



**Kinyutho v Waweru & another (Environment and Land Appeal  
E020 of 2021) [2023] KEELC 20866 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20866 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL E020 OF 2021  
JO OLOLA, J  
OCTOBER 19, 2023**

**BETWEEN**

**PAUL KAINI KINYUTHO ..... APPELLANT**

**AND**

**RUKWARO WAWERU ..... 1<sup>ST</sup> RESPONDENT**

**JAMES GICHUKI KIRETAI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This is an Appeal arising from the Judgment of the Honourable Nelly Kariuki, Principal Magistrate delivered on 6<sup>th</sup> May, 2021 in Nyeri MELC No. 249 of 2018.
2. This matter was initially instituted by the 1<sup>st</sup> Respondent herein – Rukwaro Waweru against one Kinyutho Ritho as Nyeri High Court Civil Case No. 269 of 1993. The original Defendant however passed away in the year 2000 and was substituted by his son Paul Kaini Kinyutho (the Appellant herein).
3. In the course of time, it became apparent that the suit property had been sold by the Appellant to James Gichuki Kiretai (the 2<sup>nd</sup> Respondent). Upon that realization, the 1<sup>st</sup> Respondent amended his Plaintiff in the year 2014 seeking the following orders against both the Appellant and the 2<sup>nd</sup> Respondent herein:
  - (aa) A declaration that the suit land is still subject to the trust inspite of transmission to the substituted Defendant and transfer to the second Defendant;
  - (bb) A declaration that the original Defendant and the current Defendants dealings with this land were fraudulent;
  - (cc) An order for the series of registrations of the suit land in the names of the original Defendant, the substituted Defendant the second Defendant be cancelled;



- (dd) A Court order that the second Defendant do transfer the whole of the suit land to the Plaintiff;
  - (e) Alternatively a declaration that the Plaintiff had acquired the suit land by adverse possession; and
  - (f) Costs of the suit.
4. Those prayers arose from the 1<sup>st</sup> Respondent's contention that he was a distant cousin of the Appellant's father and that his father who had brought up the Appellant's father as his own son had left the suit property to the Appellant's father to hold the same in trust for the 1<sup>st</sup> Respondent.
  5. The 1<sup>st</sup> Respondent accused the Appellant of fraudulently causing the suit property to be registered in his name despite the 1<sup>st</sup> Respondent's occupation and possession thereof before proceeding to transfer the same to the 2<sup>nd</sup> Respondent's name.
  6. By his Statement of Defence and Counterclaim, the Appellant's father admitted that he was a cousin to the 1<sup>st</sup> Respondent. It was however his case that together with one Thumbi Wachiari who was by then deceased, they were the only sons of one Wanjiku Wachiari who was unmarried and was the elder sister of the 1<sup>st</sup> Respondent's father.
  7. The Appellant's father further asserted that his portions of land and those of his brother were consolidated and registered in the name of his brother Thumbi Wachiari as parcel number Thegenge/Kianjogu/175 (the suit property) and asserts further that the said land was not in any way registered in trust for the 1<sup>st</sup> Respondent as stated in the Pleat.
  8. The Appellant's father stated that he was initially in occupation of the land before he moved to North Kinangop and that his brother then leased the land for cultivation to some persons. It is his case that following his brother Thumbi Wachiari's death on 17<sup>th</sup> July 1988 he became the rightful heir of the suit property as his brother left no surviving spouse or child.
  9. The Appellant's father stated that following his brother's death, he duly filed Nyeri SRM Succession Cause No. 136 of 1988 and that he was subsequently issued with a grant of Letters of Administration. He further states that the 1<sup>st</sup> Respondent's brother one James Mbauni Waweru filed an application for revocation of the grant issued to him but the same was dismissed on 8<sup>th</sup> November, 1990.
  10. The Appellant's father denied that his registration as the proprietor of the suit property was fraudulent and asserted that the 1<sup>st</sup> Respondent and his brother's occupation of the suit property was illegal as they had entered the land after the death of Thumbi Wachiari in 1988.
  11. By way of a Counterclaim, the Appellant's father contended that the occupation of the suit property by the 1<sup>st</sup> Respondent was illegal and that he had suffered loss as a result of the trespass. Accordingly, the Appellant's father prayed for:
    - (a) General damages for trespass and non-user of the land;
    - (b) An eviction order against the Plaintiff, members of his family, workmen, servants and/or agents;
    - (c) An injunction to restrain the Plaintiff, members of his family, workmen, servants and/or agents from further acts of trespass on land parcel No. Thegenge/Kianjogu/1715; and
    - (d) Costs of this suit.



12. Following the establishment of the Environment and Land Court pursuant to the provisions of *the Constitution* of Kenya, 2010, the suit was transferred to this Court and was registered as Nyeri ELC Case No. 34 of 2016. It was again later transferred to the Chief Magistrates Court at Nyeri as Nyeri MELC Case No. 249 of 2018 where it was consolidated with a related case being Nyeri MELC Case No. 98 of 2016; James Gichuki Kiretai -vs- Marekia Waweru.
13. In the said Nyeri MELC No. 98 of 2016, the 2<sup>nd</sup> Respondent had sued the 1<sup>st</sup> Respondent's brother – Marekia Waweru for:
  - (a) A declaration that the Defendant, his agents and/or servants are trespassers on the suit land L.R No. Thegenge/Kihora/175;
  - (b) A perpetual injunction restraining the Defendant, his agents and/or servants from entering, occupying, using or in any other way dealing with the suit land L.R No. Thegenge/Kihora/175; and
  - (c) Costs and interest.
14. That claim arose from the 2<sup>nd</sup> Respondent's contention that he is the absolute registered proprietor of the suit property having purchased the same from the previous registered owner for valuable consideration. The 2<sup>nd</sup> Respondent accused the Defendant and his agents of taking possession and use of the suit land without his consent and/or colour of right and thereby causing the 2<sup>nd</sup> Respondent to suffer loss and damage.
15. In response to that claim, the Defendant named therein filed a Statement of Defence and Counterclaim dated 25<sup>th</sup> April, 2016 wherein he denied the accusations of trespass asserting instead that he had been in exclusive occupation and possession of the suit land even during the life time of the original owner.
16. By way of his Counterclaim, the Defendant averred that the land originally belonged to Thumbi Wachiari and that following Thumbi's death, the same was allegedly transmitted to Kinyutho Riitho in a process which had been challenged by the Defendant's brothers through a Court case. It was his case that they had used the land since 1968 and that no one had ever attempted to evict him and his family from the land.
17. Accordingly, the Defendant had through the Counterclaim sought the following orders against the 2<sup>nd</sup> Respondent.
  - (a) That the Honourable Court do declare that the vendor, Kaini Kinyutho had no title to pass to the Plaintiff as the same had been extinguished by the Defendant's adverse possession.
  - (b) That the Honourable Court do declare that the Plaintiff holds this title in trust for the Defendant and the same should be terminated and Thegenge/Kianjogu/175 be transferred to him;
  - (c) Costs of this suit; and
  - (d) Any other or further relief the Honourable Court may deem fit to grant.
18. Following the consolidation, the 2<sup>nd</sup> Respondent's pleadings in the said suit were treated as his Statement of Defence in the consolidated suit.
19. Having heard the dispute and in her Judgment delivered on 6<sup>th</sup> May, 2021 aforesaid, the Learned Trial Magistrate determined that the 1<sup>st</sup> Respondent had proved his case on a balance of probabilities and granted the orders sought in the Plaint. The Appellant's Counterclaim was dismissed with costs.



20. Aggrieved by the said determination, the Appellant moved back to this Court and lodged a Memorandum of Appeal dated 3<sup>rd</sup> June, 2021 urging this Court to set aside the Judgment and decree on the grounds that:
1. The Learned Trial Magistrate erred in fact and in law in failing to appreciate that the registration of the suit land Thegenge/Kianjogu/175 in the name of Thumbi Wachira was a 1<sup>st</sup> Registration in circumstances of which was incapable of giving rise to a customary trust;
  2. The Learned Trial Magistrate erred in fact and in law in making a finding that the suit land was ever a clan land or a land the subject to trust when there was no evidence to support the said claim;
  3. The Learned Trial Magistrate erred in fact and in law in failing to appreciate that the 1<sup>st</sup> Respondent just like the deceased had his own separate parcel of land like every other son of their father;
  4. The Learned Trial Magistrate erred in fact and in law in relying on hearsay evidence and believing that there was existence of customary law which could not be proved and which had no basis or application to the subject matter or the circumstances of the case;
  5. The Learned Trial Magistrate erred in law in failing to address herself on the issue of conflict of laws and the applicable law in the event of the conflict;
  6. The Learned Trial Magistrate erred in law in failing to appreciate the history, relevance and place of land demarcation, adjudication and registration and its place in this matter.
  7. The Learned Trial Magistrate erred in fact and in law in shifting the burden of proof of trust to the Appellant whose evidence, the trial Court did not even consider; and
  8. The Learned Trial Magistrate erred in law in taking into account irrelevant issues thereby making the wrong conclusion.
21. This being the first Appellate Court, the role of the Court is to re-evaluate the evidence before the trial Court as well as the Judgment and to arrive at its own independent Judgment on whether or not to allow the Appeal. A first Appellate Court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand [See *Selle & Another -vs- Associated Motor Boat Company Limited & Others* (1968) EA 123].
22. I have accordingly carefully perused the Record of Appeal as well as the impugned Judgment. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
23. The main thrust of the Appeal herein is the Appellant's contention that the Learned Trial Magistrate failed to appreciate that the late Thumbi Wachira's registration as the proprietor of the suit property was a first registration and that the circumstances thereof were incapable of giving rise to a customary trust. It is the Appellant's submissions in this regard that the 1<sup>st</sup> Respondent was unable to substantiate the claim of a customary trust and that the evidentiary burden of proof was not discharged.
24. That position was supported by the 2<sup>nd</sup> Respondent who submitted that upon his registration as the proprietor of the suit land on 26<sup>th</sup> August 1958, Thumbi Wachiari became the absolute holder of all interests in the property and that he was at liberty to deal with the same as he deemed fit including charging it, selling or in any other way appropriating it.



25. It was further the 2<sup>nd</sup> Respondent's position that there being no element of trust noted in the register and there being no basis of imputing a customary trust on the suit property, the registered proprietor held unfettered discretion towards its use and disposition. The 2<sup>nd</sup> Respondent further asserted that following Thumbi Wachiari's death, the Law of Succession had set in and there was no basis for disturbing the current position as it was the application of the said Law of Succession that had led to the situation obtaining as of today.
26. From the perusal of the Record herein, there was no dispute that the suit property was registered in the name of the said Thumbi Wachiari during the period of land demarcation, adjudication and registration on 26<sup>th</sup> August, 1958. Apparently Thumbi was born out of Wedlock. His mother Wanjiku Wachiari would later get married to one Ritho Kinyutho with whom they sired Thumbi's half brother Kinyutho Ritho who was the father to the Appellant herein.
27. Given the circumstances under which he was born, Thumbi was left behind at her maternal ancestral home when the mother got married and went to live with her husband in Nyandarua. And so it was that Thumbi came to be adopted by one of his maternal uncles – Waweru Wachiari who is said to have brought up Thumbi as his own son. The said Waweru Wachiari was the father to the 1<sup>st</sup> Respondent herein.
28. Upon growing up, Thumbi moved to Nairobi where he was said to have engaged in the business of selling charcoal until 16<sup>th</sup> August 1988 when he died at the ripe age of 80 years. He left behind no known spouse and/or progeny. Shortly after his death Thumbi's half-brother Kinyutho Ritho and the 1<sup>st</sup> Respondent were engaged in a brief tussle as to who had a right to bury him and where. He was eventually buried on the suit property.
29. Thumbi's demise provided the curtain raiser for this dispute which has been in the Courts ever since. Before the dust could settle on Thumbi's grave, his half-brother and father to the Appellant herein instituted Nyeri PM's Succession Cause No. 136 of 1988 seeking to be granted Letters of Administration for Thumbi's estate. The same were issued to him on 19<sup>th</sup> July, 1989. The confirmed Grant included the suit property and the Appellant's father was subsequently on 19<sup>th</sup> November 1990 without the knowledge of the 1<sup>st</sup> Respondent registered as the proprietor of the suit property.
30. Having learnt of the said registration, the 1<sup>st</sup> Respondent and his two other brothers lodged a caution on the title claiming a beneficial interest before the 1<sup>st</sup> Respondent eventually instituted this suit in the year 1993. As fate would have it, the Appellant's father Kinyutho Ritho passed away on 21<sup>st</sup> January 2000. Subsequently, the Appellant proceeded in 2006 to institute a Succession Cause for the administration of his estate at the Chief Magistrates Court at Naivasha. The Appellant was issued with a Grant which by the confirmation issued to him on 16<sup>th</sup> November, 2007 transmitted the property to the Appellant to hold in trust for the other dependants of Kinyutho Ritho.
31. By an Agreement of Sale dated 25<sup>th</sup> April, 2014 between the Appellant and the 2<sup>nd</sup> Respondent, the suit property was sold to the 2<sup>nd</sup> Respondent at a consideration of Kshs.3.5 Million. A title deed was apparently then issued in the name of the 2<sup>nd</sup> Respondent on 15<sup>th</sup> May, 2014.
32. Having considered the above facts and the testimonies of the witnesses, the Learned Trial Magistrate concluded as follows at Paragraph 18 of the Judgment:

“18. From the evidence before the Court I find that the following facts are undisputed;



- (a) That Thumbi was adopted by Waweru as his son under Kikuyu customary traditions.
- (b) That Kikuyu customary traditions dictated that a baby born out of wedlock was raised by his mother's clan and specifically her brothers who would then act (as) his father. Indeed, that is why the Plaintiff was given the right by the clan to bury Thumbi on the suit land as his father Waweru was already deceased.
- (c) That the Plaintiff and all his witnesses belong to the Aithirandu a-mbari-ya-Mbogo clan to which Thumbi also belonged.
- (d) That Thumbi was the brother to the Plaintiff, Mbauni and Marekia on account of his adoption by Waweru and cousin to Rukwaro Kiambo. I am further persuaded that the suit land was indeed ancestral land. Why? The witnesses Simon, Rukwaro, Kiambo and Ndegwa Wanjohi are all age mates at 72 years old as at the time they testified. They were present during clan meetings as young men though only as observers and got to know that Wachiari's land was ancestral. They therefore know the history of the suit land from their interactions with clan meetings and the direct players involved. Indeed it was Ndegwa's evidence as Thumbi's friend that in his lifetime Thumbi had said that the land would go to Rukwaro upon his death. To my mind, this corroborates the evidence of the Plaintiff led especially (by) Rukwaro Kiambo that Thumbi was given land by Waweru with conditions i.e a trust had been created with the intention that the suit land would remain with the family and the clan. Perhaps that is why the Plaintiff felt he had a right to the suit land under customary trust."

33. While the Trial Court has been accused of relying on hearsay evidence to arrive at that conclusion, I was not persuaded that that the same was wrong or based on unproven facts. I say so because while the Appellant disputes that the suit property was ancestral and subject to the customary trust, neither the Appellant nor the 2<sup>nd</sup> Respondent have offered any explanation as to how Thumbi Wachiari came to be registered as the proprietor of the suit property.
34. From the testimonies of the 1<sup>st</sup> Respondent's witnesses particularly William Rukwaro Waweru (PW1), James Mbauni (PW2) and Rukwaro Kiambo (PW5), the parcel of land now known as L.R No. Thegenge/Kianjogu/175 (the suit property) was originally part of a larger parcel of land occupied by the family of an old man known simply as Wachiari.
35. It was common ground that the said Wachiari's eldest daughter Wanjiku bore a son before she got married. She named that son Thumbi Wachiari after her father. In due course, Wanjiku got married to one Ritho Kinyutho with whom they moved together to their new home near Ndunyu Market, North Kinangop in present day Nyandarua. It was also common ground that given the dictates of Kikuyu customary law, Thumbi having been born out of wedlock could not accompany his mother to her new home.
36. Under those circumstances, Thumbi was left under the care of his uncle Waweru Wachiari who was said to have brought him up well just like one of his sons. The said Waweru Wachiari was the father



to the 1<sup>st</sup> Respondent herein as well as the Defendant in the consolidated suit. While the Appellant denied it, it was the 1<sup>st</sup> Respondent's case that at some point in time, the said Waweru Wachiari decided to distribute the portion of land he had inherited from his father Wachiari. Having adopted Thumbi as his son, Thumbi was given the suit property measuring some 4.5 acres.

37. Given the circumstances herein, it was apparent, absent any other explanation, that the origin of the suit land was the parcel of land owned by his grandfather Wachiari who belonged to the Aitharandu-a-mbari-ya Mbogo clan. This was the case whether Thumbi inherited the land directly from his grandfather as contended by the Appellants and/or from his maternal uncle Waweru Wachiari. By any eventuality, Thumbi inherited the land previously belonging to the clan by virtue of his belonging thereto.
38. According to PW5, it however took the intervention of the clan before Thumbi could be given the land by his uncle. At the time, Thumbi was unmarried and it was PW5's testimony that it was agreed by the clan that if he remained unmarried all his life, the land would revert to his uncle Waweru (Page 231 of the Record). As it turned out, as at the time of his death in 1988, Thumbi remained unmarried and he left behind no known progeny.
39. While I agree with the Appellants that upon his registration as the proprietor of the suit property on 26<sup>th</sup> August, 1958 Thumbi acquired absolute ownership of the suit property as envisaged under Section 24 of the Land Registration Act, it was apparent to me in the circumstances herein that such registration was subject to certain overriding interests which subsisted and affected the land even though they were not noted thereon. Such interests under Section 28(b) of the Land Registration Act include customary trusts over the land.
40. As the Court of Appeal observed in embracing the concept of customary trust in *Mbui Mukangu -vs- Gerald Mutwiri Mbui* (2004) eKLR:

“ [37]. Both exponents of colonial land policy and jurisprudence, either completely disregarded, or did not fully appreciate, the nature, scope and complexity of African land relations. Land in a traditional land setting, is always the subject of many interest and derivative rights. The content of such interest and rights is often a complex area of inquiry. Such right could be vested in individuals or group units. The rights and interests frequently co-exist with each other. For example, the rights of members of a family do not necessarily derive from the corporate rights of the family as such, but by operation of the applicable law and customs. Besides, the enjoyment of the right is dependent on the fulfillment of certain conditions unique to the group unit. Several rights of the members could be inferior to, or co-terminus with, or indeed superior to the sum total of the rights of a group. Hence, customary law does not vest “ownership”, in land in the English sense, in the family, but ascribes to the family the aggregate of the rights that could be described as “ownership.”

(Bennet 1995: 3 and Cocker 1966: 30-33).

41. In the matter herein, I had no doubt that the land in question before registration was family, clan or group land. As stated by PW1, PW2 and PW5, in their community, a son was given such land in anticipation that he would eventually get married and sire children. If this happened, he would pass this land to his progeny. But if this did not happen, the land would revert back to the giver or his family. Such a person had no authority to sell or give out the land to anybody outside the clan.



42. In this case, Thumbi Wachiari did not marry or sire children during his lifetime. He did not give the suit land to anybody within or without the clan. The land had come from an owner and in the absence of Thumbi's children could only revert to the owner.
43. As it were, while the Appellant's father – Kinyutho Ritho, was Thumbi's half-brother, he was not a member of the clan known as Aitharandu-a-mbari-ya Mbogo. Unlike Thumbi who was considered a member of the clan and living within the clan, the Appellant's father could not be considered a son to Waweru Wachiari. He belonged to a distant clan far away in North Kinangop and it was wrong, nay, an act of bad manners for him to proceed and lay claim to the suit property. His claim that he initially occupied the land before moving to North Kinangop was an outright lie as all the evidence pointed to his being born in North Kinangop where his father had his own land.
44. As the Court observed in *Kanyi -vs- Muthiora* (1984) KLR 712:
- “The registration of the land in the name of the appellant under the Registered *Land Act* (Cap. 300) did not extinguish the respondents rights under Kikuyu customary Law and neither did it relieve the appellant of her duties or obligations under Section 28 as a trustee ... The trustees referred to in Section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under customary law. If the Act had intended to exclude customary law rights it would have been clearly stated.”
45. Having established that the suit land was ancestral land and that the same was held in trust for the 1<sup>st</sup> Respondent's family, I was unable to fault the Learned Trial Magistrate on her determination of the issue. In the circumstances of this case, there was no way in which the Appellant's father could be considered as the rightful heir of his half-brother, Thumbi.
46. There was equally very little by way of evidence to support the 2<sup>nd</sup> Respondent's contention that he was a bona fide purchaser for value without notice. While at Paragraph 5 of his Further Statement dated 21<sup>st</sup> August, 2019 he asserts that he visited the land prior to purchase and found no form of development or occupation thereof, the same cannot be true. I say so because it was the testimony of the Appellant himself that the land would be leased out from time to time and hence there would have been some evidence of cultivation apparent thereon.
47. At any rate, the 1<sup>st</sup> Respondent and his brother have asserted that they had been always cultivating the land as Thumbi was residing in Nairobi. That claim is given credence by the fact that barely a year after he entered into the Sale Agreement with the Appellant to purchase the suit property, he was forced to ask his Advocates to write a letter dated 25<sup>th</sup> August 2015 asking the 1<sup>st</sup> Respondent and his brother to vacate the land. If the 2<sup>nd</sup> Respondent had purchased the suit property and taken possession thereof, I did not think he would a couple of months down the line be accusing people of trespassing there into without explaining how the alleged trespassers got into the land in the first instance.
48. At any rate, it was apparent that as at the time of the alleged purchase of the suit property in 2014, the matter was the subject of active litigation in these proceedings. It was not disputed that as at the time the suit property passed hands from the Appellant to the 2<sup>nd</sup> Respondent, the matter was pending litigation before this Court. That sale thus goes against the common law doctrine of *lis pendens* which aims at preserving the status of matters that have disputes in Court pending the determination of such litigation.



49. As Turner L. J long stated in Bellamy -vs- Sabine (1857) 1 De J. 566:

“(Lis pendens) is a doctrine common to the Courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the Judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same cause of proceedings.

...

Every man is presumed to be attentive to what passes in the Courts of justice of the State or sovereignty where he resides. Therefore, purchase made of a property actually in litigation pendente lite for a valuable consideration and without any express or

implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the Judgment or decree in the suit.”

50. As I understand it, the doctrine of lis pendens is based on justice, equity, expediency and good conscience. It is based on sound policy. The concept of the rule of law anticipates fair and expeditious litigation of disputes. The law does not allow or encourage litigants to give rights which are still under dispute to others who are not litigants and in the process prejudice fellow litigants. Thus in the circumstances herein, the Appellant could not give away any rights over the suit property to the 2<sup>nd</sup> Respondent. Having purported to acquire such property in litigation, the 2<sup>nd</sup> Respondent is bound by the findings of the Trial Court.

51. It follows that I was not persuaded that the Learned Trial Magistrate had misdirected herself in the manner stated in the Memorandum of Appeal dated 3<sup>rd</sup> June, 2021 or at all.

52. In the premises, this Appeal is dismissed with costs to the 1<sup>st</sup> Respondent.

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

**In the presence of:**

Mr. Nderi for the Appellant

Mr. Kebuka Wachira for 1<sup>st</sup> Respondent

No appearance for 2<sup>nd</sup> Respondent

Court assistant – Kendi

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**J. O. Olola**

**JUDGE**

