



Gatungu (Suing as the Legal Representative of the Estate of Eva Wambui Theuri Deceased Plaintiff) v Theuri & another (Environment and Land Appeal E034 of 2021) [2023] KEELC 20865 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20865 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E034 OF 2021**

**JO OLOLA, J
OCTOBER 19, 2023**

BETWEEN

JOSEPH KING'ORI GATUNGU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF EVA WAMBUI THEURI DECEASED PLAINTIFF) APPELLANT

AND

**CATHERINE MUTAHI THEURI 1ST RESPONDENT
JOHN WANJOHI MATHINJI 2ND RESPONDENT**

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable Wendy Kagendo, Chief Magistrate, delivered on September 30, 2021 in Nyeri MCL&E Case No. 38 of 2019.
2. By a Plaint dated July 23, 2019 as amended on November 18, 2020 Eva Wambui Theuri [whose legal representative Joseph King'ori Gatungu now brings this Appeal] had sought orders against the two Respondents herein as follows:
 - (a) A declaration that Title Number Muhito/Muyu/847 is ancestral land and that the deceased held the same in trust for the family members including the Plaintiff herein and the same could not be sold off of alienated without the consent of all family members/beneficiaries;
 - (b) A declaration that the transfer of the suit property from the 1st Defendant to the 2nd Defendant was irregular, unprocedural, illegal and fraudulent;
 - (c) An order of rectification of the register by the cancellation of the transfer to the 2nd Defendant in respect of Title Number Muhito/Muyu/847 and an entry of Customary trust be noted; and
 - (d) Costs of the suit and interest.



3. Those prayers arose from the Plaintiff's contention that she was the sister to the 1st Respondent's husband the late Mutahi Theuri and that the suit property was their ancestral land which they had all used and occupied since the year 1907 when she was born.
4. It was the Plaintiff's contention that on January 6, 1982, her deceased brother was registered as the proprietor of the suit property to hold the same as a trustee for the benefit of himself, the Plaintiff and other family members. She accused the 1st Respondent of secretly causing herself to be registered as proprietor of the land following the death of her husband and thereafter proceeding to sell the whole portion thereof to the 2nd Respondent.
5. The Plaintiff asserted that the 2nd Respondent was not an innocent purchaser as both the 1st and 2nd Respondents knew of the customary trust and in particular the Plaintiff's interest on the suit property.
6. In her Statement of Defence dated February 11, 2020, Catherine Mutahi Theuri (the 1st Respondent) denied all the averments contained in the Plaint and invited the Plaintiff to strict proof.
7. Similarly, John Wanjohi Mathinji (the 2nd Respondent) asserted that the Plaintiff was not entitled to the orders sought. In his Statement of Defence dated January 24, 2020, the 2nd Respondent averred that he had entered into a valid sale agreement with the 1st Respondent to exchange the suit property with another parcel of land known as LOC 2/Mairi/1220.
8. The 2nd Respondent further denied that the suit property was the Plaintiff's ancestral land. It was his case that he had done due diligence and followed due process having established that the title was in the name of the 1st Respondent.
9. On March 11, 2020, before the conclusion of the trial, the Plaintiff passed away and was substituted by Joseph King'ori Gatungu (the Appellant).
10. Having heard the matter and in her Judgment delivered on September 30, 2021, the Learned Trial Magistrate made a finding that the Plaintiff had failed to establish the existence of a customary trust and proceeded to dismiss the claim.
11. Aggrieved by the said determination, the Appellant moved to this Court and lodged a Memorandum of Appeal dated October 4, 2021 urging this Court to set aside the entire Judgment and decree and to substitute the same with the reliefs sought in the Amended Plaint dated November 18, 2020 on the grounds:
 1. That the Honourable Chief Magistrate erred in law and in fact in holding that the Appellant had not, on the evidence adduced by the Parties, proved the existence of the customary trust in favour of the deceased Plaintiff over the suit land title Number Muhito/Muyu/847;
 2. That the Honourable Chief Magistrate erred in law in holding that customary trust should have been mentioned in the Title Deed for the suit land Title Number Muhito/Muyu/847;
 3. That the Honourable Chief Magistrate erred in law by failing to appreciate that a claim for a customary trust cannot be ventilated by way of a protest or objection in succession proceedings;
 4. That the Honourable Chief Magistrate erred in law and fact by failing to find the Respondents had notice of, and were bound by, the customary trust in favour of the deceased Plaintiff over the suit land Title number Muhito/Muyu/847;
 5. That the Honourable Chief Magistrate erred in law and in fact by failing to find that the 2nd Respondent did not prove that he was a purchaser for value without notice of the customary trust in favour of the deceased Plaintiff; and



6. That the Honourable Chief Magistrate erred in law and in fact by failing to find that a customary trust is not subject to the *Limitation of Actions Act*.
12. This being a first Appeal, the mandate of this Court is as was spelt out in *Selle & Another -vs- Associated Motor Boat Company Limited and Others* (1968) EA 123 where it was held as follows:

“... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this 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 ...”
13. I have accordingly carefully gone through the Record of Appeal, the impugned Judgment as well as the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
14. Before her death on March 11, 2020, Eva Wambui Theuri (hereinafter Eva) instituted this suit on July 23, 2019 against the two Respondents herein seeking a declaration that Title No. Muhito/Muyu/847 was their ancestral land and that her deceased brother who was the husband to the 1st Respondent held the same in trust for the family members including herself (Eva).
15. In addition, Eva had sought a declaration that the transfer of the suit property by the 1st Respondent to the 2nd Respondent was irregular, unprocedural, illegal and fraudulent. Accordingly she sought for an order of rectification of the register by the cancellation of the transfer to the 2nd Respondent and for an entry of customary trust to be noted on the register.
16. Those prayers arose from Eva’s contention that she had been born on the suit land in the year 1907 and that together with her parents and fellow siblings including the 1st Respondent’s husband Mutahi Theuri they had used and occupied the land ever since. It was Eva’s case that on January 6, 1982, her brother Mutahi Theuri was registered as proprietor of the said parcel of land to hold the same as a trustee for the benefit of himself and the other family members. Eva accused the 1st Respondent of secretly causing the suit property to be registered in her name following the death of her husband and thereafter proceeding to dispose of the same to the 2nd Respondent.
17. It was Eva’s position that the 2nd Respondent could not be said to be an innocent purchaser of the land for value without notice as both the 1st and 2nd Respondents were aware of the existence of the customary trust and in particular, Eva’s interest on the suit land.
18. In her Statement of Defence dated February 11, 2020, Catherine Mutahi Theuri [the 1st Respondent] denied all the averments contained in the Plaint and invited Eva to strict proof of everything she had stated in her Plaint.
19. Similarly, John Wanjohi Mathinji (the 2nd Respondent) asserted in his Statement of Defence dated January 24, 2020 that Eva was not entitled to the orders sought and that he had entered into a valid Sale Agreement with the 1st Respondent to exchange the suit property with another parcel of land situated in Kigumo in Murang’a County.
20. The 2nd Respondent denied that the suit property was Eva’s ancestral land and asserted that he had done due diligence through which he confirmed that the property was registered solely in the name of the 1st Respondent.



21. Following Eva's death, her nephew and legal representative Joseph King'ori Gatungu (the Appellant) was substituted in her stead before the matter proceeded to trial.
22. Having heard the Parties and in her Judgment delivered on September 30, 2021, the Learned Trial Magistrate framed the issues for her consideration as follows:
 - (a) Whether the Plaintiff has proved existence of a customary trust;
 - (b) Whether the customary trust binds the 1st Defendant; and
 - (c) Whether the customary trust binds the 2nd Defendant.
23. After consideration of the said issues the Learned Trial Magistrate concluded as follows at Paragraphs 17 to 23 of her Judgment:

“ 17. During the hearing of the Plaintiff's case when asked whether they filed the requisite document in Court challenging the succession cause, the Plaintiff answered in the negative. Further when asked whether there was a connotation of trust against the title, he answered no;

18. The Court agrees fully with the Defendant's position that the Plaintiff was the daughter to the late Theuri s/o Kaburu as such should have sought for land during the succession of her father and not from the 1st Defendant's husband who was her brother as in the circumstances she should have sought land from all her brothers;

The 1st Defendant filed a succession cause in relation to her deceased husband's estate to which when the Plaintiff was asked whether they filed a protest in the succession proceedings or even instituted revocation proceedings on the same he stated that he had not;

The Plaintiff has failed to provide any sufficient evidence to prove his claim on the suit property being subject to customary trust or fraud on the part of the 2nd Defendant;

19. The Court agreed with the Defendant that the element of a trust was not proved. This is because:
 1. To begin with, there is no mention of trust in the title deed.
 2. The witnesses who testified on behalf of the Plaintiff were not present during the meeting that is alleged to have taken place in 1964. What they told the Court was hearsay. Even PW4 who alleged that he was present said the land was subdivided into 3; Gatundu, Amos and Wachira. The Plaintiffs mother Eva was not given any land. If Eva was aggrieved, she ought to have complained at that point.
 3. PW4 also admitted that there were subsequent succession proceedings. The Court finds that Eva ought to have filed her objection or protest when the succession cause was going on.



20. The Court finds that the allegation of fraud during the succession case was not proved. In any event the Plaintiff ought to have filed an appeal if they were dissatisfied with the succession proceedings;
 21. Further it was proved that the initial Plaintiff was not living in the disputed land and she was not buried there;
 22. Having found that there was no trust, then the 1st Defendant's husband held a proper title which he passed onto the 1st Defendant;
 23. Having obtained the title legally, the Plaintiff (sic) had every right to do the subsequent exchange since neither the trust nor any fraud was proved (on) which the Court dismisses the Plaintiff's claim."
24. As it were, the legal burden in proving the existence of a customary trust lies on the person asserting a right under customary trust. As was stated by the Supreme Court in *Isack Kieba M'Inanga -vs- Isaaya Theuri M'Lintari & Another* (2018) eKLR:
- "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 -vs- 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:
1. The land in question was before registration, family, clan or group land;
 2. The claimant belongs to such family, clan or group;
 3. 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;
 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and
 5. The claim is directed against the registered proprietor who is a member of the family, clan or group."
25. In the matter before me, while the 1st Respondent denied in her pleadings any relationship between herself and Eva, it was not in dispute that Eva was the daughter of one Theuri Kaburu who had long passed away and was the father to the 1st Respondent's husband. A copy of the Green Card exhibited at Page 82 of the Record of Appeal reveals that the suit property was a sub-division of the parcel of land formerly known as Muhito/Muyu/468. That original parcel of land was registered in the name of the said Theuri s/o Kaburu on June 2, 1959 and it remained in that name until January 6, 1982 when it was sub-divided into three portions being Muhito/Muyu/845, 846 and 847 (the suit property).
26. From the record, it was also apparent that the said Theuri s/o Kaburu had brought forth three sons and two daughters. Two of the sons, Amos Kaburu Theuri and Gatungu Theuri would later inherit what became known as Muhito/Muyu/845 and 846 respectively while the rest of the family including Mutahi Theuri, the 1st Respondent's husband remained on the suit property.



27. While the 1st Respondent vehemently denied that Eva had ever lived on the suit property, there was more than enough evidence pointing to the fact that at one point in time she did reside on the land. That position was indeed confirmed by the 1st Respondent's fourth witness Jackson Maina Kuria (DW4) who states as follows in cross-examination (Page 280 of the Record):

“I know the family of Theuri. They are from our village. Theuri Kaburi had 4 children. 3 men and 1 daughter. I know that the succession was done for Theuri's estate. The land was sub-divided amongst the 3 sons.

Theuri's land is 3 shambas from my land. Eva used to live in that land before the land was sub-divided. When the land was sub-divided she was there then she moved out. I heard that she moved to her daughter's land. Eva had children. Eva and her children lived in Mutahi's portion on a part they had been given. I do not know when they moved out but I did not see them for a long long time.”

28. That evidence corroborated the position taken by the Appellant's witnesses especially that of Eva's daughter Lucy Wanyiri Muriithi (PW2) who told the Court that her mother had built a house on the suit land and that after her (PW2's) brother died in 2014, she had gone and picked Eva from her home to go and take care of her.

29. The existence of Eva's home on the suit land was indeed not a matter of conjecture. At page 31 to 33 of the Record, there are photos of some old houses built of wood and iron sheets. Those photos were first exhibited as annexures to an application dated July 23, 2019 filed by Eva seeking orders to restrain the Respondents from evicting her and/or demolishing the houses. (Pages 125 to 139 of the Record).

30. In his Replying Affidavit to the application filed in Court on November 28, 2019 (page 140 of the Record), the 2nd Respondent confirms the existence of the said houses at paragraphs 6 to 8 of the Affidavit wherein he deposes as follows:

“6. That the property was given to me vacant, the structures attached to the application are abandoned and there is no one who lives in them, hence the allegations of eviction are strange to me;

7. That the Applicant is (a) strange(r) to me as I have never seen her despite her allegation of being in the suit property; and

8. That on November 24, 2019, one Joseph King'ori Gatundu entered the suit land/property and started constructing a gate and road to the abandoned structures (Annexed and marked as JWM-5 are pictures taken as the incident was happening on the material date).”

31. I have looked at the pictures marked as annexure 'JWM-5' aforesaid and it was clear to me that they are pictures of the same homestead Eva was claiming to be her own in her application. It was interesting to note that in her brief Replying Affidavit to the application filed in Court on December 5, 2019, the 1st Respondent who denies that Eva lived on the land does not lay any claim to the so-called “structures” nor does she state who built them. All that she states is that the “structures” were abandoned without stating who abandoned them.

32. In the circumstances herein and contrary to the findings of the Learned Trial Magistrate, it was clear to me that Eva had a home on the suit land long after the sub-divisions were done in 1982 and that the 1st



Respondent took advantage of her advanced age and the fact that her daughter (PW2) had taken her away from the home to go take care of her, to deprive her of her home and her inheritance.

33. The 1st Respondent's contention that Eva got married in the 1970s and left the suit land to go live with her husband was clearly not supported by any evidence. In the contrary, it was discredited by her own witness, DW4, who testified that Eva had remained on the suit land even after the 1982 sub-division of the original parcel of land.
35. Arising from the foregoing, it was evident that the Respondents were not strangers to the Eva's possessory interest over the suit land. They knew how that interest arose. Her use and occupation of the land was out of the fact that she was a member of the family of Theuri s/o Kaburu. Her right to that portion of land had been respected by her deceased brother Mutahi Theuri despite his registration in the year 1982 as the proprietor of the suit property. That right accrued to Eva as a beneficiary under a trust and not under the Law of Succession Act as was imputed by the Learned Trial Magistrate.
36. As regards the 2nd Respondent, it was also clear to me in the circumstances herein that he could not be termed as a bonafide purchaser for value without notice. DW4 who appears to have been a more credible witness told the Court that the 2nd Respondent and Eva were close neighbours and that they knew each other. That coming from his own witness put paid to any pretence by the 2nd Respondent that he had no notice of the customary trust.
37. It was also apparent from the testimony of the Respondents that the "valuable consideration" for which the 2nd Respondent is said to have acquired the suit property was another parcel of land situated in Murang'a and known as Loc 2/Mairi/1220 measuring approximately 0.405 Ha. which was given to the 1st Respondent in exchange for the suit property. As at the time of trial, the said property had not been transferred to the 1st Respondent and was still in the 2nd Respondent's name. In the strict sense of the word it could therefore not be said that the 2nd Respondent had acquired the land for any valuable consideration.
38. In the premises, I am persuaded that the Learned Trial Magistrate erred in arriving at the conclusion that the Appellant had failed to establish the existence of a customary trust over the suit property and/or that the 2nd Respondent had acquired the property as an innocent purchaser for value without notice.
39. Accordingly I hereby allow the Appeal, set aside the Judgment and decree dated September 30, 2021 and substitute the same with the Reliefs sought by Eva in the Amended Plaint dated November 18, 2020.
40. The costs of this Appeal shall be borne by the Respondents.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 19TH DAY OF OCTOBER, 2023.

In the presence of:

Mr. Mwangi Muthomi for the Appellant

Mr. Gichuki for the Respondents

Court assistant – Kendi

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J. O. OLOLA

JUDGE

