



**Irungu & 3 others v Wairimu (Environment and Land Appeal  
E020 of 2021) [2023] KEELC 20816 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20816 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND APPEAL E020 OF 2021  
LN GACHERU, J  
OCTOBER 19, 2023**

**BETWEEN**

**NANCY NJOKI IRUNGU ..... 1<sup>ST</sup> APPELLANT  
ANTHONY IRUNGU ..... 2<sup>ND</sup> APPELLANT  
ALEXANDER IRUNGU KIRAGU ..... 3<sup>RD</sup> APPELLANT  
MWANGI MACHARIA ..... 4<sup>TH</sup> APPELLANT**

**AND**

**PHILLIS WAIRIMU ..... RESPONDENT**

*(Being an Appeal from the Judgement of the Chief Magistrate Court at Murang'a  
by Hon. E. Muriuki Nyaga dated 9 th December 2021 in ELC No. 50 of 2020)*

**JUDGMENT**

1. The Appellants were sued by the Respondent in Murang'a CMCC ELC No. 50 of 2020, for removal of a caution lodged by the Appellants over Loc. 13/ Gakoe/901. The Appellants filed a joint Statement of Defence claiming customary rights over the suit land. The trial Court entered judgment for the Respondent and held that the issue of customary trust was canvassed in Succession No. 160 of 2007, and the Court had pronounced itself that there was no trust. The Court further held that even though there were Mutation Forms which shows that the deceased intended to sub-divide the land, there was no evidence that the Appellants were to benefit from the said sub-division.
2. Dissatisfied with the said judgment of the trial Court the Appellants filed the instant appeal based on Four Grounds set out in the Memorandum of Appeal dated 22<sup>nd</sup> November 2021, that;
  1. The Learned Magistrate failed to appreciate the principal law on removal of caveat, more so the powers of the Registrar on removal of caution.



2. The Learned Magistrate erred in law and in facts by failing to find that the suit was held in trust
  3. The Learned Magistrate erred in law and fact by failing to critically analyse the evidence and thus arrived at an unjust decision
  4. The Learned Magistrate erred in law when he purported to determine and dissolve a trust in a succession cause no. 160 of 2007
3. The appeal was dispensed with by way of written submissions as directed by the Court. The Appellants through R M Njiraini & Co. Advocates filed their written submissions on 5<sup>th</sup> July 2023, and raised three issues for determination by this Court.
    4. They set out the role of the Land Registrar and submitted that the issue of caution having been resolved by the Land Registrar ought not to have been entertained by the trial Court. Reliance was placed on the case of *Azzuri Properties vs Pink Properties Limited* {2018}eKLR, where the Court noted that the trial Court lacked the jurisdiction to entertain the matter that the Land Registrar had the powers to handle.
    5. The Appellants further submitted that Kikuyu Customary laws permitted the first son to own land as was stated by the Court in *Moses Karanja Kariuki vs Naomi Njeri Kariuki & 4 Others* (1983)eKRL. Thus, they maintained that the suit land was a customary land which ought to have been shared among themselves as per the Mutation Forms.
    6. The Respondent through Githiga Kimani & Co. Advocates filed her submissions on 18<sup>th</sup> July 2023, giving history of the suit land. She submitted in the end that there was no customary trust encumbered over the suit property.
    7. The brief facts founding the filing of the suit in the trial Court were that the Appellants herein registered a caution over Loc. 13/ Gakoe/901. It is evident from the copy of a Certificate of Official Search dated 22<sup>nd</sup> October 2018, that the suit was registered in the name of the Respondent. The suit land was first registered in the name of Kamau Gatere on 19<sup>th</sup> July 1965, and which thereafter the Respondent herein acquired ownership by dint of transmission. This was subject of succession proceedings in Murang'a SPM Succ' No. 160 of 2007. It is also evident that the caution hearing had commenced before the Land Registrar.
    8. This Court gathers from the facts herein that the Appellants registered a caution over the suit property claiming beneficial interest. It was their contention that the suit property was registered in the name of the Respondent's husband, Kamau Gatere, to hold it in trust for himself and the Respondent. The issue of trust found its way before the trial Court through Appellants' Counter-claim. The trial Court in its judgment held that the issue of trust had been dealt with in Murang'a SPM Succ' No. 160 of 2007, where the Court had found that there was no trust. The trial Court noted that even though there was evidence of Mutation, there was no evidence that the deceased intended to sub-divide the suit land to the Appellants. The result of the foregoing was that the Appellants' Counter-claim was defeated hence the appeal.
    9. This Court has been moved on first appeal. As such, it is reminded of its role within the provisions of Section 65(b) of the *Civil Procedure Act*, which allows this Court to determine the appeal on both law and facts. The trial Court exercised its discretion based on the facts placed before it, and this Court cannot simply interfere with that discretion since it has been moved on appeal. The Supreme Court



when moved on appeal in the case of *Musa Cherutich Sirma vs Independent Electoral and Boundaries Commission & 2 others* [2019] eKLR, had this to say about interfering with the discretionary powers

In reiterating the above position, we affirm that we would only interfere with the Appellate Court's exercise of discretion if we reach the conclusion that in exercise of such discretion, the Appellate Court acted arbitrary or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the Court's exercise of discretion."

10. Thus, this Court must be sufficiently led as to interfere with this discretion donated by both the *Constitution* as well as Statute. The role of this Court as laid out in Section 78 of the *Civil Procedure Act* is to re-evaluate, re-assess and re-analyze the evidence as contained in the Record of Appeal. The Court in the case of *Peter M. Kariuki vs Attorney General* [2014] eKLR, held as follows; -

We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.

Further, in the case of *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123, the Court of Appeal stated:

I accept counsel for the Respondent's proposition that this court is not bound necessarily to accept the findings of facts by the court below. An appeal to this court from a trial by the High 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).

11. The grounds upon which the instant appeal is premised on are as set out hereinabove. Taking cue from the grounds set therein, and having read through the Record Appeal and having considered the parties' submissions and guided by the authorities cited, the issues for considerations by this Court are; -
- i. Whether there was any trust created over the suit land in favour of the Appellants
  - ii. Whether the trial Court erred in removing the caution
  - iii. Whether the appeal is merited
  - iv. Who should bear the costs for the appeal

#### **I. Whether there was any trust created over the suit land in favour of the appellants?**

12. The Appellants claim over the suit land was for customary trust, which they alleged the Respondent's husband held on their behalf. The relationship between the parties herein can be deduced from the Plaintiff contained in the Record of Appeal.



13. Trust is one of the overriding interests contemplated under the [Land Registration Act](#). Section 28 provides:

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- a. ....
- b. Trusts including customary trusts;
- c. ....  
.....

14. Registration of the suit land was done under the old land regimes. The [Registered Land Act](#) (Cap 300 Repealed) Section 30 of the Repealed [Act](#) made provisions for overriding interest over land. The principles for consideration in a claim for customary trust were laid out by the Supreme Court in the case of [Isack M'inanga Kieba vs Isaaya Theuri M'lintari & Another](#) {2018}, where it expressed itself as follows on matters of trust:

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:

- i. The land in question was before registration, family, clan or group land
- ii. The claimant belongs to such family, clan, or group
- iii. 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.
- iv. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
- v. The claim is directed against the registered proprietor who is a member of the family, clan or group.

15. Perhaps it is important to point out that this Court cannot impose trust, and the person alleging trust must lead evidence on that. This was the position of the Court in the case of [Juletabi African Adventure Limited & another v Christopher Michael Lockley](#) [2017] eKLR, where the Court held; -

It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because: -

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

16. The Appellants had a duty to lead evidence before the trial Court and to the satisfaction on the principles set out in the case of [Isack M'inanga Kieba vs Isaaya Theuri M'lintari & Another](#), *supra*.



17. At the hearing of the Appellants case, DW1 told the trial Court that the suit land belonged to their deceased grandfather and it ought to be shared into four. DW1 relied on her Witness Statement of 19<sup>th</sup> March 2021, and which this Court has read through. DW1 had stated that the suit land was registered in the name of Mwangi Rurinja, since he was the only one who did not have any other land.
18. In determining the issue of customary trust, the trial Court held that the same had been determined in the succession proceedings. This Court has perused a copy of the judgment of the Court in Succession No. 160 of 2007, where the Court in relying on the case of *Karanja Kariuki vs Kariuki*(1983)KLR found that as per the Kikuyu customary law, land was to be registered in the name of the eldest son and in this case, it would have been registered in the name of Irungu Mwangi. The judgment was a culmination of an application for Revocation of grant, where the Applicants therein were claiming ownership of the suit land on the presumption that the deceased was holding the land on behalf of the family.
19. Though not expressly stated, the Succession Court had determined the issue of customary trust when it expressed itself thus “from the foregoing, it would be that Irungu Maina would have been the person in whose name the land would have been registered”. The Succession Court had concluded so when determining the principle of customary law among the Kikuyu where the parties herein belong.
20. The trial Court reiterated the finding in the Succession Court and did not find in favour of the Appellants. The trial Court noted that even though there was an intention to sub-divide the land, there was no evidence that the same was in favour of the Appellants.
21. Applying the principles set out above, it is not in dispute that the Respondent’s husband was a sibling to three other persons who have distinct relation with the Appellants. The trial Court had expressed itself that the Appellants had their respective parcels of land. This finding corroborates the statement of DW1, which stated that the Respondent’s husband was registered the owner of the suit property since the other brothers had land which was within the locality of the suit land. She added that the Respondent’s husband did not have another land.
22. Despite stating that her husband and the others had other parcels of land, she maintained that they buried their kin on the suit land. This testimony was not buttressed with any evidence which would have aided the trial Court in determining whether the suit land was a family land or not. Also, it is not clear to this Court whether the land was registered in the name of the Respondent’s husband because their father was dead, or for other reasons.
23. While it is not in dispute that the Respondent’s husband had siblings and the claim is properly directed, it is not clear to this Court in form of evidence or from the Record of Appeal whether the suit land was family land or not.
24. As stated earlier, the onus of proof rested with the Appellants to demonstrate to the trial Court that the suit land was a family land. This burden was not discharged. Therefore, it is evident that the trial Court did not err in dismissing the Appellants’ Counter-claim.

## **II. Whether the trial court erred in removing the caution?**

25. Section 73 of the *Land Registration Act*, makes provisions for removal of a caution and stipulates thus:
  - (1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.



- (2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.
- (3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.
- (4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.
- (5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.
- (6) On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under section 74 shall not be affected by the cancellation.'

26. A caution may be removed by a Land Registrar or by an order of Court. The Land Registrar had undertaken some caution hearing and had given directions that the land be sub-divided among the four brothers. The justification for this was that the deceased had prior to his death expressed his intentions to sub-divide the land. Respectfully, there was nothing on record to show that the land was to be shared among the deceased brothers. This was the holding of the trial Court as well.

27. Additionally, the claim for beneficial interest arose from a claim for customary trust which the Land Registrar did not have powers to determine. Respectfully, again the Land Registrar did not have the powers to give the direction it did. This Court associates itself with the pronouncement of the Court in the case of *Consolata Ochieng Ogutu & 3 others v Adet Odongo & another* [2021] eKLR, where the Court held;

22. In the Court of Appeal cases of *Muthuita v Muthuita* (1982-88) 1 KAR 42 at 44 & *Njenga Chogera v Maria Wanjira Kimani & Others* [2005] eKLR, it was held:

“Customary law trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded.”

23. From the above decisions, the question is whether the Succession Court has jurisdiction to determine the question of the existence of a customary trust? Interests in land arising from customary law trusts are now expressly recognized under the provisions of Section 28 (b) of the *Land Registration Act*, No.3 of 2012 and the same can only be determined by the Environment and Land Court as the Court contemplated in Article 162(2) of the *Constitution* and established under section 4 of the *Environment and Land Court Act* to



hear and determine disputes relating to the environment and the use and occupation of, and title to, land.

28. Even though the Land Registrar has the power to remove caution, and make such orders within the provisions of Section 73(4) of the *Land Registration Act*, care ought to be exercised as not to exceed the powers of the Land Registrar.
29. The Respondent acquired ownership of the suit land by transmission. There is no evidence that the grant donating powers to the Respondent over the suit property has been revoked. There being no reason allowing the Appellants to lay claim over the suit land. allowing the caution to proceed would have been against the Respondent's proprietary rights.

### **III. Whether the appeal is merited?**

30. The onus of leading evidence as to the existence of customary trust rested with the Appellants. This Court has already found hereinabove that the Appellants did not lead any evidence to demonstrate that the suit land was family and or clan land. It was also against the principle of law for the Land Registrar to conclude that the intended mutation was in favour of the Appellants. The Appellants had the burden of proof to ascertain to the trial Court that they were the beneficiaries of the mutation.
31. The Land Registrar gave the parties to the hearing the option of moving Court to seek redress. It appears to this Court that the Respondent had moved the trial Court during the pendency of the caution hearing. While the doctrine of exhaustion barred the Respondent from moving Court, the nature and claim raised in the Counter-claim changed the substratum of the suit. The suit was therefore ripe for determination by the trial Court.
32. The Appellants did not adduce any evidence to invoke the power of this Court to interfere with the discretionary powers of the trial Court. Consequently, the Court finds that the Appeal herein lacks merit and therefore finds no reasons to interfere with the decision of the trial Court.
33. The upshot of the foregoing is that the appeal lacks merits and is hereby dismissed.

### **IV. Who should bear the costs for the appeal?**

34. This Court has the power to make such orders as to costs. It is trite law that costs shall follow the event and the successful party is entitled to costs. However, this Court takes note of the relationship between the parties to this appeal. As such this Court directs that each party shall bear their own costs.
35. Having carefully considered the instant Memorandum of Appeal, Record of Appeal, the rival written submissions and the relevant provisions of law, the Court finds that the Appeal herein is not merited and the Court proceeds to dismiss the said Appeal entirely with an order that each party to bear his/her own costs.
36. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 19<sup>TH</sup> DAY OF OCTOBER, 2023.**

**L. GACHERU**

**JUDGE**

**L. GACHERU**

**JUDGE**



Delivered virtually in the presence of; -

1<sup>st</sup> Appellant

2<sup>nd</sup> Appellant Absent

3<sup>rd</sup> Appellant

4<sup>th</sup> Appellant

Respondent - Absent

Court Assistant – Joel Njonjo

**L. GACHERU**

**JUDGE**

**19/102023**

