



**Makathimo v Kimathi & 2 others (Environment and Land Appeal
E020 of 2022) [2023] KEELC 20314 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20314 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E020 OF 2022
CK NZILI, J
SEPTEMBER 27, 2023**

BETWEEN

FRANCIS MBURUGU MAKATHIMO APPELLANT

AND

GRACE KATHURE KIMATHI 1ST RESPONDENT

PRISCILLA MWARANIA NTHUKU 2ND RESPONDENT

FELICITY MAKATHIMO KAIGONGI 3RD RESPONDENT

*(An appeal from the judgment of the Hon. J.M Njoroge, Chief
Magistrate in CMCC ELC NO. E015 of 2020 delivered on 20.4.2022)*

JUDGMENT

1. The late Makathimo Mboroki was the owner of L.R. No. Ntima/Igoki/260, measuring approximately 1.41 ha. He left behind his wife and children on the suit land when he passed on in 1970. The land was registered in his son's name, the appellant, in 1966. Before his death, the deceased had also given the son L.R. No. Ntima/Igoki/253 which he combined with the suitland in 1997 to become L.R. No. Ntima/Igoki/5734 and 5375. The appellant eventually sold the former parcel, leaving behind the latter, measuring approximately 1.79 ha.
2. The respondents, who are the appellant's sisters, naturally expected a share of their late father's family land from the appellant. They reported to the Njuri Ncheke panel of elders, who made an award that the suit land be equally shared among them. The appellant, however, declined to honor the elders' award. By a plaint dated 12.10.2020, the respondents, as the plaintiffs, moved the primary court for breach of constructive and resulting trust. They sought for a declaration that the appellant held the suitland in trust for them in equal shares, excision of half share of L.R. No. Ntima/Igoki/5735, a division of half share of L.R. No. Ntima/Igoki/5735, the division into four portions and registration of the same in equal shares. The plaint was accompanied by a case summary, issues for determination, pre-



trial questionnaires, authority to act, a list of witnesses, witness statements, further witness statements dated 22.3.2021, and documents dated 12.10.2020.

3. Alongside the plaint, the respondents filed an application dated 12.10.2020, seeking interim orders of inhibition against the title. The court issued the orders on 14.12.2020, pending a hearing and determination of the suit.
4. By a statement of defense dated 6.11.2020, the appellant denied that the deceased was a registered land owner during the adjudication process or that the suit land was transferred to him in 1966 as alleged or at all and further that the respondents were born or lived on it. The appellant admitted that he lawfully and was right in combining the two parcels of land the same way it was within his powers to dispose of L.R. No. Ntima/Igoki/5734.
5. The appellant denied that L.R. No. Ntima/Igoki/260 was family land registered under his name in trust for the respondents. He denied the alleged trust or breach of it since he obtained the parcel number out of his sole efforts during the land adjudication process in the area. The appellant maintained that he was a first-time registered owner, as per the title deed acquired on 8.1.1970. The appellant termed the respondents as elderly and retired lady teachers who were all married, living and settled in their homes in Kinoru Meru township, Mutuati Meru, Langata Nairobi, and Mikinduri, respectively.
6. Further, the appellant averred that the purported award by the Njuri Ncheke elders was a concerted decision influenced by a distant cousin, made in his absence and lacking any probative value. He termed the claim as untenable in law and time-barred. The statement of defense was accompanied by a list of witnesses, witness statements, and documents dated 15.2.2021. A further list of witness statements was also filed dated 4.5.2021
7. Grace Kathure Kimathi and Priscilla Mwarania Nthuku, the 1st and 2nd respondents, testified as PW 1 and 2 at the trial. In contrast, Geoffrey Kimera M'Ndiira M'Rukaria testified as PW 3. After adopting her witness statements dated 12.10.2020, PW 1 produced a copy of the records for LR Ntima/Igoki/260, 253, 572, 5735 and the adjudication register for parcel L.R No. Ntima/Igoki/260 as P. Exh No's 1-5 respectively. Further, PW1 produced a letter that authorized the transfer in the adjudication register of parcel L.R No. Ntima/Igoki/260, from her late father's name to the appellant's, dated 2.4.1966. The cumulative evidence of the respondents was that their late father subdivided the ancestral land into land parcels L.R No. 260 and 253 in favor of himself and the appellant.
8. In cross-examination, PW 1 told the trial court that his late father had six children, and therefore, the land held by the appellant was under trust, as concluded by the Njuri Ncheke panel of elders. Additionally, the respondents testified that since their late father was illiterate, he could not have been the author of P. Exh No. 6, more so when, as of 1965, the appellant was in primary school.
9. Regarding PW 2, her evidence was that their late father was buried on the suit land initially registered as L.R. No. Ntima/Igoki/260 as family land. She denied that the appellant had bought the suit land because it originally belonged to their late father.
10. PW 3, as a brother to the deceased, told the court that his younger brother had two sons, Gerald Ndegwa, who was given a parcel of land in Kithoka and Runogone, that the appellant was also given his land while the suit land was left for the respondents. He confirmed that the two parcels initially belonged to the respondent's late father and should be shared among the parties. PW3 confirmed further that the respondents were all born and educated on the suit land. He insisted the respondents were entitled to a share of the suit land.



11. The appellant testified as D.W. 1. After adopting his witness statements dated 16.2.2021 as evidence in chief, he produced a green card for L.R. No. Nyaki/Kithoka 363 as D. Exh No. 1 and a valuation report for L.R. No. Ntima/Igoko/5735 as D. Exh No. (2). He testified that he bought L.R. No's Ntima/Igoki/260 and L.R. No. Ntima/Igoki/252 in 1964, while he was 22 years old, the land was not family land since the ancestral land based in Runogone belonged to Gerald Ndegwa Makathimo. The appellant testified that his parents used to live on L.R. No. 363 but only came to stay on L.R. No. Ntima/Igoki/260 on his invitation. He insisted that he acquired a title deed for L.R. No. 260 on 8.1.1970 and was not privy to the letter produced as P. Exh No. (6) transferring the land to him by his late father.
12. Further, D.W. 1 told the court that after buying L.R No. 253 in 1997, he combined his two parcels of land, which he had extensively developed without any objection from the respondents. Additionally, the appellant stated that even when the bypass access road took a portion of the land, he was compensated for it. D.W. 1 admitted that PW 3 was his cousin and a party to ELC No.257 of 2017.
13. Asked about any evidence of the purchase, the appellant claimed that he had no sale agreement from whoever he bought the land from in 1964. Likewise, he denied that his late parents were buried on the suit land or that he allegedly chased away his late mother from the suitland. He told the court that in 1964, he was already working as an untrained teacher at Meru Primary School.
14. John Festus Murunga testified as D.W. 2 and adopted his witness statement dated 4.5.2021, as his evidence in chief. His testimony was that the respondents' ancestral land was in the Runogone area and not in the suit land, which the appellant had acquired from one M'Rimbere and M'Riria before land adjudication started in Kaaga area. He could not, however, state when the sale had taken place since, at the time, he was aged 11 years. Further, D.W. 2 could not confirm if the appellant's late parents were buried on the suit land and why.
15. With the above evidence, the trial court allowed the respondents' claim, which decision the appellant has appealed against on the basis that the trial court erred in law and, in fact, in:
 - a. Failing to find the claim, self-contradictory, and lacking merit.
 - b. Finding that the suit land had initially been recorded in the name of M'Makathimo Mboroki without any basis.
 - c. Finding the registration in favor of the appellant fraudulent based on a letter dated 21.4.1966 without the basis that he was its author.
 - d. For finding constructive trust in favor of the respondents, without proof of any wrongs by the appellant on account of fraud.
 - e. For disregarding uncontested facts that the only family land was L.R. No. Nyaki/Kithoka/363 and not the suit land the appellant had acquired through purchase.
 - f. For holding that the appellant had no financial means to acquire the suit land, despite evidence to the contrary.
 - g. The land was registered under his name for finding that the appellant was in school at the time.
 - h. For rejecting his evidence on the purchase despite the legal requirement at the time.
 - i. For disregarding the uncontroverted evidence of D.W. 2 since the rest of his eyewitnesses to the sale were all dead.



- j. For allowing the respondents' claim, which was based on extraneous facts, not before the court.
 - k. For allowing the claim whose standard of proof should have been on a higher degree than on the balance of probabilities.
 - l. For deciding against the law and the weight of the evidence tendered.
16. With the concurrence of the parties, this court directed that the appeal be canvassed by way of written submissions to be filed by 17.7.2023. The appellant by written submissions dated 5.7.2023 submitted that there was no reply to the defence whose contents remained unchallenged going by the case of *Mount Elgon Hardware vs United Matters Ltd (1996) eKLR*.
 17. The appellant submitted that the respondent's claim evidence and witnesses were contradictory and not based on pleaded customary trust yet parties are bound by their pleadings as held in *David Sironga Ole Tunkai vs Francis Arap Muga & 2 others (2014) eKLR*.
 18. Further reliance was also placed on *Kazungu Fondo Shutu & another vs Japhet Noti Charo & another (2021) eKLR* on the proposition that constructive trust cannot be inferred without evidence.
 19. Similarly, the appellant relied on *Beatrice Kuri Francis vs Susan Gatiria M'Mukiria & 5 others Meru ELCA 81 of 2019* that fraud must be strictly pleaded and proved.
 20. Additionally, the appellant relied on *Christopher Michael Lockley v Juletabi African Adventure Limited & 2 others [2013] eKLR* that evidence must be led to find a trust.
 21. On whether there should have been a sale agreement the appellant relied on *Peter Mbiru Michuki vs Samuel Mugo Michuki (2014) eKLR* that Section 3 (2) of the *Law of Contract Act* came into effect in 2003 and therefore there was no need of contract in 1964.
 22. Lastly, the appellant submitted that given the failure by the respondents to challenge his title and prove any overriding interest, his title remained lawfully acquired and that the appeal should succeed. The respondent by written submissions dated 16.7.2023 submitted that the judgment of the trial court should not be overturned since it was found based on evidence and the law.
 23. Reliance was placed on *Isack M'Inanga Kiebia vs Isaya Theuri M'lintari & Another [2014] eKLR*, *Monica Mukulu Muteti vs Mutava Maingi (2019) eKLR*, *Juletabi African Adventure (supra)*, *Twalib Hatayan Twalib Hatayan & another vs Said Saggat Ahmed Al-Heidy & others (2015) eKLR*.
 24. The mandate of the court in a first appeal is to re-evaluate, re-establish, and re-assess the primary file in terms of its pleadings, evidence tendered, and the law, and come up with independent findings on both facts, evidence, and the law, while at the same time giving due allowance to the trial court, which had the opportunity to observe and hear the witnesses testify first hand. See *Selle & another vs. Associated Motor Boat Company Limited (1968) E.A 123* and *Peters vs. Sunday Post Limited (1958) E.A 424*.
 25. It is a trite law that parties are bound by their pleadings, and issues flow from pleadings. See *IEBC vs Mutinda Mule (2014) eKLR* and *Raila vs IEBC (2017) eKLR*. In *Kiruga vs. Kiruga & another (1988) KLR 348*, the court observed that an appellate court could not substitute its actual findings with the trial court's outcomes unless there was no evidence to support such results or it was wrong.
 26. In this appeal, the respondent's claim was based on customary trust. In paragraphs 5 and 6 of the plaint dated 12.10.2020, the respondents had averred that at the adjudication stage, the original land was recorded in the name of the late Makathimo M'Mboroki, but in unclear and or suspicious circumstances, it was transferred to the appellant's name in 1966. In paragraphs 7 and 8 of the plaint, the respondents averred that the suit land at all times, despite the entries, remained family and was held



in trust for them by the appellant, who had breached and or violated it. Alongside the plaint was a list of documents, among them, the adjudication register for L.R. No. Ntima/Igoki 260 and a letter of transfer of the suit land to the appellant. The two documents were produced as P. Exh's No. 5 & 6 without any resistance or objection from the appellant.

27. In paragraphs 4, 5, and 7 of the statement of defense, the appellant had averred that a parcel of land L.R. No. 260 was never recorded in his late father's name during the adjudication stage. Instead, he averred that he had acquired it independently and was the first registered owner. The appellant did not plead that the adjudication register and the transfer letter dated 21.4.1966 were fraudulent, unauthentic, or a forgery. Additionally, the appellant did not produce any alternative adjudication records superior to P. Exh no. 5 and 6 and demonstrate that lawfully he was the recorded owner during the adjudication stays as opposed to his late father.
28. Moreover, the appellant failed to call the Land Registrar or the Director of Land Adjudication to counter the evidence tendered by the respondents to the effect that he was not the first registered owner of the suit land L.R. No. 260. In their pleadings and testimony, the respondents stated that they were born and occupied the land as a family together with their siblings and parents until they passed on.
29. On page 43 of the appeal record, the appellant stated that in the witness statement, he adopted as his evidence in chief that the ancestral land was situated in Runogone, where "they" moved from and settled in the Kithoka area during the adjudication period in 1967. Further on page 45 of the appeal record, the appellant stated that he lived on the suit land with his mother. His testimony before the trial court was that he lived on the suit land with his parents, whom he had invited since they were sickly until his father died in November 1970. He denied authoring the letter to transfer the land to himself. His evidence was that the land belonged to him.
30. It is trite law that when a title deed is disputed, all the paper trail towards its acquisition becomes an issue. The appellant knew that how he acquired the suit land was under attack. It was not enough to waive the title deed before court and claim ownership. See Dr. Joseph N.K Arap Ngok vs Moiyo Ole Keiwua & 4 others Nai C.A No. 60 of 1997.
31. In Solomon Meme Muthamia vs. Ntaari Kabutura and Land Adjudication Officer Meru (2001) eKLR, the issue was whether the registration under the defendant's names was fraudulent, mistaken, or irregular. The court observed that though the 2nd defendant mistakenly conducted the land adjudication process, the same did not amount to fraudulent conduct.
32. Constructive or resultant trust was discussed in Kazungu Fondo Shutu (supra) the court cited with approval Mumo vs Makau (2002) IEA 170, that trust was a question of fact to be proved by evidence. Further, the court noted with approval Juletabi African Adventure Ltd (supra) and Twalib Hatayan (supra) that constructive trust was an equitable remedy imposed by court against the one who had acquired the property by wrongdoing in circumstances which require the court to find that equity treats the legal owner as a trustee, or where a trustee takes advantage of his position for his benefit. The court said that the imposition of constructive trust was meant to guard against unjust enrichment. Regarding the resulting trust, the court observed that it was a remedy imposed by equity where the property was transferred under the circumstances, suggesting that the transferor did not intend to confer a beneficial interest upon the transferee. In Twalib Hatayan (supra), the court held that the circumstances of the case have to be looked at to presume or infer the transferor's intention, the onus under Sections 107 & 108 of the *Evidence Act* to establish the particular fact to find a trust, being on the part of the applicant.
33. In this appeal, the respondents led evidence that the suit land belonged to their late father before the registration on 8.1.1970 in the appellant's name. The evidence was never challenged or discounted by



way of superior evidence by the appellant. Parole evidence in law cannot be used to contradict written documents. See Prudential Assurance Co. of (K) Ltd vs Sukhwinder Singh Jutley & another Civil Appeal No. 23 of 2005 and Muthuuri vs National Industrial Credit Bank (2003) KLR 145.

34. The evidence by D.W. 1 and D.W. 2 on how the appellant acquired the suit land dismally failed to discredit P. Exh's No. 5 & 6. These were public documents under Sections 79 and 81 of the *Evidence Act*. See George Kimani Njuki vs National Land Commission & others (2022) eKLR. The circumstances under which the appellant and his late brother acquired the land show an irresistible pattern: their late father intended the land to be held in trust in favor of the respondents. The appellant admitted that they moved to the Kithoka area before the adjudication process commenced. If the late father was the recorded owner then and was already on the land by 1964, his transfer to the appellant was subject to his overriding interest and those of his children, the respondents included. The appellant knew that his late parents had moved into the suit land alongside his siblings the respondents.
35. The fact that the respondents were women and eventually married off did not extinguish their accrued rights to the land unless they denounced them. The trial court was, therefore, entitled to consider all the circumstances surrounding the registration of the land in favor of the appellant to establish if there was an intention to found a trust.
36. The respondents' facts and evidence were relevant as held in Mumo vs. Makau (supra). They cannot be termed as extrinsic or extraneous. Whereas fraud had not been pleaded, the respondents had pleaded irregularity in how the appellant came to be registered as the owner of the suit land. The court has already held that parole evidence cannot contradict the public documents that the respondents relied upon. That notwithstanding, the documents were relevant to point out the status of the land before the registration. D.W. 2 was unable to establish the date of the purchase, the consideration paid and if the appellant's late father was among the witnesses to the sale agreement. As was the law in 1970, the appellant did not possess a note or memorandum of the sale of the land from the seller(s). See Peter Mbiri Michuki (supra) and Karisa Mutsonga vs Johnson Nyati (1984) eKLR.
37. Looking at the pleadings, evidence tendered, and the law, the trial court rightfully allowed the respondents claim. The appeal is, as a result of this, dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 27TH DAY OF SEPTEMBER 2023

In presence of

C.A Kananu

Appellant

Kiogora Nyanga for appellant

Gichohi for Mutuma for respondent

HON. CK NZILI

ELC JUDGE

