



**Ndung'u v Nduati & another (Environment & Land Miscellaneous Case
17 of 2013) [2023] KEELC 17571 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17571 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE 17 OF 2013**

LN MBUGUA, J

MAY 11, 2023

BETWEEN

PETER NJOROGE NDUNG'U PLAINTIFF

AND

DAMARIS WANJIKU NDUATI 1ST DEFENDANT

NJOROGE NDUATI 2ND DEFENDANT

JUDGMENT

1. This suit was filed as CMCC No.12 of 2012 at Kiambu Magistrates court, but was transferred to this court thereafter vide a miscellaneous application No. 17 of 2012. Apparently after the transfer, the miscellaneous file was maintained in regard to the subsequent proceedings of the main suit.
2. The parties are close family members whereby the plaintiff is son of Ndungu Njoroge who was brother of Nduati Njoroge. The latter was husband of 1st defendant and father to the 2nd defendant. The two brothers (Ndungu Njoroge and Nduati Njoroge) are not alive. At the heart of the dispute is a parcel of land identified as Kiambaa/karuri/T 53 "A" (the suit property) registered in the name of the plaintiff but the defendants apparently occupy the said land.
3. Vide a plaint dated 27.1.2012, the plaintiff prays for the following orders;
 - a. An order of eviction of the defendants from land parcel no. Kiambaa/Karuri/T 53 "A".
 - b. That a permanent injunction restraining the defendants, by themselves, their family relations, their agents, servants and or any other person authorized or purporting to be authorized by them from trespassing on Land parcel no. Kiambaa/Karuru/T. 53 "A".
 - c. Costs of the suit.



4. The defendants have opposed the suit vide their statement of defence and counter claim dated 24.2.2012. Their claim is set out as follows;
 - a. A declaration that the defendants are entitled to one-half share of the Parcel of Land known as Kiambaa/karuri/T. 53 "A" measuring 0.13 acres or thereabouts and that the plaintiff is trustee thereof to the defendants.
 - b. An order that the plaintiff do subdivide at his own costs the parcel of land known as Kiambaa/karuri/T.53 "A" and transfer to the defendants one-half portion thereof in default, the Deputy Registrar to execute the necessary transfer documents in favour of the defendants thereof for the sub-division and transfer to the defendants from the plaintiff.
 - c. A permanent injunction restraining the plaintiff Peter Njoroge Ndung'u by himself, family relations, agents, Servants and/or any other person authorized or purporting to be authorized by him from trespassing, developing, selling, dealing, charging, advertising and/or in any manner interfering with parcel of land known as Kiambaa/karuthi/T. 53"A".
 - d. Costs of the suit

The Evidence

5. The case of the plaintiff was advanced by three witnesses. The plaintiff, Peter Njoroge Ndungu testified as PW1. He adopted his witness statement dated 27.1.2012 as his evidence. He also produced the documents listed at page 5 of his bundle as P-exhibits 1-9.
6. Pw1's testimony is that the suit land No. 53 "A" was initially plot no 53 measuring 100 by 100 feet and was bought by his father and his uncle Stephen Munanau (pw2) in 1959. The original title was however in the name of pw1's father's name. Later, the two brothers subdivided the land, with plaintiff's father getting the parcel 53 "A", while pw2 got parcel 53 "B".
7. The father of the plaintiff died on 20.3.1993, and a succession cause was filed in case no. 398 of 1994. This paved way for the registration of the suit property in the name of the plaintiff.
8. PW1 avers that in total, there were 5 brothers in his father's house namely;
 - Ndungu Njoroge (eldest; plaintiff's father).
 - Nduati Njoroge, 2nd born (husband/father of 1st & 2nd defendants respectively)
 - Stephen Munanau (pw2), 3rd born.
 - Harrison Kimemia (4th born),
 - Jonh Wamucuu (pw3) 5th born.
9. It was the testimony of PW1 that the two brothers, Ndungu Njoroge and Stephen Munanau (pw2) had allowed their brothers namely Nduati Njoroge and Harrison Kimemia to occupy their land. After the subdivision into parcels A & B, Kimemia, was left on the parcel B, while Nduati was on parcel A, but they were told to leave. Whereas Harrison Kimemia left harmoniously, Nduati stayed put.
10. Pw1 avers that the suit land is not ancestral property, and he doesn't hold the land in trust for the defendants. If anything, the defendants have other parcels of land, including their ancestral land No. Kiambaa/Thimbigwa 2723 (the title to this land has been produced as p-exhibit 8).
11. Pw1 denies that Nduati Njoroge purchased the suit land, that is why he prays for the eviction of the defendants.



12. During Cross Examination, pw1 reiterated that before the suit plot came into his name, it was registered in the name of his father. He however concedes that he only learnt about the purchase of 1959 because by then, he was 2 years old, having been born in 1957. He also affirms that as long as he knew himself, he found the 1st defendant occupying the suit land and she gave birth to all her 6 children on that land. To date, she stays on that land. He also stays on that land.
13. Pw1 further confirmed that a caution had been lodged on the suit land. In re-examination, he stated that the said caution was lodged in 1994 after the death of his father.
14. PW2 is one Stephen Munanau Njoroge. He adopted his witness statement dated 7.11. 2022 as his evidence. He identifies himself as a brother of fathers of plaintiff and 2nd defendant. He avers that his brother Ndungu Njoroge is the one who bought the suit land from Kimani Thiba, then he allowed his brothers to settle there as their parents did not have land. Later, pw2 was able to purchase an adjacent land, but the entire land no.53 was in the name of Ndungu Njoroge.
15. Pw2 avers that they subdivided the parcel 53 into two with him getting parcel 53 “B”, while Ndungu Njoroge got parcel 53 “A”. There were endless conflicts between his two brothers Ndungu and Nduati, so they called clan members to set the boundary between his (PW2’s) parcel and that of Ndungu, as by then both their brothers, Kimemia and Nduati were staying on the lands. He avers that there was an understanding that the two brothers, Kimemia and Nduati would leave that land once they acquire alternative land. Thus the subdivision did not in any way give Nduati any rights over the suit property.
16. In cross examination, pw2 stated that he was born in 1939; he was 20 years and in school when the suit land was bought, but he personally bought plot B. He also stated that the elders were called upon to straighten the boundary of parcel A and B, but they did not deliberate on the of claims of Nduati. He reaffirmed these averments in Re-Examination.
17. PW3, one John Wamucu Njoroge is another brother of the fathers of plaintiff and 2nd defendant. He adopted his witness statement dated 7.11.2012 as his evidence. He stated that his two brothers, namely pw2 and Ndungu Njoroge had purchased the piece of land known as No.53. They had then given his two other brothers, Nduati Njoroge and Kimemia Noroge a place to put up their temporary homesteads as their parents had no land, but on clear understanding that they would move out upon purchasing their own lands.
18. That sometime in 1980, the two brothers, that is pw2 and Ndungu Njoroge invited clan members to set up the boundary as between the land of Ndungu Njoroge and Stephen Munanau (pw2) and he was present during the exercise.
19. In cross examination, pw3 stated that there were no records of the clan meeting.
20. The defence case was advanced by 4 witnesses. The 1st defendant Damaris Wanjiku Nduati testified as DW1. She adopted her witness statement dated 2.2.2015 as her evidence. She avers that she got married to Nduati Njoroge around 1959 and they relocated to the land known as no. 53. On arrival, they set up their matrimonial home there. No one else was on that land save Ndungu Njoroge and the seller of the land, Kimani Ndiba. She avers that her husband and Ndungu Njoroge had agreed to jointly buy that land. However, her husband gave the purchase money to the elder brother, Ndungu Njoroge out of respect and that the two also agreed that the title would be in the name of Ndungu Njoroge,
21. That the seller of the land also sold a portion of the land to Stephen Munanau, and again, it was agreed that the land would still be registered in the name of Ndungu Njoroge.



22. Later, the land was divided into two with Ndungu Njoroge getting parcel “A” while Stephen Munanau got parcel “B”. That despite this subdivision, it was agreed between Ndungu Njoroge and Dw1’s husband that the latter would continue occupying the land as a joint owner. They continued leaving peacefully on the suit land, and they developed the same. To date, she is still occupying the suit property as that is the only place she calls home.
23. In cross examination, Dw1 reiterated that the suit land was bought by her husband and Ndungu and they paid the purchase price slowly, but she has no record of the said purchase. They finished paying for the land around 1969 or 1967.
24. She further stated that for parcel 53, the dispute started in year 1974, that is when the intervention of the elders started.
25. She admitted that upon the death of her husband, they did succession as he had other properties, like the land he was given by his father. She confirmed that when her husband died, his children inherited his property. However, she avers that the plaintiff inherited the property of his father but not rightfully.
26. Dw1 further stated that the elders had been called to straighten the boundaries. That Kimani sold the land to Munanau, Ndungu and Nduati, but Nduati did not get the land because of the error of those who were doing subdivision. She confirmed that there were people sent by chief who came to determine boundary of parcel “A” & “B”.
27. Dw2 is one Njuguna Waweru. He adopted his witness statement dated 8.4.2015 as his evidence. He was born in 1931 and he knew the family of the parties herein well. He remembers being invited by Nduati Njoroge to a meeting, he found Ndungu Njoroge and the chief and they demarcated the boundary of the suit property. He avers that the problem arose when plaintiff grew up and wanted to build a house, but his parents had no land to give him.
28. In cross examination, Dw2 was not clear as to who called him to the meeting, but he had found chief and other people and measurements were taken, clarifying during re-examination that he is 96 years old, hence very old.
29. Dw3 is Mary Ngendo who adopted her witness statement dated 8.4.2015 as her evidence. She was aware of a meeting which took place in the 80s where the suit property was being officially divided amongst the two brothers. During the meeting in which the chief was present, she saw the two brothers, Ndungu Njoroge and Nduati Njoroge giving the purchase price of the suit property to Stephen Munanau. She stated that her role in the meeting was to cook for the guests.
30. She further stated that the problem arose when the plaintiff grew up and wanted to build his own house, but he had no land.
31. During cross examination, Dw3 stated that the meeting was called upon to resolve the boundary between Nduati and Ndungu. She further stated that her role was to cook tea, so, as the talks were on going, she was cooking and she doesn’t know what they talked about. She also did not see Munanau being given money.
32. The 2nd defendant Njoroge Nduati testified as DW4. He adopted his two witness statements dated 24.2.2012 and 24.2.2015 as his evidence. His testimony is that the late Ndungu Njoroge and Nduati Njoroge jointly bought the suit property in 1959, of which the latter put up his homestead and went on to occupy the land to date.
33. He further stated that in the 80s, a meeting was held in the presence of his father, their uncles and the chief and it was resolved that the property would be subdivided between his father Nduati Njoroge,



- Plaintiff's father Ndungu Njoroge and Stephen Munanau, but the title would remain in the name of plaintiff's father to hold it in trust for the others. It was further resolved that plot "A" would be shared equally between his father and plaintiff's father, while parcel B went to Stephen Munanau.
34. After the death of his father, problems arose, that is when they decided to put a caution to the suit land. They are claiming the land on the basis of trust.
 35. Dw4 states that the plaintiff stays on the land of Stephen Munanau.
 36. In cross examination, Dw4 stated that parcel 53 had yielded two parcels, "A" & "B", of which he was born in the former. He was born in 1964 so it is his father who told him about the purchase of the land. He states that the plaintiff got the land to be registered in his name through fraud and this was because he never informed them of that registration. He avers that the problems arose in 1995.
 37. On the meeting, he stated that the same took place in 1984 where the boundary between Nduati and Ndungu's land was placed by the elders and that Stephen Munanau was not present.
 38. He reiterated that they are claiming the land because of staying there for a long time.
 39. Dw4 further stated that he has no property of his own, but when he was shown the search certificate for parcel Kiambaa/ Thimbigwa/2723, he confirmed that the land is in his father's name and is occupied by his (Dw4's) son. Himself, (Dw4), he has nowhere else to go as he was left by his father on parcel 53 "A". the land

Submissions

40. Even though the defence case was closed way back on 20.6.2022, the matter stalled primarily because of none compliance on filing of submissions on the part of the plaintiff. When it became apparent that such submissions were not forthcoming, the court directed the defendants to file their submissions, the same are dated 23.2.2023.
41. It was submitted for the defendants that they are entitled to half of the suit land parcel 53 "A" through customary trust. This is because the said land was bought by the two brothers, Ndungu and Nduati equally, but was registered in the name of the former as the elder brother. To this end, reference has been made to the cases of *Mbui Mukangu v Gerald Mutwiri Mbui* C.A No. 281 of 2000 and [*Henry Mwangi v Charles Mwangi* CA. 245 of 2004](#).
42. It was further submitted that the defendants are entitled to half of the suit land through the doctrine of adverse possession as they have been on that land for many years. On this point, they have relied on the cases of [*Lewa v Kabindi Ngala Mwangandi* \(2005\) eKLR](#) and [*Titus Mutuku Kasuve v Mwaani Investments & 4 Others* \(2004\) eKLR](#).

Determination

43. I have considered the pleadings, the evidence and the submissions proffered herein. There is no controversy on the relationship between the protagonists, that they are family members whereby, Ndungu Njoroge and Nduati Njoroge being the fathers of the plaintiff and father of 2nd defendant respectively were brothers. Ndungu and Nduati also had other brothers including both pw2 and 3 as well one Harrison Kimemia. Nduati was the husband to 1st defendant.
44. Another uncontested issue is that the suit land was acquired through purchase, and was registered in the name of Ndungu Njoroge, way back in an 8.12.1959. The green card shows that by then, the suit parcel 53 "A" was a subdivision of parcel T. 53. There is also no controversy that Pw2 Stephen Munanau



- owns parcel 53 “B”. Further, there is no dispute that currently, the suit parcel 53 “A” is registered in the name of the plaintiff. However the defendants occupy the said land.
45. The issue for determination is whether the defendants are entitled to half of parcel 53 “A” or whether they should be evicted from that land.
46. It is trite law that in evidence he who asserts must prove his case. Section 107 of the *evidence Act* succinctly states:
- “Whosoever 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”.
47. In *Galaxy Paints Company Ltd v Falcon Guards Ltd* [2000] eKLR the court held as follows;
- “the issues for determination in a suit generally flowed from the pleadings, and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the courts determination”.
48. In *Samson Emuru v. Suswa Farm Ltd* (2006) eKLR, the court made reference to the text book by *Bullen and Leake and Jacob’s* 12th Edition page 8 where the issues of pleadings were articulated as follows;
- “As parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings. For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made”.
49. The defendants have advanced a claim of adverse possession through submissions. However, that claim was not pleaded and cannot therefore be made a subject of determination in this judgment. Thus the authorities cited by the defendants are not applicable and the said claim of adverse possession must fail.
50. The defendants have pleaded a claim of the suit land on trusteeship basis, and in their submissions, they term the said trust as a customary one. In the supreme court case of *Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another* [2018], eKLR, the court had this to say on customary trust claims;
- “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*.”
51. The undisputed evidence of both protagonists is that the suit land was acquired from one Kimani Ndiba through purchase. It was not ancestral land, thus no customary rights or interests could be claimed by both parties before the purchase. The claim of the defendant based on customary trust must therefore fail.
52. The issue remaining to consider is whether any other kind of trust arose out of the purchase of the suit parcel. In the case of *Pbillicery Nduku Mumo v Nzuki Makau* [2002] eKLR, the court of Appeal held that it is trite that trust is a question of fact and has to be proved by evidence. In *Rose Naswa Masinde v Lilian Nekesa Simiyu Mukopi* [2014] eKLR, the court stated as follows;
- “Trusts can be created expressly but can also be created informally or be implied (See Snells, *Equity*, 13th Edition, Sweet & Maxwell, Chapter 9). One of the recognized categories of this form of trust is where one person purchases a property, but the same is conveyed in the name of someone other than the purchaser. In the case of *Dyer v Dyer*(1788) 2 Cox Eq,



92 at 93, (quoted in Snells, Equity, supra, page 206) it was stated as follows :- "The clear result of all the cases, without a single exception, is ,that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of common law, that where a feoffment is made without consideration, the use results to the feoffer."

53. I have seen the green card in the trial bundle which shows that the suit parcel T 53 "A" was registered in the name of Ndungu Njoroge way back on 8.12. 1959. In her recorded statement, the 1st defendant, DW1 stated as follows;

"I witnessed the payment of the balance of the purchase price which was completed around late 1959 where my late husband gave his brother the late Ndungu Njoroge his part of the payment of the purchase price".

54. However, during cross examination, Dw1 stated that the two brothers, Ndungu and Nduati were paying for the purchase price of the suit land slowly, but she knew not the particulars of the purchase price adding that;

"They finished purchasing the land in 1969 or 1967".

55. I find that there is not the slightest evidence to indicate that any consideration of the purchase price of the suit property was paid by Nduati Njoroge.

56. An argument has been advanced by the defence that there was a clan meeting around the 1980s to demarcate the land of Ndungu from that of Nduati. Dw1's testimony is that there were disputes starting from 1974 and that is when the "sittings" started. That Munanau (Pw2) had also bought land next to that of Ndungu and the meeting was called to determine the boundary of parcel A and B. To this end, Dw1's evidence on the clan meeting buttresses the evidence of the plaintiffs that indeed the clan meeting was to demarcate the two parcels A and B.

57. For Dw2, he avers in his recorded statement that he was in the meeting where the goal was to create boundaries on the suit property to show each families portion of the land. In cross examination, he could not really tell what happened, simply saying that he took measurements of the land "between that man and that one". It is however noted that Dw2 is rather elderly, being 96 years old.

58. As for Dw3, she stated in her statement that she saw the two late brothers give the purchase price of the suit land to Stephen Munanau during the clan meeting. She corrected herself during cross examination saying that she did not see Munanau being given money, that her role was to cook tea, so she did not know what the talks were all about as she was involved in cooking. Dw4 is the one who states that during the meeting, the parcel 53A was divided into 50/50 (meaning equal shares). And during cross examination, he stated that the elders came to mark boundaries between Ndungu and Nduati. That evidence of Dw4 is not corroborated by the other defence witnesses.

59. I find that there is no concrete evidence emerging from the elders/clan meetings of 1980s to indicate that the alleged rights and interests of Nduati were defined thereof within parcel 53 A. What emerges from the statements of the defendants as particularly captured in the statements of Dw2 & 3 is that "the problem came when the plaintiff grew up and wanted to build his own home but had no land to build."



60. Another point for consideration is that the defendants did not litigate on their claims of the suit land during the lifetime of Ndungu Njoroge. The suit property was purchased and registered in the name of Ndungu Njoroge in 1959. He died in 1993. In the case of *Peter Nyaga Kairu v Esther Wanjiku Njau & 5 others* [2019] eKLR, I Was dealing with a case where a plaintiff was claiming the land of his deceased brother. I stated that:

“The Plaintiff had over 14 years to sort out all these issues during the life time of his brother (deceased). The Latin phrase “Mortui non mordent”, which means dead men don’t tell tales, dead men don’t bite is very much applicable in this case.”

61. And so it is in this case that the defendants did not agitate for their rights and interests in the suit land to be defined when Ndungu Njoroge breathed, only to advance such claims after his death.

62. Finally, the court has considered the size of the suit property, Parcel 53 “A” which measures 0.13 acres as indicated in the title of the plaintiff at page 12 of plaintiff’s bundle. In their pleadings, the defendants are claiming one half share thereof. Simple mathematics depicts an eighth of an acre commonly referred to as 50 by 100 ft as being 0.125 of an acre, meaning that the suit parcel is almost equal to an eighth of an acre. It is not logical, practical or even fathomable that the two brothers, Ndungu and Nduati had bought the suit parcel 53 “A” with an intention of ever subdividing it amongst themselves. I would pose the question, subdivide the same into what?, a 1/16th of an acre for each brother?.

63. In the case of *Paul Kirinya v Delfina Kathiri* [2019] eKLR, I was dealing with a situation where a son was claiming half a share of his mother’s one acre piece of land. I considered the issue of size of the land while stating as follows;

“This is a situation whereby defendant is an elderly lady, while plaintiff is a working class secondary school teacher. No one else is occupying the suit land save the plaintiff, a pointer to the manifestation of greed on the part of the plaintiff. It is not tenable that plaintiff should be clinging on this small piece of land yet he has a salary while his mother is eking out a living in places being referred to as mjini”.

64. In the matter at hand, the defendants have other land of their own. Indeed Dw4 (2nd defendant), admitted that parcel Kiambaa/Thimbigwa 2723, of which the title has been availed by the plaintiff at page 17 of plaintiff’s bundle belongs to their father and is occupied by his (DW4’s) son. In her own words, Dw1 stated that;

“When my husband died, we did file succession caseas he had other properties like that of his father.his children inherited his property”.

65. A look at the search document for title Kiambaa/ Thimbigwa /2723 reveals that the land is indeed registered in the name of Nduati Njoroge and its measuring 0.223 ha. Taking cue from my decision in the case of *Paul Kirinya v Delfina Kathiri* (*supra*), I can only attribute the occupation of the suit land by the defendants as a manifestation of unmitigated greed and selfishness on their part, where they even advance a claim that the plaintiff does not stay on that suit land but stays with his uncle, Pw2 to justify their entitlement to the suit property. The defendants would want to perpetuate this inequity for good.

66. In the final analysis, I find that the defendants are not entitled to the suit property 53 “A” through any kind of trust. I therefore proceed to give the following orders;

1. The Counter claim of the defendants is hereby dismissed.



- 2) The plaintiff's suit is allowed whereby an order is hereby issued requiring the defendants to vacate the suit land No. Kiambaa/Karuri/T 53 "A" within 30 days from the date of delivery of this judgment failure to which, they are to be evicted from the said land.
- 3) On costs, ordinarily, parties ought to bear their own costs in family disputes. However as already established herein, the defendants have manifested unbridled greed in occupation of the suit land for decades. In the circumstances, the defendants are condemned to bear the costs of the suit, plus interests on costs which interests shall be computed from the date of delivery of this judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mwathe for Plaintiff

Wambua holding brief for Mr. Opiyo for Defendants

Court assistant: Eddel

