



**Muhendato v Dzilala (Environment and Land Appeal 2 of 2021)  
[2023] KEELC 17471 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17471 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT AND LAND APPEAL 2 OF 2021**

**AE DENA, J**

**MAY 11, 2023**

**BETWEEN**

**JUMA MOHAMED MUHENDATO ..... APPELLANT**

**AND**

**SWALEH MOHAMED DZILALA ..... RESPONDENT**

*(Being an Appeal against the judgment of the learned Hon Patrick Wambugu Mwangi (P.M) delivered at Kwale on 20th January, 2021 in Civil Suit (MELC) No. 82 of 2018)*

**JUDGMENT**

1. This appeal arises from the judgement of Hon. Patrick Wambugu Mwangi Principal Magistrate delivered on 20/01/21 in Civil Case (MELC) No. 82 of 2018. The Appellant was the 1<sup>st</sup> Defendant in the trial court. He was sued by the Plaintiff together with the National Land Commission, the 2<sup>nd</sup> Defendant in relation to plot No. Kwale/Ngombeni/897 measuring 1.0HA (herein the suit property). The facts as pleaded in the plaint dated 11/12/2018 were as follows;
2. The original registered owner of the suit property was Mohamed Mgumi Mwaganyuma Muhendato (deceased). The Plaintiff claimed he is an heir and family member of the deceased. That after the death of Mohamed Mgumi Mwaganyuma Muhendato his son the 1<sup>st</sup> Defendant secretly without involving the Plaintiff and other heirs filed succession proceedings at the Kadhi's court in Kwale and registered the suit property in his name. That the green card for the suit property shows that the 1<sup>st</sup> Defendant holds the suit property as a trustee on his own behalf and on behalf of the Plaintiff and other family members.
3. It is further averred in the Plaintiff that the title to the suit property was obtained through fraud, misrepresentation and or illegal means. The particulars were listed in paragraph 8 (a) – (d) and which I will revisit later in this judgement. It is also averred that the 1<sup>st</sup> Defendant and the rest of the family



members reside on the suit property since the time they were born and have constructed structures thereon.

4. The Plaintiff further stated that part of the suit property was earmarked for compulsory acquisition through the 2<sup>nd</sup> Defendant for purposes of the construction of the Dongo Kundu by-pass project. That the said portion was the one occupied by the Plaintiff and the rest of the family members.
5. Apprehensive that the 1<sup>st</sup> Defendant would keep the compensation funds to himself and unjustly enrich himself the Plaintiff filed the present suit seeking orders to restrain the 2<sup>nd</sup> Defendant from effecting compensation until resolution of the dispute. He also sought inter alia, an order revoking the title issued to the 1<sup>st</sup> Defendant having been obtained through fraud, misrepresentation, illegal means and or corruption and a declaration the 1<sup>st</sup> Defendant/Appellant held the suit as a trustee for his own behalf and on behalf of the Plaintiff and other family members.

### **The Defendants Case**

6. The 1<sup>st</sup> Defendant in his Statement of Defence dated 14/12/2018 denied the allegations of fraud and stated he was the registered owner of the suit property on his own behalf and that of his siblings and not the Plaintiff. That he lawfully acquired the land through Islamic law after the death of his father and the process of compensation should not be stopped. It was also stated that the suit was subjudice land case No. 62 of 2014 and should not be entertained by the court. The Defendant denied the jurisdiction of the court.
7. After considering the evidence of the parties and submissions the trial Magistrate found that the 1<sup>st</sup> Defendant holds the suit property in trust for himself and the estate of Mwanganyuma and issued the following verbatim orders;-
  - a. The Plaintiffs case succeeds
  - b. ‘That it is hereby declared that the registration of the 1st Defendants’ father Mohammed Mgumi Mwanganyuma Mwendato as the owner of Kwale/Ngombeni/897 was encumbered by customary trust and or trust and the subsequent registration of the Plaintiff as the proprietor of the suit land by transmission did not in any way affect or dissolve the trust.

That Consequently, the proceeds from the compensation of the said property held by the 2<sup>nd</sup> Defendant should therefore be shared equally among the heirs of the late Mohamed Mgumi Mwanganyuma the family patriarch’
  - c. The defendant shall pay the costs of the suit.
8. Aggrieved the 1<sup>st</sup> Defendant appeals the entire judgement. In the Memorandum of Appeal dated 17/02/21. The following grounds are raised against the said judgement;-
  1. That the learned Hon. Magistrate erred in law and in fact by purporting to make findings on issues of trusteeship, yet the evidence tendered was to the effect that the allocation and or registration of the Appellants father, the late Mohammed Mgumi Mwanganyuma Mwendato as the owner of the suit premises, being Plot No. Kwale/Ngombeni/897 was fraudulent and or illegal and or through misrepresentation.
  2. That the learned Hon. Magistrate erred in law and in fact by making a finding to the effect that the suit premises was family land by virtue of ancestry, yet no such evidence was adduced to support the same.



3. That the learned Hon. Magistrate erred in law and in fact by making findings of customary rights and in particular declaring that the suit land is held in trust by the Appellant on behalf of other heirs, including the Respondent herein on the strength of Digo and Duruma customary practices, yet no evidence was tendered linking both parties herein to the said tribes.
  4. That the learned Hon. Magistrate erred in law and in fact by not appreciating the fact that the Respondent by bringing the claim in the lower court he was accusing the Appellants father for excluding his father from adjudication and or demarcation processes, yet no evidence was tendered to prove the same and further that no claim had been made by the Respondent's father prior to his demise purporting that the suit land was a subject of a trust, notwithstanding the fact that he was better placed to do so.
  5. That the learned Hon. Magistrate erred in law and in fact by not appreciating the fact that the suit was res judicata as a similar suit had been filed by the Respondent against the Appellant being Kwale PMCC No. 62 of 2014, which said suit was dismissed on 22<sup>nd</sup> May 2019 for want of prosecution, being a decision that is now considered a judgement on merit or a final judgement.
  6. That the learned Hon. Magistrate erred in law and in fact by making a finding to the effect that long occupation of a parcel of land automatically establishes customary trust, yet there was no indication by the parties that they enjoyed such rights, neither was there any intention of creating such rights.
  7. That the learned Hon. Magistrate erred in law and in fact by dismissing the Appellants Defence while accepting the Respondents case and or claim, which was not proved as per the pleadings filed in court.
9. The appellant invited this court to allow the Appeal by setting aside the said judgement and substituting it with an order dismissing the Respondents suit in the lower court with costs.

### **Hearing of the Appeal.**

10. This court on 27/10/22 gave directions that the appeal be disposed of by way of written submissions. The appeal was set down for hearing /highlighting of submissions on 9/11/22. The Appellant complied. Mr. Koja for the respondent/plaintiff attended court and sought for 14 days to file submissions. I then set down the appeal for hearing on 1/12/22 which was later rescheduled due to the ELC@10 conference to 8/12/22. Mr. Koja for the Appellant did not attend. Ms. Chengo held the brief of Mr. Kenga for the Appellant confirmed that she had not been served with the Respondents submissions. This court upon confirmation that the same had not been filed opted to proceed with what was on the record. The appeal is deemed to have been heard ex parte therefore. It is noteworthy though that Respondent did file submissions on 20/8/2019 in respect of the proceedings before the trial court and which form part of the record of appeal herein.

### **Analysis and Determination**

#### **Jurisdiction**

11. The jurisdiction of the court was denied by the 1<sup>st</sup> Defendant on the basis of being subjudice. This objection was raised as a response to the Plaintiffs interlocutory application dated 11/12/2018. The trial court dismissed this objection in its ruling dated 6/11/2019. The 5<sup>th</sup> ground of appeal seeks to impugn the judgement of the trial court on the basis that the suit was res judicata Kwale PMCC



No. 62 of 2014, which suit is stated to have been dismissed on 22<sup>nd</sup> May 2019. The trial court in its judgement after considering section 6 of the *Civil Procedure Act* and various case law on the elements to be proved maintained the earlier position and found that the 1<sup>st</sup> Defendant failed to demonstrate the requirements for resjudicata.

12. The above ground has been argued both on the basis of sub judice and resjudicata. Counsel for the Appellant urged in his submissions filed on 8/11/22 that the trial court refused and or neglected to analyse the factual matrix so as to make an informed decision despite referring to the correct legal provisions. The 1<sup>st</sup> Defendant in his grounds of opposition dated 5/2/2019 was of the view that the present suit was an abuse of court process since the Plaintiff had filed the previous suit 62 of 2014 involving the same subject matter and parties which was yet to be determined and or fully prosecuted in other words it was pending. For me a suit that has been dismissed for want of prosecution cannot be considered as pending for purposes of Order 6. The fact that it could be revived by way of application under the provisions of Order 17 Rule 2 (6) does not make it a pending suit. Infact I find a contradiction in the 1<sup>st</sup> Defendants submission when counsel wants the suit to be regarded as pending and at the same time submits that the dismissal should be treated as a judgement of the court.
13. Neither can the suit be resjudicata for the reason that it was not decided on its merits but was locked out on technicality. I'm guided by the Court of Appeal decision in the case of Michael Bett Siror Vs. Jackson Koech (2019) eKLR where it was held that a suit dismissed for want of prosecution cannot amount to a judgement. There are no two judgements as submitted by counsel for the Appellant. I see no reason to disturb the learned trial magistrate finding. This dispenses with Ground no. 5 of this appeal.
14. The Appellant has raised 7 grounds of appeal. Having dealt with the ground 5 above I note that the rest of the grounds of appeal seek a determination on whether the Plaintiff has proved the existence of a customary trust to the required standard. In analyzing this issue, I will also speak to each of the grounds of appeal raised herein.
15. This is a first appeal and as such I will be guided by the Court of Appeal dictum in the case of Selle Vs. Associated Motor Boat Co. (EA.123) that I need not be bound by the findings of the trial court. That the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
16. Upon review of the Plaint, the Plaintiffs submissions dated 31/8/20(see the summation of the Plaintiffs case), I formed the view that the Plaintiff hinged his claim that the 1<sup>st</sup> Defendant holds the suit property in trust for the heirs and family of Mohamed Mgumi Mwanganyuma Muhendato on the fraudulent acquisition of the title by the 1<sup>st</sup> Defendants father. It is stated in the submissions that it is this initial fraud which continued to be perpetrated by the 1<sup>st</sup> Defendant during the succession proceedings, that denied him a share of the compensation. This view seems to be the same view taken by the 1<sup>st</sup> Defendants as summed up in the 1<sup>st</sup> Defendants written submissions dated 31/8/2020 (see paragraph 3 thereof).
17. I have enumerated the above for the reason that it will assist in analysing the 1<sup>st</sup> ground of appeal. I note that the trial Magistrate after considering the evidence and submissions of the parties framed the main issue for determination as whether the Plaintiff had proved customary trust and proceeded to focus his analysis on this issue. But I also note that the analysis was silent on the claims of fraudulent acquisition of the suit property. This seems to be the basis of the 1<sup>st</sup> ground of appeal which faults the trial court for making findings on trusteeship when the evidence tendered was to the effect that the allocation and



- or registration of the Appellants father as the owner of the suit properties was fraudulent and or illegal and or through misrepresentation. It also partly touches on the 4<sup>th</sup> ground of appeal.
18. Having enumerated my understanding above the first hurdle therefore was for the Plaintiff to prove the allegations of fraud, misrepresentation and illegalities on the part of the 1<sup>st</sup> Defendants' father and subsequent transmission to the 1<sup>st</sup> Defendant. Based on my observations the trial Magistrate ought to have expressed himself on the issue, it could not be wished away. As pleaded to me the Plaintiff is saying that the land having belonged to his grandfather, all his sons and subsequently his grandchildren had a share in the property, that this created a trust were it not for the exclusion of the Plaintiffs father.
  19. The particulars of fraud are replicated in the Plaint as well as the Plaintiffs witness statement dated 24/02/20 verbatim as follows; -
    - a. The Plaintiffs father Mohamed Mguni Mwganyuma (deceased) was excluded by the 1<sup>st</sup> Defendants father Mohamed Mgumi Mwganyuma Muhendato (deceased) who were brothers during land adjudication exercise.
    - b. That subsequently the 1<sup>st</sup> Defendant father obtained title to the land excluding his own brother.
    - c. The 1<sup>st</sup> defendant filing succession causes No. 201 of 2014, at Kwale Kadhis court without involving the Plaintiff and his family members well knowing that they are also heirs and part of (sic)estate.
    - d. Procuring subsequent registration without disclosing other heirs.
  20. It is trite that he who alleges must prove. Section 107 of the *Evidence Act* (Cap 80) states: (1,) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
  21. The burden of proof therefore lay upon the Plaintiff to prove the allegations of fraud, misrepresentation and or illegalities as stated in his pleadings and witness statement. I reviewed the testimony given in court by PW1 who was the Plaintiff. On the issue of fraud he stated on cross examination he was before court because there was fraud by failing to register his father as co- owner of the property. He produced a copy of search dated 6/12/18(PEX1) and Certified copy of the green card (PEX2) to cement this. Indeed, the search and the green card supported his evidence that the name of his father Mohamed Mguni Mwadungo never featured in any of the entries in the register of the suit property but in my view, this alone cannot prove fraud.
  22. PW1 also reiterated on cross examination that the fraud was because his father was not recorded in the title deed. There was no evidence to show how the Plaintiffs father was left out and why it was fraudulent. No single adjudication record was produced to support the Plaintiffs allegation. Infact upon cross examination PW1 the Plaintiff stated that adjudication was done in 1974-1978 when he was still in school and that he never participated in the process. He stated that his father left the demarcation process to his brother who was senior chief. This can only be hearsay in the absence of corroboration in view of PW1 admission he was not present but was in school.
  23. My curiosity was also further drawn to the summons produced by the 1<sup>st</sup> Defendant in respect of Kadhis court case No. 256 of 2017 dated 20/09/17 filed by Hamisi Mohamadi Madang on behalf of the estate of the 1<sup>st</sup> Defendant when the 1<sup>st</sup> defendant was still alive (item 14 of the defendants list of documents). This was not rebutted by the Plaintiff and who the Plaintiff never called or intended to call as witness to corroborate that their father was fraudulently left out.



24. In any event it is trite that the standard of proof of fraud is on a standard slightly above that of a balance of probabilities - see the case of *Vijay Mortaria Vs. Nansigh Darbar & Another* (2000) eKLR. This standard was not discharged. It is my finding that the Plaintiff did not prove to the required standard the claim that his father was fraudulently not registered as co-tenant of the suit property abinitio with his brother.
25. On the other hand, the 1<sup>st</sup> Defendants case was that he procedurally acquired the title by inheritance from his father. He produced in support of his claim documents as listed in the 1<sup>st</sup> Defendants list of documents dated 30/7/20 which from my review enumerated the history of how the 1<sup>st</sup> Defendant acquired the title. This was from the first registration of his father as the proprietor, the involvement of the Assistant Administrator General, transfer to 1<sup>st</sup> Defendant and his brother as trustees on their own behalf and that of their siblings. A letter from the Chief Ng'ombeni location confirming the ownership of the plot to the 1<sup>st</sup> Defendants immediate family followed by the succession proceedings and the title issued in 2016 which as per the green card produced by both the Plaintiff and 1<sup>st</sup> Defendant shows the 1<sup>st</sup> Defendant registered as proprietor as trustee pursuant to the Kadhis proceedings. The Kadhis proceedings only included the beneficiaries as per the chiefs letter and it was wrong for the Plaintiff to interpret it to include himself and the entire family. In my view the 1<sup>st</sup> Defendant did a good job of explaining that his title was procedurally obtained and the title could not be impeached in the absence of fraud or misrepresentation. I have already made a finding that fraud was not proved.
26. It is contended on behalf of the 1<sup>st</sup> Defendant that the title herein could not be impeached or even rectified as ordered by the trial Magistrate on the basis that there was a customary trust. Let me state that the Plaintiff prayed for an order revoking the title issued to the 1<sup>st</sup> Defendant having been obtained through fraud, misrepresentation, illegal means and/or corruption. For me the Magistrate did not revoke the title as prayed by the Plaintiff. In any event he never considered this limb. This then takes me to the trial Magistrate declaration that the 1<sup>st</sup> Defendant holds the suit property as a trustee for his own behalf and on behalf of the Plaintiff and other family members.
27. Even in the absence of proof of fraud the court ought to be satisfied that the elements for a trust existed abinitio and which led to the allegations of fraud and or misrepresentation. Did the Plaintiff then prove to the required standard the existence of a trust to cement his claim that the 1<sup>st</sup> Defendant held the suit property as trustee on his own behalf, the Plaintiff and other members of the family? This will cover the rest of the grounds of appeal in my view.
28. I find it necessary to first review the elements of a trust and in so doing I will be guided by the Supreme Court of Kenya determination in *Isack M'inanga Kiebia Vs Isaya Theuri M'Lintari* (2018)eKLR which provides a comprehensive review of judicial decisions in customary trusts. The court declared that a customary trust is one of the trusts to which a registered proprietor is subject under the proviso to section 28 and 30 of the RLA (repealed) and now enacted in sections 25 and 30 of the [Land Registration Act](#). That occupation is not necessary for a trust to be established.
29. Learned counsel for the Defendant/Appellant urged that the learned Magistrate purported to make findings on a customary trust yet there was no iota of evidence to prove the existence of a customary trust. According to the 1<sup>st</sup> Defendant, pleadings cannot be evidence. I then asked myself – did the Supreme Court really intend that once one pleads customary trust it would be automatic and if not what then would be required to prove customary trust?
30. The Supreme Court in its analysis further pronounced itself thus; -  
...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 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. (Emphasis is ours.)

31. From the above judicial decision it is clearly emphasized that the court can only make to a finding of a customary trust after it has evaluated the evidence and then determine which category of customary trust existed based on the facts and evidence. The Court also emphasized each case, should however be determined on its own merit and evidence. The apex court did not stop at this but went ahead to enumerate essential elements to be considered namely being the nature of the holding of the land and the intention of the parties. The court 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 .
32. Indeed, the trial Magistrate also relied on the above Supreme court decision and applied the above test. I have considered the relevant part of the judgement which was dubbed 'Establishment of the customary Trust.' The learned Magistrate rightly referred to the provisions of sections 27, 28 and 30 of the Registered *Land Act* and their equivalent in the new regime that is sections 24,25,26 & 28 (b)of the *Land Registration Act* 2012 overriding interests which may subsist on land affecting it without being noted on the register, one being customary trusts. The trial Magistrate after noting there was a plea of customary trust on the part of the Plaintiff and a claim of private ownership by the 1<sup>st</sup> Defendant pursuant to a grant of administration and after noting the legal provisions above as well as citing various court decisions found it necessary to examine the root of title of the suit property. Upto this point I did not see any problem with the approach.
33. The trial court then observed that since the parties shared an ancestor Mwaganyuma who was the father of 3 sons one of whom was the Plaintiffs father and the 1<sup>st</sup> Defendant having inherited the suit from his father Mohamed Mgumi Mwaganyuma who in turn got it from the family patriarch, made a finding that the suit property was family land by virtue of ancestry.
34. Having made the above finding the court made a further finding that the land was registered in the name of Mohamed Mgumi Mwaganyuma to hold in trust for other family members as he was the eldest and literate son and the fact that the said Mwaganyuma had died before demarcation it fell on the eldest son Mohamed Mgumi Mwaganyuma to hold the land in trust for the sons of the said Mwaganyuma. The trial court relied on the Court of appeal decision in Henry Mwangi Vs. Charles Mwangi CA 245 which stated that under customary law to which both parties are subject to, the eldest son inherits land



to hold in trust for himself and other heirs. The learned Magistrate then stated this would apply to Digo and Duruma customary practices on land.

35. Were the findings above backed by the evidence of the Plaintiff? It is the appellants contention there was none. Applying the first test I will proceed to consider whether the suit property was before registration, family or clan land. There was no evidence adduced before this court that the suit was family land or clan land. The Plaintiff at paragraph 7 of the plaint states that from the face of the search and copy of green card of the suit property, the 1<sup>st</sup> Defendant holds the same as trustee on his own behalf and on behalf of the Plaintiff and other family members. I do not think this is correct. I say so because the certificate of official search dated 6/12/2018 produced by the Plaintiff states that on 2/12/16 the Defendant was registered 'as trustee cause no.201/2014'. This meant that this entry should be read together with the order issued by the Kadhis' court which the Plaintiff clearly states in his pleadings he together with other heirs were left out.
36. The Supreme Court indeed emphasized each case has to be determined on its own merits and quality of evidence" going further to add that "it is not every claim of a right to land that will qualify as a customary trust." The quality of the evidence adduced by Plaintiff is what was wanting in the present case. The Plaintiff did not call other witnesses to corroborate his evidence that the land was before registration family land and also rebut the content of the chief's letter produced by the 1<sup>st</sup> Defendant. Not even the beneficiaries of the other sons of his grandfather were called. I note in the Supreme Court decision (supra), both parties shared a grandfather and there had been a clan agreement that the community land would be sub-divided and each portion registered in the name of an appointed member to hold the land in trust on behalf of each household in compliance with the land adjudication process which had set in. In the present case there was no evidence of such arrangements before adjudication or at the time of adjudication yet this is the point the Plaintiff places as the origin of his claim on the exclusion of his father and that the land was family land.
37. I will not overstress element (b), (c), and (e) since it is not in dispute that the parties were close relatives. As for d) the intervening circumstances were the allegations of fraud which I have made a finding were not proved. It is therefore this court's finding that a customary trust was not proved.
38. The upshot of the foregoing discussions and various findings of this court is that the appeal is merited and is upheld. The judgement of the trial court delivered on 20/01/2021 is hereby set aside and replaced with an order dismissing the suit with no orders as to costs this being a dispute involving relatives.

Orders accordingly.

**DELIVERED AND DATED AT KWALE THIS 11<sup>TH</sup> DAY OF MAY, 2023.**

**A.E. DENA**

**JUDGE**

Judgement delivered virtually through Microsoft teams Video Conferencing Platform

**In the presence of:**

Ms Chengo holding brief for Mr. Kenga for Appellant

No appearance for the Respondent

Mr. Daniel Disii- Court Assistant.

