



**Tundwe v Wasike (Environment and Land Appeal E022 of 2021)  
[2023] KEELC 21563 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21563 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E022 OF 2021  
EC CHERONO, J  
NOVEMBER 16, 2023**

**BETWEEN**

**REGINA NANG'UNDA TUNDWE ..... APPELLANT**

**AND**

**MARGARET NASIMIYU WASIKE ..... RESPONDENT**

*(being an Appeal arising from the Judgment/Decree by Hon. G.P Omondi  
(PM) delivered on 10th June 2021 in Bungoma CM-ELC NO. 88 of 2018)*

**JUDGMENT**

**INTRODUCTION**

1. The Appellant/Plaintiff, Regina Nang'unda Tundwe instituted a suit against the Respondent Margaret Nasimiyu Wasike before the Chief Magistrate's Court being Bungoma CM-ELC No.88 of 2018(hereinafter referred to as the former suit) seeking the following orders;
  1. Permanent injunction
  2. Eviction.
  3. Costs of the suit
  4. Any other relief.
2. The Respondent/Defendant, Margaret Nasimiyu Wasike filed a statement of defence and counter-claim dated on 12/6/2015. In her counter-claim, the Defendant/Respondent sought the following orders;
  - a. A declaratory order that the plaintiff holds land parcel no. w. bukusu/n. myanga/1909 in trust for the defendant



- b. Upon grant of prayer (a) above, an order directing the plaintiff to execute all the transfer forms and consents to vest title for land parcel NO.W. Bukusu/N. Myanga/1909 in the names of the Defendant in default the Deputy Registrar of this Honourable Court be authorized to execute all the necessary transfer documents on behalf of the plaintiff in favour of the defendant.
3. After the former suit was heard and determined, the plaintiff/Appellant's suit was dismissed and Judgment was entered in favour of the defendant in terms of the counter-claim on 10<sup>th</sup> June 2021. The plaintiff/Appellant was aggrieved and preferred the present Appeal on the following five(5) grounds;
    1. The learned Trial Magistrate erred in law and fact when he dismissed the plaintiff's case despite overwhelming evidence of ownership and occupation of the suit land.
    2. The learned Trial Magistrate erred in law and fact when he briefly, shallowly and casually summarized the evidence framed few issues and disregarded the strong case by the plaintiff.
    3. The learned Trial Magistrate erred in law when he admitted proceedings of the land Disputes Tribunal in Bumula Land Disputes Tribunal that were followed in the Provincial Land Disputes Appeals Tribunal but later quashed by the High Court at Bungoma in Civil Appeal NO.21 of 2004 by Justice Boaz N. Olao J.
    4. The Learned Trial Magistrate erred in law and fact when he heavily relied on extraneous evidence at the expense of direct and robust evidence adduced and awarded the counterclaim which did not specifically plead the type of trust making the same fatally defective in substance.
    5. The entire Judgment is shallow and contrary to the weight of evidence adduced as to what constitutes a trust and there was not prove of such trust by the counterclaim.
  4. When this matter came up for directions on 12/7/2023, the parties agreed to canvass the by written submissions.

### **The Appellant's Submissions**

5. The Appellant through the firm of J.W.Sichangi & Company Advocates gave a brief background to the facts as adduced by the parties and their witnesses before the trial court. In a way, the counsel attempted to regurgitate the evidence before the trial court by analyzing the same. The second limb of their submissions is on whether the trial Magistrate overlooked the issues raised in the appellant's case and or framed wrong issues. According to counsel, the Appellant's case was extremely clear and consistent in that she told the court how their common biological father entrusted her with the entire land and later shared out to her young sister, the respondent herein. they submitted that upon being given her share of land no. w. bukusu/n. myanga/1446, the respondent sold the whole of it to one miti otuba kibuyi. the learned counsel further submitted that the evidence by the appellant clearly shows that the initial land parcel no.w. bukusu/n. myanga/291 was transferred to the appellant on 17/6/1970 and that the green card shows that subdivision of the same land into parcels no.w. bukusu/n. myanga/1445 and 1446 was done on 8/12/1987 and that there is no proof that their late father actually participated to sell what he bequeathed his children to deprive the Respondent her share. He submitted that the Respondent alleges fraud in the sale and collusion but no particulars or evidence is given to support her allegations that her father colluded with the Appellant to sell her portion to one Miti Otuba Kibuyi.
6. Counsel also submitted that the trial court got it wrong when it observed in his analysis that the plaintiff and the defendant are sisters and their father Joseph Osura Mukule owned land W. Bukusu/ N. Myanga/291 but registered in the name of the plaintiff. He further observed that portion was sold



to Miti otuba kibuyi and the remainder shared between the plaintiff and the defendant. he submitted that the erred when it held that the plaintiff sold her portion w. bukusu/n. myanga/1910 and w.bukuu/n.myanga/1909 was left and that the appellant registered herself wrongly and denied the respondent her inheritance thereby enriching herself unfairly. he submitted that the pleadings and evidence as let by both parties clearly do not support that conclusion.

7. The learned counsel further submitted that the Respondent could not have taken occupation and possession of portion NO. W. Bukusu/N. Myanga/1909 in the year 1981 as the subdivision that created 1909 and 1910 was done in 1994, therefore it follow that in 1981, the parcel the Respondent claims to have been in adverse possession did not exist since a copy of the green card on page 88 of the record of appeal shows the entry was made on 1/11/1994 and could not have been in existence in 1981
8. The counsel submitted that the obvious conclusion is with the version given by the appellant who laid all the facts convincingly supported wit evidence showing that she is still the bona fide registered owner of NO. W. Bukusu/N. Myanga/1909 and that she is entitled to the protection of the law under Section 26(1) of the [Land Registration Act](#)
9. The third issue raised by the appellant is whether there was a trust established between the parties. On this issue, the advocate submitted that the respondent alleged to have taken possession of W. Bukusu/N. Myanga/1909 from 1981 until the filing of this suit. However, he submitted, evidence on record is clear that in 1981, the suit parcel no. W. Bukusu/N. Myanga/1909 had neither been created nor transferred in the Appellant's name. As such, he submitted, the claim for trust therefore does not lie. He further submitted that all witnesses stated that the Respondent invaded the land in 2010 when disputes were ongoing at the Tribunal. He further submitted that the ingredients for adverse possession were not established during the hearing other than allegations that the respondent entered the suit land in 1981. He submitted that the Respondent's entry into the suit land was not adverse but was with permission of the Appellant who was a sister. the following case was relied; richard wafwafwa songoi v ben munyifwa songoi c.a no.110 of 2016(kisumu).

### **Respondent's Submissions.**

10. The Respondent did not file submissions as directed by the court

### **Legal Analysis And Decision**

11. I have considered the extract of the record of appeal, the submissions by counsel fo the Appellant and the relevant law. In the case of *Selle v Associated Moto Boat Co. (1968)E.A 123*, the Court of Appeal delineated the mandate of the first appeal court as follows;

“...this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ...is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

Again in *Jabane v Olenja(1986)KLR 664 Hancox JA(as he then was)* held;

“I accept this proposition, so far as it goes, and this court does have power to examine and re-evaluate the evidence and findings of fact of the trial court in order to determine whether the conclusion reached on evidence should stand (see *Peters v Sunday Post (1958)E.A 424*). More recently, this court has held that it will not likely differ from the findings of fact of a trial judge who had the benefit of seeing and hearing all the witnesses, and will only interfere



with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did- see in particular Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1KAR, 278 and Mwana Sokoni v Kenya Bus Service (1982-88)1 KAR 870.”

12. It is not in dispute that the appellant herein who was the plaintiff in the former suit bungoma cm-elc no. 88 of 2018) had sought orders against the defendant/respondent for inter-alia eviction and permanent injunction in respect of the suit property parcel no. w. bukusu/n. myanga/1909. the defendant/respondent filed defence denying the plaintiff/appellant’s claim and in addition filed a counterclaim against the plaintiff/appellant seeking a declaration that the plaintiff holds the suit land parcel no. w. bukusu/n. myanga/1909 in trust for her. both the plaintiff/appellant and the defendant/Respondent gave sworn testimony and called witnesses in support of their respective positions.
13. The plaintiff/Appellant in his sworn testimony-in- chief stated that she was the sole owner of the original land parcel no. w.bukusu/n. myanga /291. she stated that she was given the land by the survey in 1970 and she lived in the land alone. she produced a certified copy of the green card as p-exhibit 1. she stated that she subdivided the original land into two portions being parcel no. w. bukusu/n. myanga/1445 and 1446. the plaintiff further stated that she was told give her sister who is the defendant/respondent herein some part of the land and she gave her 7 acres from land parcel no. w. bukusu/n. myanga/1446. she stated that the other parcel no.w. bukusu/n. myanga/1445 measuring approximately 9 acres belonged solely to her. the plaintiff/appellant further stated in her testimony that sometimes in 1971, there was somebody who bought land from the defendant/respondent and she gave him the title. she stated that she went to the d.o and the defendant/respondent and her were told to give it to the person who allegedly bought the land. she said that after the defendant/respondent sold her land in 1971, she got married. she stated that she subdivided her land parcel no.w. bukusu/n. myanga/1445 to two portions namely no.w. bukusu/n. myanga/1909 and 1910 and sold one portion being w. bukusu/n. myanga measuring 3 acres to one martin wekesa and remained with land parcel no.w. bukusu/n. myanga/1909 measuring 6 acres. she stated that in the year 2010, the defendant/respondent and her people beat her and occupied the suit land. she stated that prior to 2010, she was the one owning the suit land.
14. on cross-examination, the plaintiff/appellant admitted that the original land parcel no. w. bukusu/n. myanga/291 belonged to his father, one joseph oswero osuri and that she was born there and lived with in the land with their father. the plaintiff/appellant also stated that their father did not subdivide the suit land parcel no. w. bukusu/n. myanga/291. she also admitted that the defendant/respondent was born and raised in the suit land and that she gave her 7 acres in 1978. she further stated that the defendant/respondent sued her in the tribunal and was served summons to attend court. she stated that Land parcel NO.W. Bukusu/N. Myanga/1446 is owned by Miti and that she is the one who signed the transfer documents in favour of the said Miti. She said that Defendant/Respondent sold land to many people, some of whom she knew.
15. The Defendant/Respondent (DW1) testified on 17/4/2019 and introduced herself as a resident of Lupita and that the plaintiff/Appellant is her biological sister. She referred to her witness statement dated 9/9/2011 as well as a replying affidavit sworn on 25/8/2011 which she adopted in her testimony-in-chief. The defendant/Respondent also referred to documents annexed to her Replying affidavit referred hereinabove and produced as Exhibits. These were a green card and certificate of official search for the suit land parcel NO.W. Bukusu/N. Myanga/1909 produced as D-Exhibit NO.1 &2. She stated that the plaintiff and their father Joseph Oswero Osurisold 7 acres of the original suit land to one Miti Okubali and were given 17 cows which the plaintiff took and sold to educate her children. She stated that the suit land belonged to their father and that she is entitled it. She further stated that the original



- suit land was measuring 18 acres and her father(deceased) gave her a portion measuring seven and a half acres in the presence of the area chief in the year 1978. She said that she got married in 1967.
16. Hentry Nakhulia Wekesa(DW2) was sworn and referred to his witness statement dated 2/9/2011 which was adopted in her testimony-in-chief. He stated that in 1988, he was working as an Assistant Chief and one Joseph Mukule Osura (now deceased) called him to arbitrate a dispute between her two daughters Regina and Margaret who are the plaintiff and the defendant herein. He stated that he was to witness the subdivision of land where each was to get 6 acres. He said that there was another portion the said Joseph Mukule Osura had sold to one Miti Otumba which was separate. He stated that the subdivision of the land was done using feet. On cross-examination, the witness stated that when the suit land was being subdivided between the plaintiff and the defendant in 1988, the defendant was married and was not residing on the suit land but after she was given her portion, she started using the same. He stated that the plaintiff used to interfere with boundary features time and again as he used to receive reports. He recalled once receiving a complaint the plaintiff had interfered with the boundary features and immediately took action by arresting and taking her to myanga Police Station but the case was later withdrawn to explore an out of court settlement.
17. From the extract of the record particularly the testimony of the parties and the witness, it is clear that the original land parcel NO.W. Bukusu/N. Myanga/291 was a clan land given to Joseph Mukule Obure(deceased) and registered in the name of Regina Nang'unda Tundwe(Plaintiff) to hold in trust for herself and the family, including Margaret Nasimiyu Wasike. The plaintiff in her testimony stated that she had authority over the whole land and she subdivided into two portions namely W. Bukusu/N. Myanga/1445 and 1446 Measuring 9 and 7 acres respectively. The plaintiff also admitted that she was told to give her sister Margaret who is the defendant/Appellant 7 acres from land parcel NO. W. Bukusu/N. Myanga/1446. She stated that someone bought land from the defendant and she went to the D.O with Margaret and was told to give the land to that person. However, the plaintiff did not produce the alleged sale agreement showing that it was the defendant/respondent who indeed sold the land. The plaintiff did not also call the D.O who told her to give the land to the person who allegedly bought it. The plaintiff stated that the defendant/respondent sold her portion of land to one Martin Wekesa whom she was living with in his house in 1971 and immediately got married. DW2 in his testimony stated that he was called by Joseph Mukule Obura to witness the sharing of his land by his two daughters in 1988. In his attempt to resolve the dispute, the trial magistrate framed two issues for determination as follows;
1. Whether the defendant sold her share of land to Miti Wekesa?
  2. Whether there was any trust created?
18. In answer to the first issue, the trial Magistrate in his analysis observed as follows;
- “...In the replying affidavit sworn by the Defendant on 25/08/2011 and annexed the proceedings of Bumula Land Disputes Tribunal, Miti Otuba Kibuyi testified in the Tribunal and states that he bought land from Mzee Joseph Osura Mukule at a cost of 17 herds of cattle, one goat and one sheep. The payment went through the plaintiff who handed over to her father. By then the claimant, the Defendant in this case, was too young to be given any part of the said property as She was the objector’s plaintiff’s maid.
19. This corroborated the Defendant’s evidence that she did not sell land to Miti Otuba Kituyi
20. Further DW2’s evidence also corroborated that of the defendant when he stated that when father of the plaintiff called him to witness the subdivision of his land to his two daughters, the plaintiff and Defendant. By then there was a portion he had already sold to Miti Otuba Kibuyi...”



21. As regards the second issue, the learned trial magistrate in his analysis also stated as follows;

“...Applying the aforementioned principles to the case at hand, the plaintiff and Defendant are sisters and their father was Joseph Osura Mukule who owned land W. Bukusu/N. Myanga/291 but registered in the name of the plaintiff. Portion of the land was sold to Miti Otuba Kibuyi and the remainder shared between the plaintiff and Defendant. The plaintiff sold her portion W. Bukusu/N. Myanga/1910 and W. Bukusu/N. Myanga/1909 was left. The plaintiff got herself registered on W. Bukusu/N. Myanga/1909. If W. Bukusu/N. Myanga/1909 belongs to the plaintiff, then the Defendant got no share at all.”

I agree with the analysis and evaluation by the trial Magistrate and his decision in the impugned Judgment.

22. The upshot of my finding is that this appeal is devoid of merit and the same is hereby dismissed. Since the Appellant and the Respondent are biological sisters, I order each party to bear her own costs of this appeal and the costs in the trial court

Orders accordingly.

**READ, DELIVERED, DATED AND SIGNED IN THE OPEN COURT/VIRTUALLY AT BUNGOMA THIS 16<sup>TH</sup> NOVEMBER, 2023**

**HON. E.C CHERONO**

.....

**ELC JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

In the presence of;

Mr. Juma Waswa H/B Sichangi for Appellant

Respondent/Advocate-absent

OKWARO C/A

