



**Lucheli v Lucheli (Environment & Land Case 268 of 2017)  
[2023] KEELC 20748 (KLR) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20748 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 268 OF 2017  
DO OHUNGO, J  
OCTOBER 17, 2023**

**BETWEEN**

**JOSHUA NAMISI LUCHELI ..... PLAINTIFF**

**AND**

**ENOCK SHANGALA LUCHELI ..... DEFENDANT**

**JUDGMENT**

1. The parties herein are brothers, the children of Jairo Lucheli and Robai Nechesa Lucheli (both deceased). The plaintiff initially filed this suit on 13<sup>th</sup> September 2012 as Kakamega HCCC No. 237 of 2012. The matter was later transferred to this court, hence its current case number.
2. The plaintiff averred in his plaint dated 1<sup>st</sup> August 2012 that the parcel of land known as N. Kabras/Malava/938 (suit property) was registered in the name of their mother to hold in trust for the plaintiff and the defendant and that their mother transferred it to the defendant to hold in trust for himself and the plaintiff. The plaintiff therefore urged this court to make an order that he is entitled to 15 acres out of the suit property. He further sought for costs and interest therein.
3. The defendant filed his defence on 19<sup>th</sup> October 2012 and averred that he is the registered proprietor of the suit property and therefore entitled to the whole of it. He denied the plaintiff's other allegations and urged the court to dismiss the suit with costs.
4. At the hearing, the plaintiff testified as PW1 and adopted his witness statement as his evidence. He stated that the parties' father had several properties including the suit property. That their father had six sons including him (the plaintiff) and that their father gave family land to the rest of the brothers during his life. That Richard Songa was given parcel number S/Kabras/Chemuche/974, Peter Shalo was given parcel number S/Kabras/Chemuche/975, Elijah Fundi was given parcel number N/Kabras/Malava/930 and 931, Reuben Muchika was given parcel number S/Kabras/Chemuche/155 and that



the defendant herein was given parcel number N/Kabras/Malava/938 (the suit property) which he (the plaintiff) was to share equally with the defendant.

5. The plaintiff added that he is the registered owner of parcel number N/Kabras/Malava/1169 which parcel he purchased with his own funds and that sometime in the 2005 after their mother's demise, he discovered that the suit property was registered in the defendant's name he filed Tribunal Case number 6 of 2006 which he lost. That he thereafter appealed but the appeal was also dismissed. He added that the defendant was registered as the proprietor of the suit property as a trustee and that their homestead together with their parents' graves are on the suit property. That although the defendant is their last born, according to their Kabras culture, it is not mandatory that the last born inherits the homestead.
6. Limwechela Lucheli Wangatia, a sister to the parties herein, testified as PW2 and adopted her witness statement. She stated that their father died sometime in 1964 and left behind the suit property and that their mother died sometime in 2005. She further testified that their mother told them that the suit property should be shared equally between the plaintiff and the defendant.
7. Samwel Luvembe Musee, a cousin to the parties, testified as PW3 and after the parties' mother died in 2005, he was appointed by the family to oversee distribution of her estate including the suit property, but they failed to agree.
8. Filbert Liwa Nzavali testified as PW4 and stated that he was a Principal Fingerprint Officer at National Registration Bureau. having worked as such for 28 years. That their office received an exhibit memo form from Kakamega CID on 14<sup>th</sup> May 2019 and attached to it were application for consent of the Land Control Board dated 3<sup>rd</sup> December 1980 and transfer of land form dated 19<sup>th</sup> December 1983 with request that they determine if the fingerprints thereon were identical with known fingerprints of Robai N. Lucheli. That they did their verification on 17<sup>th</sup> May 2019 and found that the thumbprints were identical.
9. Number 69287 Police Corporal Peter Maritim testified as PW5 and stated that the plaintiff went to their office on 5<sup>th</sup> January 2018 and complained that the defendant had fraudulently acquired the suit property sometime in 1984 during the lifetime of their mother. That the plaintiff requested PW5's office to help him establish if the thumb print impressions on land transfer forms dated 19<sup>th</sup> December 1983 matched those of his late mother. He added that he findings of the fingerprint examiner showed that the defendant did not commit any offence.
10. The plaintiff's case was then closed.
11. During defence hearing, the defendant testified as DW1 and adopted his witness statement dated 6<sup>th</sup> October 2012. He stated that their father had only ten acres of land but through the efforts of his siblings with the exception of the plaintiff, they expanded the land to 30 acres which was registered in their mother's name at adjudication as the suit property. That his brothers also acquired other pieces of land which were then shared amongst them sometime in 1979 but of all his siblings, he received the least acreage. He added that according to customs, he remained in their homestead which was on the suit property as his brothers including the plaintiff moved to their respective pieces of land. He further stated that it was only after their mother's demise that the plaintiff started laying claim to the suit property.
12. The defendant went on to testify that a meeting was called by their late mother in February 1979 over sharing of property and that he was given the suit property at the meeting while the plaintiff was given land parcel number N/Kabras/Malava/1169 which the plaintiff later purported to have purchased.



13. Peter Masayi Shachora testified as DW2 and stated that the parties herein are his nephews and that he attended a meeting in 1979 during which property including land and animals was shared. That at the meeting, the plaintiff was given land parcel number N/Kabras/Malava/1169 while the defendant was given the suit property since he was last born and according to the parties' culture, the last born retains the place where the parents lived. That the plaintiff did not buy land parcel number N/Kabras/Malava/1169 and that the said parcel belonged to DW2's uncle but was auctioned by a bank due to default. That the family of the parties' father purchased the parcel at the auction and the plaintiff's pay slip was used to settle the balance through check off. He added that the other brothers reimbursed the plaintiff in respect of the amounts that were deducted from his salary.
14. The defence case was then closed. Parties thereafter filed and exchanged written submissions.
15. The plaintiff argued that the defendant fraudulently acquired the entire suit property before their mother's demise. That the handwritten minutes purportedly made on 4<sup>th</sup> February 1979 alleging distribution of the deceased's property contradicted themselves by not capturing the true names of the deceased's sons. He further contended that the suit property was ancestral land which belonged to their father but was registered in the names of their mother during adjudication and he was entitled to inherit it since his other brothers had been allocated other land. He urged the court to find that the defendant had fraudulently acquired the suit property and that the suit property ought to revert to the names of their mother for succession purposes.
16. In response, the defendant submitted that the suit property was given to him in the 1979 meeting while the plaintiff was given land title number N/Kabras/Malava/1169. That, consequently, the plaintiff is not entitled to any part of the suit property. The defendant further argued that the plaintiff's claims that he purchased N/Kabras/Malava/1169 are not true since DW2 testified that the plaintiff was only used as the nearest person whose payslip could be used for the transaction. He further argued that the plaintiff's claims of fraud had failed in view of the evidence of fingerprint examiners which showed that their late mother had executed the transfer. He concluded by submitting that the plaintiff is not entitled to half of the suit property and urged the court to dismiss the case with costs.
17. I have carefully considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether the plaintiff has established trust, and whether the plaintiff is entitled to the reliefs sought.
18. There is no dispute that the defendant is the registered proprietor of the suit property, a parcel of land that measures approximately 12.2 hectares or 30.14 acres. On his part, the plaintiff is the registered proprietor of the parcel of land known as N/Kabras/Malava/1169, which measures approximately 11.2 hectares or 27.67 acres.
19. As registered proprietors of land, the plaintiff and the defendant are entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Section 26 of the *Act* obligates the court to accept their certificates of title as conclusive evidence of their proprietorship of the respective parcels, unless the provisos under Section 26 (1) (a) or (b) are established. Although the plaintiff levelled accusations of fraud against the defendant in his testimony, no fraud was pleaded in the plaint and no prayer for cancellation of the defendant's title on account of fraud was included in the plaint.
20. Pursuant to Section 28 (b) of the *Land Registration Act*, all registered land is subject to overriding interests including customary trusts, unless the contrary is expressed in the register. The plaintiff has opted to challenge the defendant's proprietorship on account of trust. I have perused the certified copy of the register in respect of the suit property, which was produced, and I have not seen any exclusion of trusts.



21. Whether trust exists is a question of fact which must be proven through evidence. The key considerations are the nature of the holding of the land and intention of the parties. In *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, the Supreme Court stated as follows:

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 v. 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.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.

22. The plaintiff has contended that the suit property belonged to the parties' deceased father who passed away before adjudication and that it was registered in the name of the defendant to hold in trust for him and the plaintiff. A perusal of the certified copy of the register in respect of the suit property shows that the first registered proprietor was the parties' mother who became registered owner on 3<sup>rd</sup> June 1975. She later transferred the suit property to the defendant on 19<sup>th</sup> January 1984 and a certificate of title was issued to the defendant on 24<sup>th</sup> January 1984. Although the plaintiff made allegations that the transfer was fraudulent, I note that PW4 and PW5 who were the plaintiff's own witnesses confirmed that no offence was disclosed in the transaction.
23. While the plaintiff has contended that their mother transferred the suit property to the defendant to hold jointly for the defendant and the plaintiff, I note that the mother passed away on 5<sup>th</sup> November 2005, almost 21 years after the transfer. Although the plaintiff claims that he only knew of the defendant's exclusive proprietorship after the mother's death, I am not persuaded that was the case. There is a common thread in the brothers' ownership of land which shows that each acquired around 12 hectares of land and that the transactions took place between the late 1970s and mid-1980s. The date in respect of the defendant's proprietorship is no exception. Further, it has not been shown why the defendant or indeed the plaintiff would be entitled to only about 6.1 hectares which is much less than what the rest of the brothers were getting. Equally, why are the other brothers not claiming a portion of the suit property? The only plausible explanation is that the defendant acquired the whole of the suit property just like the plaintiff acquired the whole of N/Kabras/Malava/1169.
24. Even though the plaintiff claims that he purchased N/Kabras/Malava/1169, I note that he acknowledged under cross examination that a meeting took place in 1979 at which family properties were shared and that the minutes of the said meeting state that N/Kabras/Malava/1169 was given to him at the meeting. The parties' mother's action of transferring the suit property solely to the defendant is also consistent with the said minutes.



25. In view of the foregoing, the plaintiff has failed to establish trust. It follows therefore that the reliefs sought are not available. In the result, I find no merit in the plaintiff's case, and I therefore dismiss it. Considering the relationship between the parties, I make no order as to costs.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 17<sup>TH</sup> DAY OF OCTOBER 2023.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

The Plaintiff present

Mr Nyikuli for the Defendant

