



REPUBLIC OF KENYA



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**Munene v Nkoroi & another (Environment and Land Appeal
E044 of 2022) [2023] KEELC 20899 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20899 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E044 OF 2022
CK NZILI, J
OCTOBER 18, 2023**

BETWEEN

GOERGE MUNENE APPELLANT

AND

SABINA NKOROI 1ST RESPONDENT

ERIC MURANGIRI BUNDI 2ND RESPONDENT

*(Being an appeal from the judgment and decree of Hon. E. Ayuka Senior
Resident Magistrate in Nkubu ELC No. 95 of 2019 delivered on 30.6.2022)*

JUDGMENT

1. By a memorandum of appeal dated 5.7.2022, the appellant faults the lower court judgment because the court erred in law and, in fact, in:-
 - i. Holding that LR No. Nkuene/Kithunguri/2xx was registered in the appellant' and was transferred to him as a gift in trust for the respondents.
 - ii. Not considering material evidence on how the appellant acquired the land and that the respondents were far from the suit property.
 - iii. Failed to consider and or ignored to analyze the evidence by the appellant's witnesses, which was not challenged at cross-examination.
 - iv. Recording bits of his evidence and leaving out the crucial parts, primarily where the 1st respondent was residing and how both respondents had benefited from the succession cause by being granted their respective shares of the estate of their late father
 - v. Failed to establish that a registered owner of the land had powers to utilize and transfer his to anyone's provided legal transfer procedures were followed, including his brothers.



- vi. Failed to find that the respondent's evidence had not been challenged and rebutted both in cross-examination and examination in chief and that of the respondent was not recorded in the proceeding.
 - vii. It is imported its evidence, facts, and findings contrary to the evidence on record and the law.
 - viii. Shifted the burden of proof from the respondents to the appellant to show that the land was not trust land.
2. As a first appeal, the court is mandated in law to re-examine, re-evaluate, and re-appraise the lower court record, come up with individual findings both on facts and law while at the same time mindful that the trial court had the opportunity to hear and observe the witness first hand. See *Peter vs Sunday's Post Limited* (1958) E.A 124.
 3. At the trial, the respondents, as the plaintiffs had by an amended plaint dated 6.11.2019, sued the appellant, claiming that they shared a common grandmother, the late Sabelina M'Mwamba, whose only child was their mother, Kanyore Vierina. The respondents averred that during her lifetime, the late Sabelina M'Mwamba had two parcels of land, namely LR No's Nkuene/Kithangari 4xx and 2xx, which were ancestral lands.
 4. The respondents averred that the entire family of her grandmother settled and lived on the latter parcel of the suit land, which housed the ancestral home. It was averred that the deceased registered LR No. 4xx in the name of the appellant not as an absolute gift, but to hold it in trust for the other children of the sole daughter aforementioned and share it among them once they reached the age of majority or upon demand.
 5. The respondents averred that after they demanded a share from the appellant, he refused or breached the trust bestowed upon him by denying their rights to share, access, and transfer the ancestral land. They termed the acts by the appellant as discriminatory and prayed for a declaration that the suit land was held in trust and that the same be subdivided in a share measuring 1.24 acres or thereabouts to be transferred to them. The amended plaint was accompanied by a list of witnesses' statements and documents dated 4.11.2019, a case summary, and issues for determination dated 10.1.2020.
 6. Through a statement of defense dated 19.11.2019, the appellant opposed the claim and contended that the subject parcels of land belonged to the late Sabelina M'Mwamba, which were never passed to her out of a family lineage as to constitute ancestral land. The appellant averred that he was the only one living with the deceased right from birth, whereas the respondents lived and were settled in their father's residence in the Murugu area and never lived with the deceased during her lifetime. He denied the alleged registration of LR No. 4xx as trust property since none was captured in the registration documents or ever existed through a trusteeship deed.
 7. Further, the appellant averred that his late mother and the wife of the late Gervasio Ritara Kuguria never raised any such claim during his grandmother's lifetime alongside the respondents, yet there was an elder since registration in 1965. Additionally, the appellant averred that the respondents were beneficiaries of the estate of the late Gervasio Kitara Kuguria following a certificate of confirmation in Nkubu PMCC No. 25 of 2016; hence, they were estopped from raising any entitlement to the suit land. The defence was accompanied by witnesses' statements and documents dated 15.6.2020.
 8. From the court records, the respondents, by a notice of withdrawal of advocate dated 30.7.2020, relieved the law firm of Murango Mwenda & Co. Advocates from representing them. It is also unclear from the record if any reply to the defense was filed to the defendant herein. The trial court, however,



by an application dated 3.8.2020, granted an inhibition order against the suit land till the hearing of the case.

9. Sabina Nkoroi testified as PW 1. Her testimony was that the appellant, as her elder brother, was registered as the owner since their late mother was insane. Her evidence was that the appellant, despite a request, declined to subdivide and transfer a share to her and the 2nd respondent, the son of her late younger brother. PW 1 told the court that her residence was on land belonging to their son Paul Nkoroi next to the disputed land since she was not allocated any land. She said that the appellant took advantage of the situation and solely registered the land under his name, yet it belonged to their maternal grandmother, whom she had taken care of but left at some point to go and reside elsewhere. She termed her late grandmother illiterate to have transferred the land to the appellant, hence her attempt to unsuccessfully register a caution over it in 2018 and the complaint before the area chief.
10. Erick Murangiri and Margaret Mureti testified as PW 2 and 3. PW 2 told the court that the appellant was his uncle and brother to his late father, John Bundi, who used to live and had a house on the suit land before he passed on in 2008. PW 2 testified that his late father showed him the land and the house, which still stood on the suit land before he passed on. He testified that he was chased away from the land soon after his father's death by the appellant and, therefore, had nowhere to stay. He testified that Gervasio was his grandfather and, out of a succession cause of his estate, acquired 1.50 acres of land as LR No. 4xx.
11. PW 3, a sister to the appellant, told the court that their late mother allocated two acres each to their brothers and the 1st respondent since she used to take care of their deceased grandmother. PW 3 told the court that in breach of the instructions by the late mother, the appellant chased away the 1st respondent, demolished her structure, and cut down her banana trees and that interventions by the family were thwarted by the appellant alleging that the land solely belonged to him.
12. Similarly, PW 3 confirmed to the court that her two other brothers, Julius Magaju and Martin Kiume, had acquired two acres each, but the appellant chased away the respondents from their portion and were now living next to the suit land on a piece of land belonging to a neighbor by the name Nkoroi. PW 3 clarified that her late mother was of unsound mind while the grandmother was illiterate and hence could not have given consent to transfer the land.
13. PW 4 was Mboroki Marete, an uncle to the 1st respondent. His testimony was that her late sister and mother to the 1st respondent gave the land to the appellant to hold it in his siblings' trust, whose initial registered owner was Sabelina M'Mwamba, a sister-in-law who used to live on the suit land. He confirmed that the appellant chased away the respondents from the suit land and demolished their structures. PW 4 clarified that he was present when the land was shared out and that the 1st respondent's late mother was of unsound mind.
14. PW 5 was Mungania Manene, a neighbor of the appellant. His testimony was that the late Sabelina M'Mwamba summoned him and clarified that her land would be shared by the 1st respondent, who used to take care of her and her brothers and was specific that her homestead and house would go to the 1st respondent. He said that after the late Sabelina M'Mwamba passed, PW 1 continued to live on her land but was later chased away by the appellant, who demolished the homestead. He termed the wishes of the initial owner as clear as to the manner and nature of the registration of the land held by the appellant, given that it was to be inherited by the 1st respondent and her siblings in equal shares. PW 5 testified that though the 1st respondent had been married elsewhere, she returned to the suit land with her children and continued living therein until, for reasons unknown to him, she was chased away from the land by the appellant. From the record, it is unclear if the respondents formally produced the list of documents alluded to above as exhibits.



15. George Munene, the appellant, testified as DW 1. His testimony was that their late father was Gervasio, while Sabelina M'Mwamba was a maternal grandmother who gifted him the suit land in 1965, for he used to live with her. He denied that her sister and nephew, the 1st and 2nd respondents, ever lived on the suit land. DW 1 told the court the respondents could only inherit land from their late father, Gervasio, which was processed at Nkubu Law Courts as per confirmation of grant produced as D. Exh No. 1 (a) & (b). DW 1 told the court that his late father had tried to counsel him to share his land with his siblings, which suit was thrown out. She termed her sister, the 1st respondent, as a wife to this neighbor, Nkoroï, but not a beneficiary of the ancestral land.
16. DW 1 told the court that her late maternal grandmother had given him another parcel of land, which he transferred to his brother Julius Magaju, LR No. Nkuene/Kithangari/4xx as per a land control board consent dated 9.4.1969, which he produced as D. Exh No. (2). DW 1 confirmed that his late mother used to till the land. He produced a copy of the letter dated 24.5.1971 as D. Exh No. (3), copy of green card as D. Exh No. (4), proceedings at the land registrar's office over the caution as D. Exh No. (5) and the documents to show that the respondents were beneficiaries of the ancestral land as D. Exh No. 6 (a), (b), (c) & (d). DW 1 also testified that after the land was registered under his name, the late grandmother lived for 21 years, and none of his parents or siblings, who were already adults, objected to it until 2000, when his father raised the issue and later filed a suit in 2019. He denied that the 1st respondent cared for his late grandmother since she owned a parcel from their late father.
17. Further, DW 1 denied that his land was either family or ancestral, even though he never purchased it. DW 1, in cross-examination, also admitted that his late father used to till the land for his benefit since 1969, but eventually surrendered it to him. He denied that she used to live or stay on the land. DW 1 denied that he allegedly chased away the respondents from the land or that an injunction had been issued against him.
18. Additionally, DW 1 clarified that his late father demanded that the land be shared with his siblings, which dispute went before the area chief. Nevertheless, DW 1 acknowledged sharing two acres of the land with his brother Martin Kiumbe and acquiring 2 ½ acres from his late father's estate.
19. DW 1 admitted before the court that none of the late grandmother's children, particularly his late mother, attended the land control board meeting leading to the land transfer to him. He denied any alleged disputes over the land with his late mother since he used to farm and support his grandmother. He termed the land as a gift from her.
20. Mutonga Ntiba, Martin Kiumbe, and Josephat Mungira testified as DW 2, 3 & 4. On his part, DW 2 told the court that he attended the dispute over the suit land between DW 1 and his late father at the area chiefs camp, where it was decided that the suit land initially belonged to the appellant's late grandmother and therefore did not form part of the ancestral land since it was a gift.
21. DW 3, a brother to the appellant, told the court that their ancestral land was in the Maguru area and that only the appellant moved and started caring, staying, or living with his late grandmother until she gifted him with the suit land in 1965. He confirmed the dispute handled at the chief's camp over the land involving his late father and the appellant.
22. DW 3 said that he had been living in the suit land following authorization by the appellant. DW 4, the assistant chief of the area, confirmed to the court that he handled the claim over the suit land and made a decision that did not form part of the appellant's late father's estate as per the title deed issued to the appellant in 1969.



23. With this evidence, the trial court found that the appellant held the suit land in trust and should be transferred to the respondents.
24. With leave of court, parties agreed to and were directed to canvass the appeal through written submissions to be filed by 13.8.2023. None were filed!
25. The issues calling for the court's determination are:-
 - i. If the appeal before the court is competent.
 - ii. If the trial court arrived at the impugned judgment based on the pleading, facts, and evidence on record before it.
 - iii. If the trial court applied the relevant law on all the pleaded facts and evidence before it.
 - iv. If the appeal has merits.
26. The primary pleadings before the trial court were the amended plaint dated 6.11.2019 and the statement of defense dated 19.11.2019, all accompanied by very detailed and comprehensive witness statements and a list of documents. The respondents had pleaded, and the appellant had admitted that the suit land was initially acquired and registered with their maternal grandmother, the late Sabelina M'Mwamba's name.
27. The 1st respondent, in her witness statement, narrated that during adjudication and gathering, part of the land in the Kithunguri area was moved to the Muguru area, which was smaller, while the more significant portion was left in Kithunguri. The 1st respondent stated that the late grandmother directed the appellant as the eldest son to her only living child, to be transferred to the land in Munguru as his but to hold the larger portion where she lived in trust for the rest of the siblings, including a specific portion as her share.
28. The respondents averred and testified that after gaining the age of majority, the appellant reneged on the grandmother's directives or wishes until out of pressure he shared some parcels with two brothers, Julius Magaju getting LR No. Nkuene/Kithunguri/4xx and a portion of the suit land to Martin Kiumbe, who has settled therein but had no title deed.
29. The respondents averred that they lived on the suit land until the appellant employed tricks to get the 1st respondent out of the land, eventually demolished the houses, and blocked her from accessing, using, or sharing the land. The respondents urged the trial court to find that a customary trust existed and that the land should be transferred to the intended beneficiaries.
30. In his defense, the appellant admitted that the suit land initially belonged to his maternal grandmother, who willingly, voluntarily, and legally transferred it to him during her lifetime to own absolutely with no intended trust in favor of his late mother and his siblings. Additionally, the appellant denied that the land was ancestral or family land or occupied by the respondents as alleged or at all, who never raised any ownership or possessory rights during the lifetime of the initial owner, either individually or through his late mother, Kanyore Vierina. Moreover, the appellant averred that the only ancestral land or family land that the respondents were entitled to had already been shared from the estate of the late Gervasio Kitara Kungura.
31. It is a trite law that parties are bound by their pleadings, and issues flow from them. In the case of Raila Odinga & others vs. IEBC & others (2017) eKLR, the court held that pleadings play a pertinent role in an adversarial system, and parties must not be allowed to travel outside their pleadings. In this case, the respondents filed issues for determination dated 10.1.2020. They isolated pertinent issues namely;



- the circumstances surrounding registering the suit land in the appellant's name, whether there was an intended trust; if the trust had been breached, and whether the court should direct the appellant to honor the trust by transferring the land to them.
32. In his defense and witness statement dated 29.11.2019, the appellant admitted the relationship between him, the initial owner of the land, and the respondents. He stated in the witness statement that her late grandmother had acquired the land from her late husband, M'Mwamba M'Mamuru. He averred that he was the one living with and caring for the deceased grandmother who gave him the land as a gift, as evidenced by a letter of consent and by the land register in 1965. He denied any trusteeship deed existed, was created, registered, or envisaged. Further, the appellant averred and testified that for over 54 years, no claim was raised against him. He further denied that since her late grandmother was in good health and frame of mind to transfer the land, he followed all the necessary legal processes in acquiring the land.
33. Additionally, the appellant denied any alleged use, occupation, and possession of the suit land by the respondents. The appellant, however, admitted that he, on his own volition, shared out LR No. Nkuene/Kithunguri 4xx with one of his brothers as a registered holder. The ingredients to found a customary trust were set out in *Isaack M'Inanga Kiebia vs Isaaya Theuri M'Lintari & another* (2018) eKLR. The court observed: "Each case has to be determined on its own merits and quality of evidence."..... In addition, the court also held that a customary trust would be presumed to have been created in favor of family members whether or not they are in occupation of the land if the following elements are in existence:-
- a. The land was before the registration family, clan, or group land.
 - b. The claimant belongs to the family, clan, or group.
 - c. The relationship of the claimant to such a family, clan, or group is not so remote or tenuous to make his claim adventurous.
 - d. The claimant would have been entitled to be registered as an owner or other beneficiary of the land, but for some intervening circumstances.
 - e. The claim was directed against the registered proprietor, a family, clan, or group member.
34. In this suit, the respondents pleaded that the suit land belonged to their maternal grandmother, whose only surviving child was their late mother. The ownership of the suit land by the late Sabelina M'Mwamba as the maternal grandmother of the parties herein is not in dispute. D. Exh No. 5. 3 indicates that the late Kanyore Gervasio was the mother of the appellant and the respondents herein, who also acquired some coffee farm numbers on behalf of his mother from the Nkuene Farmers Coop Society. D. Exh No. 4 was a copy of a green card showing that the register for LR No. 2xx was opened on 20.9.1965 in the name of Sabelina Mwamba, and the title deed was issued on 18.3.1968 under her name. The record shows that the appellant was transferred the land as a gift on 7.5.1969.
35. The appellant testified that he acquired the land lawfully as per the fees paid on 27.3.1969, stamp duty paid on 7.5.1969, 18.3.1969, and the letter of consent all produced as D. Exh No's. 2, 3, 4 & 6 (a), (b), (c) & (d).
36. The date when the consent was issued was not indicated. The application referred thereto applying for the consent duly executed by the initial owner of the land was missing. Minutes for the land control board meeting held on 9.4.1969 were not produced before the trial court. In cross-examination, the appellant admitted that none of the children of the initial owner, including his late mother, attended the land control board meeting to authorize or consent to the transfer.



37. No document was produced duly signed by the initial owner to show that she had voluntarily and willingly consented to the land being registered under the appellant's name. The appellant tendered no evidence that the initial owner and her relatives, including his mother and the respondents, were aware of the changes to the title register before the appellant's late father registered the caution. Other than the land control board consent and stamp duty receipts, the appellant failed to produce any transfer forms duly signed and executed by the transferor as evidence that legal procedures were duly followed before the land came under his name.
38. Trust is established as a matter of fact. In *Juletabi African Adventure Ltd & another vs Christopher Michael Lockley* (2017) eKLR, the court held that trust is proved through evidence, and a court never presumes or implies a trust except in cases of absolute necessity to give effect to the intention of the parties. In *Jackson Mwiti M'Rinyiru vs Silas M'Rinyiru Mbui* (2020) eKLR, the court observed that it was not enough for the appellant to state that the suit land belonged to his grandfather and therefore was ancestral. In *M'Ikiugu M'Mwirichia & Another vs Esther Nthiira M'Ikiugu & others* (2009) eKLR, the court observed that whether as an issue of intergenerational equity arising from ancestral land or trust, the 1st appellant held the land in trust for the respondents and that he was not at liberty to dispose of the same without prior approval of ultimate beneficiaries. The court concluded that the suit land had its roots in ancestry.
39. In the present suit, the appellant admitted that the late grandmother acquired the land as a widow of the late M'Nabea M'Muru. The land ideally would have gone to the appellant's late mother as the first beneficiary, unlike the appellant in line with Section 39 of the *Law of Succession Act*.
40. In their witness statement, the respondents gave a cogent history of how the land came under the name of their grandmother, who had only one brother, the appellant, and after their uncle passed on during the Mau Mau period. The respondents' witnesses gave a history of the circumstances under which the respondents settled on the land and the wishes of the late grandmother in registering the two parcels of land in the names of the appellant.
41. The appellant never disputed the history given by the respondents. His evidence is that he was an absolute owner of the two parcels of land, which he merely voluntarily gifted his two brothers. He pleaded and testified that the two acres he transferred to Julius Magaju as LR No. 4xx and settled two acres of land to Kiumbe had nothing to do with any alleged wishes by his late grandmother or pointed to a trust. While admitting that the respondents were a sister and nephew, he averred and testified that all they were entitled to was granted to them out of the succession cause over his father's estate on the paternal side. He denied that he had discriminated against his sister, the 1st respondent, or breached any alleged trust.
42. The respondents pleaded that the appellant was registered as the elder son to hold the land in trust for the grandchildren of the initial owner listed in paragraph 10 of the amended plaint. Julius Martin Kiumbe testified as DW 3 and admitted that he was on the suit land under the appellant's authority. He told the court that LR No. 4xx had been transferred to his deceased brother by the appellant and that it formed part of the disputed land. This evidence was corroborated by PW 3, a sister to the appellant and the 1st respondent, and PW 4, an uncle to the parties herein.
43. The circumstances of the land registration in favor of the appellant and the manner of occupation by the respondents were also confirmed by PW 5, a neighbor to the parties. DW 1, in his witness statement and cross-examination, clarified that his late mother used and or tilled the land for her benefit since 1969.



44. On the other hand, DW 3 told the court that the late Sabelina Mwamba passed on around the year 1985, and was living on the suit land. Other than DW3, no other family member was called to hold credence to the appellant's fashion of events that no trust existed. DW 3 evidence was also unreliable to support the appellant's version, given that he was also a beneficiary of the envisaged trust.
45. In *Kimani Githanja vs Jane Njoki Githanja* (1983) eKLR, the court observed that land inheritance among the Kikuyus envisaged the eldest son assuming the title of Muramati once his father passed on who would have no more rights than his brothers except the title. In *Jason Gitimu Wanyara vs Martin Munene Wanjara & others* (2012) eKLR, the court observed that land registration did not extinguish the rights of other parties entitled to it under Kikuyu customary law.
46. In *Peter Gitonga vs Francis Maingi M'Ikiara Meru HCC No. 146 of 2000*, the court observed that the circumstances surrounding registration must be looked at to determine the purpose of the registration as to whether a trust was envisaged.
47. Applying the preceding case law, I find that the respondents' pleadings and evidence to have satisfied all the elements to found a customary trust under *Kiebia vs M'Lintari* (supra).
48. The trial court relied upon the facts and evidence from the pleadings, including witness statements and documents regarding the name Sabelina M'Mwamba, the matriarch, and the history of the family relationships vis a vis the suit land. The appellant could only have been first among equals with the respondents in so far as the entitlement of the suit land was concerned. It was not open for him to deal with the suit land as he pleased without considering the rights of the respondents and DW 3.
49. The appellant has not demonstrated which documents and facts were not taken down or considered or which were foreign and which the trial court imported.
50. The appellant had the duty to rebut the presumption of a trust. In *Mutiso vs Mutiso* (1988) eKRL, the court observed that even if a gift were indicated, it would still be that the beneficial ownership was intended to remain in the person making the gift.
51. In this appeal, the appellant urged the court to find that the gift was absolute. The appellant admitted that his late grandmother lived on for another 21 years, alongside his late mother on the suit land. Evidence tendered is that the respondents were also on the suit land during the lifetime of the initial owner of the land and the appellant's late mother.
52. The appellant blamed the respondents and pleaded that the claim was untenable due to inordinate delay. In law, a claim based on trust is never time-barred according to Section 20 (2) of the Limitations of Actions Act. The appellant pleaded that there was no intention to create a trust. Therefore, he had the onus to rebut any alleged trust. See *JBR vs IMM* (2019) eKLR and *HN vs JNM* (2019) eKLR.
53. The upshot is that I find the appeal lacking merits. The same is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 18TH DAY OF OCTOBER 2023

In presence of

C.A Kananu

Munene for appellant

HON. CK NZILI

ELC JUDGE

