land came to view the land. The Defendants had invited the purchaser.
10. The certificate of official search, dated April 3, 2019, produced as Exhibit No. 1, shows that the Defendants were registered as the owners of the suit land as of June 20, 2011. Upon discovery, they requested that the Defendants surrender the title deed of the suit land to the land registry so that it would be noted in the register that the Defendants hold the suit land also in trust for the Plaintiffs. However, the Defendants declined, hence the institution of this suit.
11. PW2, whose land is situated adjacent to the suit land, testified that before the adjudication exercise, he used to see the late Mzungu Lumwe, the father of the 1st Plaintiff, cultivate the suit land with his brother, the late Tuji Tsuma, the father of the Defendants. PW2 also testified that on the day before the adjudication exercise, he accompanied a brother to the Plaintiffs, called Kahindi Muzungu, and the 1st Defendant to mark the boundary that separates the suit land from his land.
12. PW1 testified that they learned through the Defendants' advocate's letter, produced as Plaintiffs' Exhibit No. 2, that the Defendants had arranged to sell the suit land to a third party without their consent, a clear indication of the Defendants' intention to dispose of the land, further supporting the Plaintiffs' claim.



13. The Plaintiffs testified that it is an established custom and tradition in their community that during the ascertainment of rights and claims in the land, a few members of the family are registered to hold the land in trust for the rest of the family. This is what is legally referred to as a 'customary trust'. They argue that although the Defendants are registered as owners of the suit land, the registration is subject to the overriding interest of a customary trust in favour of the Plaintiffs.
14. Based on the pleadings, evidence, and submissions, the issue I frame for the determination of this court is whether the Plaintiffs have proven a case on a balance of probabilities for the doctrine of customary trust to apply in their favour and whether the orders sought in the plaint are germane to award and who should bear the costs of the suit.
15. As already noted, other than filing a defense, the Defendants did not testify before this court to controvert the testimonies and the evidence tendered by the Plaintiffs.
16. In my view, the Plaintiffs correctly submit that a customary trust is one of the overriding interests in land registered under the [Land Registration Act](#). The suit land was registered on 20th June 2011 under the provisions of the Registered [Land Act](#), Chapter 300, Laws of Kenya (repealed). Sections 27 and 28 of the former Act stipulated that the rights of a registered proprietor were absolute but were also subject to the overriding interests outlined in Section 30 of that Act. Section 30(g) of the former Act recognized customary trusts as one of the overriding interests affecting land registered under that Act. The provisions of those Sections are similar to those in Sections 24, 25, 26, and 28 of the [Land Registration Act](#) No.3 of 2012.
17. Section 28 of the [Land Registration Act](#) No. 3 of 2012 provides that, unless the contrary is expressed in the register, all registered land shall be subject to overriding interests as may from time to time subsist and affect the same, without their being noted on the register. Some of the overriding interests include trusts, such as customary trusts, as outlined in Section 28(b) of the Act.
18. Section 107(1) of the [Land Registration Act](#) provides that any right, interest, title, power, or obligation acquired, accrued, established, or exercisable before the commencement of the Act shall continue to be governed by the law applicable to it immediately before the commencement of the Act.
19. The Plaintiffs correctly contend that as a matter of law, Section 30(g) of the Registered [Land Act](#) provides for a customary trust as an overriding interest in land without it being noted on the register. The Plaintiffs have pleaded a customary trust in the suit land, which was registered in the name of the Defendants. The Plaintiffs cite the leading decision in this realm - the case of *Isaack Kiebia M’Inanga v Isaack M’Iintari & another* [2018] eKLR, the Court held as follows:

“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 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 to 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.”



20. The court then proceeded to set out – persuasively so - the elements that would qualify a claimant as a trustee to be:
 - a. 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 circumstance.
 - e. The claim is directed against the registered proprietor who is a member of the family, clan, or group.
21. The Plaintiffs submit that they have satisfied the tests set out in the foregoing case to prove a trustee relationship with the Defendants with respect to the suit land for the following reasons that the evidence adduced: it is evident that the suit land was used as a family land for cultivation by both the Plaintiffs and the Defendants before registration.
22. PW2 testified that he would see the Plaintiffs' family and that of the Defendant cultivate the suit land. The Defendants and the Plaintiffs used to cultivate the suit land together and continue to cultivate it to date. Furthermore, that there is also evidence that the Plaintiffs and Defendants are related. They are all descendants of the late Tuji Tuma, their family patriarch and original owner of the suit land. Their relationship with the Defendants is, therefore, not remote as to make their claim tenuous.
23. In paragraph 4 of the statement of defense, the Defendants admit to common ancestry with the Plaintiffs but contend that their families are distinct from each other with independent and distinct rights. There is also evidence from PW1 and PW2 that the Plaintiffs would have been registered but for the absence of a representative of their family units on the date of the adjudication exercise.
24. Plaintiffs contend that, from the evidence adduced, it is not in dispute that the suit has been brought against the Defendants, who are the registered proprietors of the suit land, as shown in the certificate of official search.
25. The Plaintiffs aver that they have also demonstrated that they continue to use the suit land together with the Defendants. The Plaintiffs are in actual physical occupation of the suit land, notwithstanding the Defendant's registration.
26. The Plaintiffs assert that they do not seek to cancel the registration of the suit land in favor of the Defendants but rather to secure their interests in the suit land by having their interests noted in the register, with a rider that no dealings may be registered against the title without their prior written consent.
27. The Plaintiffs submit that the Defendants' registration as owners of the suit land does not preclude them from holding an interest in trust for the benefit of the Plaintiffs. The Defendants' registration is encumbered by a customary trust in favor of the Plaintiffs. The Defendants' registration did not extinguish the Plaintiff's rights under the customary trust. As such, it did not relieve the Defendants of their obligations to the Plaintiffs as trustees as provided in the Act.
28. The Plaintiffs further submit that they have established their claim of a customary trust in the suit land on a balance of probabilities and pray for judgment as claimed in the plaint.



29. I have considered the evidence and the submissions by the Plaintiffs, particularly on the issue of customary trust. Albeit the Defendants did not testify, they filed a defence denying the Plaintiffs' claim. On the record, there is also filed documentation showing that the parties have been attempting to resolve the issue concerning this land through alternative means, including the area administration.
30. What remains to be deduced is whether the Plaintiffs fall within the test as enunciated in the *Isaack Kiebia M'Inanga* case (*supra*).
31. A note from the Senior Chief Marere location captures the history of this land, how it was adjudicated, and whether the Plaintiffs share a common ancestry. The Chief notes that this was not clan land; instead, it was family land adjudicated in favor of the family of Tsuma Tuji and not Lumwe Tuji. The interests of Tsuma Tuji were ascertained through an elaborate adjudication process, and the Defendants' family did not participate in the entire process nor raise any objections as provided under the *Land Adjudication Act*.
32. Significantly, the two families were distinct and had come to settle in that area from Ribe. After adjudication, the land was determined to be in Tsuma Tuji's favor.
33. It is essential to note that while we are dealing with the concept of customary trust, it must be correlated with the adjudication process. The Plaintiffs did not tender any evidence that their patriarch, Lumwe Tuji, attempted to have the land adjudicated in his favor. The thread of case law we have indicates that it is imperative to consider this aspect. For example, in *Jimmy Parnyumbé Luka & 3 others v Chairman Land Adjudication Committee Leshuta Land Adjudication Section & 6 others* [2021] KEELC 637 (KLR) - the court, for instance, questioned whether petitioners in that matter participated in the adjudication process to warrant orders sought in the petition, significantly the court stated:
- “I would agree with the 2nd to the 6th respondents that the petitioners have not shown that when the 7th respondent was allocated 210 acres, the act resulted in some people being displaced. In other words, the petition is full of allegations and speculations which the petitioners were duty bound to prove but did not. Besides, there is nothing to show that the allocation of the 210 acres of land to the 7th respondent was not for public good.
43. As earlier on observed in this judgement, the petitioners were not parties to the objection proceedings and the petitioners only ventured into the proceedings by way of an appeal to the Minister.”
34. The *Land Adjudication Act* establishes an elaborate procedure for ascertaining and recording individuals' rights under an adjudication area. The process has an in-built mechanism of quasi-judicial processes that one must follow. Precedents from this Court and the Superior Courts indicate that the manner provided in law to address grievances emanating from the adjudication process is via Judicial Review - see for example, the decision in *Amarnath (Suing on Behalf of the Estate of the Late Amarnath Gupta) v Kazungu & 2 others* (Civil Appeal E033 of 2021) [2023] KECA 1280 (KLR) (27 October 2023) (Judgment).
35. Whereas the Plaintiffs claim that the land was adjudicated in favor of the Defendants' patriarch and not their patriarch, no evidence shows that their patriarch had such an interest. No evidence was tendered as to why he could not attend the adjudication process, such an important exercise, nor was it established that he had given authority to the Defendants' patriarch to have the land registered in trust for him, his family, or his descendants. Furthermore, according to the findings from the alternative dispute resolution mechanism, as noted above, the Chief of the area states that these families were not closely knit and that this was not clan land—a prerequisite for a customary trust to attach.



36. Ultimately, I find and hold that the Plaintiffs have not established a case on a balance of probabilities to warrant the invocation of the doctrine of customary trust. Consequently, the orders sought in the plaint are not attainable.

37. The plaintiffs' suit is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 27TH DAY OF MARCH 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Shujaa, for the Plaintiffs

Happy: Court Assistant

In the Absence of:

The Defendants

