



**Juma v Omollo & 2 others (Suing as the Legal Representatives of the Estate of the Late Raphael Okoth Omollo) (Civil Appeal 232 of 2019) [2025] KECA 1170 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1170 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 232 OF 2019  
HA OMONDI, LK KIMARU & LA ACHODE, JJA  
JUNE 20, 2025**

**BETWEEN**

**MARGARET AKUKU JUMA ..... APPELLANT**

**AND**

**WILLIAM NDINYA OMOLLO ..... 1<sup>ST</sup> RESPONDENT**

**CLARIS ATIENO OKOTH ..... 2<sup>ND</sup> RESPONDENT**

**MARGARET AKOTH MBUNYA ..... 3<sup>RD</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE  
RAPHAEL OKOTH OMOLLO**

*(Being an appeal from the Judgment of the Environment and Land Court  
at Busia (A. K. Kaniaru, J.) dated 30th July, 2019 in Case No. 197 of 2014)*

**JUDGMENT**

1. By a plaint dated 24<sup>th</sup> May, 1998 and subsequently amended on 28<sup>th</sup> November, 2016 and 11<sup>th</sup> October 2010, Margaret Akuku Juma [Margaret], the appellant stated that in 1989, together with her deceased husband Jacob Ouma Obongo [Jacob], entered into an agreement with Raphael Okoth Omollo [Raphael] now deceased for purchase of property known as L R No. Bunyala/Bukoma/7, (hereinafter referred to as the “suit property”). The suit property had earlier been charged to Kenya Commercial Bank Limited [KCB] as security. When her husband, Jacob defaulted in repaying the loan and realising that the suit land would be auctioned, she took a loan from her Teachers’ Sacco of Kshs.58,000/- to help offset the loan.
2. It was the appellant’s case that upon the demise of Jacob, Raphael approached her tenants and directed them to pay him rent as the new owner of the suit property. Upon making inquiries at the Busia Land Registry regarding the status of the suit land, she discovered that there was a transfer registered in favour



of Raphael on 27<sup>th</sup> June, 1997 which she deemed illegal and fraudulent. The appellant set out what she alleged to be particulars of fraud and conspiracy.

3. Upon discovery of the sale of the suit property in 1998, she investigated and during her investigation she came across Budalangi Land Control Board Consent to transfer dated 5<sup>th</sup> June 1997, yet the Board Minutes obtained from Kakamega Ardhi House did not reflect any entry concerning the suit land. She denied knowledge of the 1<sup>st</sup> respondent's interest in the suit land as she had been residing on the suit land. The appellant prayed for
  - a. Cancellation of the transfer registered in the respondent's name.
  - b. A permanent injunction restraining the respondent or any party acting on his behalf from entering the suit property and interfering with her quiet enjoyment thereof
  - c. An order compelling the respondent to account for all profits she has received from the property,
  - d. cost of the suit and interest.
4. The respondents' case was that Raphael was a bona fide purchaser, and that the process of purchase and transfer of the suit property was lawful and above board. It was their case that the suit property initially belonged to Jacob, who charged it to Kenya Commercial Bank for Kshs.1,000,000/-; he was unable to service the loan; the bank instructed auctioneers to sell it allowing Jacob the option to sell it on his own so as to raise the money to clear the loan.
5. By a sale agreement dated 18<sup>th</sup> March, 1997, Jacob agreed to sell to Raphael the suit land at an agreed consideration of Kshs. 1,550,000. Raphael was issued with the title in his name, took possession, and started collecting rent as agreed.
6. Upon the demise of Jacob on 16<sup>th</sup> February, 1998, his wives complained that the suit land was sold without their knowledge and consent. However, one of the wives Everline Ouno Mwalo abandoned the claim and instead testified in favour of the respondent corroborating the respondent's case. The respondent maintained that as of the time of purchase, the property was free from encumbrances as there was no interest of any wife registered against Jacob's title. The respondent denied the instances of fraud listed and prayed that the suit be dismissed with costs or in the alternative a refund of the purchase price with the interest of the market value of the land at current market prices.
7. In his determination, the learned judge concluded that it was evident the suit land would have been sold by the bank because there was a loan whose repayments had run into arrears. The appellant's late husband opted to sell the land by private treaty and that's how Raphael came in. The judge further noted that had the bank elected, it would have sold the land including any alleged trust claimed by the appellant; and the appellant would have done nothing about it. The learned judge concluded that since the suit land was sold through private arrangements to repay the same loan, the appellant could not turn around and claim the land from the purchaser. The suit was subsequently dismissed.
8. The appellant, being aggrieved by the judgment of the High Court, has lodged this appeal raising twelve grounds, focusing on alleged errors in the interpretation and application of the relevant law, concerning spousal consent and mandatory provisions of the Married Women Property Act of England, and the [Land Registration Act](#). The appellant also contends that the trial court disregarded crucial evidence and legal requirements.



9. The appellant through her advocate, Muoki & Company Advocates, filed written submissions in which the twelve grounds stated in her memorandum of appeal were compressed into three issues, namely:
  - a. The appellant's interest in the suit
  - b. The lack of the Land Control Board Consent and the effects thereof of the sale of the suit.
  - c. The burden of proof on the legality of the sale of the suit land.
10. The appellant contends that it is an uncontroverted fact that the appellant was the wife of the deceased Jacob Ouma who was registered as the proprietor of the suit land as such she obtained an overriding unregistered equitable interest in the suit land. It is further uncontroverted fact that the appellant contributed towards the purchase and development of the suit and thus a co- owner of the same.
11. Regarding the appellant's assertion of her interest in the suit land being separate from the deceased husband, appellant invoked the provisions of the Married Women Property's Act and maintained that her deceased husband held the suit land in trust for both of them. Relying on the case of Mugo Muiro Investments Limited v EWB & 2 Others [2017] eKLR, the appellant faulted the learned judge for failing to appreciate the fact that the appellant had interest in the suit land and could make her claim without a representation of her deceased husband. The appellant faults the learned judge for holding that the overriding interest enjoyed by the appellant ought to have been pleaded as a trust with particulars of the breach set out.
12. It is submitted further that in his determination, the learned judge failed to substantiate his findings on the appellant's contention of trust, lack of spousal consent, failure to examine the particulars in the register as evidenced in the green card.
13. Regarding the Land Control Board Consent, the appellant contends that the provision of Section 6 of the Land Control Act is clear that the consent is mandatory without which the sale is void. The lack of proof of a valid consent as required by the law voided the purported sale and/or transfer.
14. Turning onto the burden of proof, it is contended that the trial judge shifted the burden on the appellant to prove the legality of the agreement entered between the appellant's deceased husband and the respondent. The appellant maintain that she proved her interest in the suit land and demonstrated that the sale of the suit land was marred with illegalities.
15. Despite the respondent indicating that they had filed their written submissions which they entirely relied on, the said submissions could not be traced from the system.
16. This being a first appeal, the Court is required to re-evaluate and re-analyze afresh the evidence presented before the trial court in order to arrive at its own independent conclusions of law and fact, bearing in mind that the trial Judge had the advantage of seeing and assessing the demeanor of witnesses. (See *Selle v Associated Motor Boat Co. Limited* [1968] EA 123) In addition, we must be cognizant of the fact that we should not interfere with the findings of fact by the trial court unless they were based on no evidence or on a misapprehension of the evidence or the trial Judge is shown demonstrably to have acted on wrong principles in reaching his findings. (See *Jabane v Olenja* [1968] KLR 661).
17. Having considered the pleadings in the record of appeal, the judgment of the trial court, the Appellant's grounds of appeal and the rival submissions of the parties, the substantive issues that fall for determination in this appeal are: whether the appellants established before the trial court, to the required standard, that the sale and transfer of the suit property to the respondent was fraudulent and



illegal as pleaded in paragraph 9 of their plaint and whether the respondent was a bona fide purchaser for value.

18. Fraud has been defined in Black's Law Dictionary 11th Edition as:

“A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.” It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved. Fraud was specifically pleaded in paragraph 8 of the Joint Statement of Claim and the particulars thereof itemised. The Court of Appeal in *Vijay Morjaria v Nansingh, Madhusingh Darbar & another* [2000] eKLR held that: “It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

19. On the standard of proof required for claims based on fraud, courts have held that the standard of proof is higher than in the ordinary civil cases. In *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015] eKLR, this Court adopted the definition of fraud as set out in Black's Law Dictionary, as follows:

“Fraud consists of some deceitful practice or willful deceive, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantages to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”

20. Fraud is a serious accusation which, procedurally, has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt and that general allegations, however strongly worded, are insufficient to amount to an averment of fraud of which any court ought to take notice and that fraud is, however, a matter of evidence.

21. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned. In *Eldoret Express Limited v Tawai Ltd and another* [2019] eKLR, this Court stated that:

“Fraud is a serious thing to allege and there is a requirement that it be particularized and then proved to a standard that is higher than a mere balance of probabilities. See *R. G. Patel v Lalji Makanji* [1957] EA 314. The degree of proof must be such as to create a moral certainty though it need not reach the criminal standard of proof beyond reasonable doubt. This has to be so because allegations of fraud in a civil suit carry with them an element of criminality and are referred to as being quasi-criminal in nature. As Esther put it more than a century ago in *Le Leure v Gould* [1895] 1 & B. 491 at p. 498,



“a charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any court unless it is shown that he had a wicked mind.”

22. Given those parameters, did the appellant present sufficient evidence before the trial court on the basis of which their plea of fraud could be sustained? Did she discharge their burden of proof?
23. There is no doubt that in her plaint, the appellant, complied with the requirement on pleading fraud. She set out in detail under paragraph 9 of the plaint the particulars of fraud, among which were that the sale was not disclosed, no Land Control Board Consent was obtained, the transfer was as a result of collusion with the Busia Land Registrar and the respondent did not declare the sale promptly.
24. From the record, it is evident that despite pleading fraud, in her testimony, the appellant did not tender any evidence to support the allegation. In the instant case, it was upon the appellant to adduce evidence of the allegations of fraud that she had made against the respondent which she did not.
25. Was the respondent an innocent purchaser for value? Black’s law Dictionary 8th Edition defines “bona fide purchaser” as:

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

26. In the Ugandan case of *Katende v Haridar & Company Limited* [2008] 2 E.A.173 it was held that:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- a. he holds a certificate of title
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.”

27. It is uncontroverted that respondent vide a sale agreement dated 18<sup>th</sup> March, 1997 according to which Jacob agreed to sell to Raphael the suit land for Kshs.1,550,000/= . He took possession of the suit land and started collecting rent thereon as agreed. The property was transferred to the respondent. It was only after the demise of Jacob that the appellant and her co-wife complained that the suit land was sold without their knowledge and consent.
28. The Supreme Court in *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) held that

“As held by the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina Civil Appeal No 239 of 2009* [2013] eKLR, where the registered proprietor’s root title is under challenge, it



is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”

It is not in dispute that the suit property had been charged to Kenya Commercial Bank as security. It is also not in dispute that when Jacob failed to service the loan, the bank was at the verge of exercising its statutory power of sale. In his evidence, the respondent produced a notification of sale, advertisement in the East African Standard Newspaper, public auction letter dated 17<sup>th</sup> February 1997 and land sale agreement dated 18<sup>th</sup> March, 1997 as proof of the transaction for purchase of the suit land.

29. From the record, the evidence of the respondent is clear and cogent. He demonstrated how he acquired the title. The learned judge was correct in his analysis of the evidence adduced by the parties.
30. There was an argument by the appellant that the trial Judge ought to have determined the issue of consent from the land control board as envisaged under the *Land Control Act*.
31. Under that statute, it is required that both the vendor and the purchaser must sign the relevant application for consent of the Land Control Board. It was alleged by the appellant that no effort was made to obtain that consent. In his determination, the judge correctly noted thus:

“The issue of consent of Land Control Board is a bit tricky, given that the original parties involved-the alleged seller and purchaser are deceased...I will be reluctant therefore to attribute any blame relating to the manner of procurement of the consent of the defendant

...

The land register shows the transfer was smooth and/or seamless. This raises a presumption that all was done above board.”

32. This Court has, in a number of cases, considered the effect of a failure to obtain Land Control Board consent on a transaction. There has, however, been no consensus on the issue, and in a sense, the question is still unsettled. In *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [2014] eKLR the Court of Appeal sitting in Nyeri held, inter alia, that the possession of the land by purchasers was an overriding interest in favour of the purchasers.
33. The Court of Appeal sitting in Nairobi took a totally different approach to the question in *David Ole Tukai v Francis Arap Muge & 2 Others* [2014] eKLR. After a detailed analysis of the provisions of the *Land Control Act* and previous decisions on the failure to obtain consent from the Board, it differed with the Court in *Macharia Mwangi Maina* (supra) for several reasons, the main one being on the application of equitable principles to the *Land Control Act*. The Court held as follows:

“...First and foremost, we have already stated that in our opinion granted the express unequivocal and comprehensive provisions of the *Land Control Act*, there is no room for the courts to import doctrine of equity in the Act. This is one simple message of Section 3 of the *Judicature Act*. The said Court allowed the appeal from the decision of the High Court which had held that in the situation before the court, the solution was to apply the principles of equity, and natural justice to temper the harshness of law such as Section 6 of the *Land Control Act*.”



34. Similarly, this Court in *Aliaza v Saul (Civil Appeal 134 of 2017)* [2022] KECA 583 (KLR) (24 June 2022) (Judgment) stated that

“In my view, from the time the appellant entered the first of the two parcels of the suit land in 2002 and into the subsequent portion that he purchased in 2004, a constructive trust in his favour was created in respect of the land. Such trust, as was found by the court in the case of *Macharia Mwangi Maina*, became an overriding interest over the suit land. The failure on the part of the respondent to obtain the necessary consent from the Land Control Board within the required period of six (6) months to enable the appellant transfer the suit land into his name does not render the transaction void. Equity and fairness, the guiding principles in Article 10 of *the Constitution*, require that the *Land Control Act* is read and interpreted in a manner that does not aid a wrongdoer, but renders justice to a party in the position of the appellant.”

35. Regarding spousal trust, the appellant contended that the suit land was acquired jointly and thus Jacob held it in trust for her. Section 25 of the *Land Registration Act* do not relieve a proprietor of any duty or obligation to which he is subject to as a trustee. The overriding interests alluded to in Section 25 are set out in Section 28 of the *Land Registration Act* which provides as follows:

“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. spousal rights over matrimonial property;
- b. trusts including customary trusts;
- c. rights of way, rights of water and profits subsisting at the time of first registration under this Act;
- d. natural rights of light, air, water and support;
- e. rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- f. leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;
- g. charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
- h. rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- i. electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
- j. any other rights provided under any written law.”

36. It will be noted that trusts are among the overriding interests provided for in Section 28 above, and for which a proprietor holds land subject to, as provided in Section 25 above. A trust is essentially a



situation in which one person holds property on behalf of, or for the benefit of another. Trusts are of different types and can be created in a variety of ways (Hansbury & Maudsley, Modern Equity, 10 Edition, Chapter 4)

37. The Supreme Court of Kenya, while faulting the decisions in *Obiero v Opiyo*, and *Esiroyo v Esiroyo*; in the case of *Isaac of M'inanga Kiebia* (Supra)

“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 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:.....

.....We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered *Land Act*, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in *Obiero v Opiyo* and *Esiroyo v Esiroyo*. Once it is concluded, that such rights subsist, a Court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests.

In the foregoing premises, it follows that we agree with the Court of Appeal's assertion that “to prove a trust in land; one need not be in actual physical possession and occupation of the land.” A customary trust falls within the ambit of the proviso to Section 28 of the Registered *Land Act*, while the rights of a person in possession or actual occupation, are overriding interests and fall within the ambit of Section 30(g) of the Registered *Land Act*.

.....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.



38. It is trite that each party to a suit is bound by its own pleadings and courts have repeatedly confirmed that fact. In the case of Isack Kieba M’Inanga v Isaaya Theuri M’Lintari & Another SCoK No. 10 of 2015 the Supreme Court Justices held that;

“.....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) 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; (c) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and, (d) The claim is directed against the registered proprietor who is a member of the family, clan or group.

39. A trust can never be implied by the Court unless there was intention to create a trust in the first place. In Peter Ndungu Njenga v Sophia Watiri Ndungu [2000] eKLR the Court held,

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

40. Similarly, in Juletabi African Adventure Limited & Another v Christopher Michael Lockley [2017] eKLR the Court also held that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:

“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.”

41. From the above authorities, it is clear that the appellant had the burden to prove the existence of the trust which she failed. The nature of the trust that the appellant was alluding had not been disclosed either in her plaint or evidence. She merely pleaded that since she was the deceased’s wife, the deceased held the suit land in trust for her.

42. No evidence was led by the appellant of any customary law that applied to the parties herein which infused a trust between the parties to enable the Court delve into whether a trust exists, and if so, the rights given under that trust as is provided for under section 28(b) of the [Land Registration Act](#). Consequently, we find that the appeal lacks merit and is dismissed with costs to the respondent.

**DATED AND DELIVERED AT KISUMU THIS 20<sup>TH</sup> DAY OF JUNE, 2025.**

**H. A. OMONDI**

**JUDGE OF APPEAL**



.....  
**L. KIMARU**

**JUDGE OF APPEAL**

.....  
**L. ACHODE**

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

