



REPUBLIC OF KENYA



M'arimi & 2 others v M'arimi & 2 others (Environment & Land Case E029 of 2022) [2023] KEELC 21629 (KLR) (15 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21629 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E029 OF 2022**

CK NZILI, J

NOVEMBER 15, 2023

BETWEEN

JOHN M'ANAMPIU M'ARIMI 1ST APPELLANT

SALEMO MAKANDI M'ITONGA 2ND APPELLANT

MARY KATHURE M'ITONGA 3RD APPELLANT

AND

M'MAITIMA M'ARIMI 1ST RESPONDENT

M'RUKARIA M'ARIMI 2ND RESPONDENT

TABITHA GACHERI 3RD RESPONDENT

(Being an appeal from Meru Chief Magistrate ELC Case No. 9 of 2018 delivered on 20.5.2022 by Hon. T.M Mwangi Senior Principle Magistrate)

JUDGMENT

1. By a plaint dated 8.4.2013, the appellants had brought a claim against the respondents, as the defendants in the lower court, over L.R. No. Nthimbiri/Igoki/78, (hereinafter the suit land). They had averred that the suit land was registered in the name of the 1st respondent in trust for them as part of the family land, inherited from their late father and father-in-law, respectively. It was averred that the 1st respondent, without their consent or approval subdivided the suit land into L.R. No's. Ntimbiri/Igoki/660 & 661, and transferred L.R. No 660 to the 2nd respondent
2. The appellants averred that the actions of the respondent's registration and transfer created a constructive and resulting trust in their favour, and they were entitled to equitably and fairly share the suit lands as beneficiaries of the late M'Arimi Mutweri. Since the respondents had refused or declined to honour the trust, the appellants prayed for a declaration that the respondents held the suit lands in



- trust for them, an order that the suit land be subdivided into four equal portions upon consolidation with Parcel No. Nthimbiri/Igoki/782-87, and be jointly shared among the 1st, 2nd and 3rd plaintiffs and the two respondents. A case summary accompanied the plaint, issues for determination, witness statement dated 2.12.2014, documents dated 27.8.2019 and witness statements dated 13.4.2017 and 16.4.2019.
3. Through an application dated 5.3.2015, Tabitha Gacheri applied to join the suit as an interested party, alleging she was the owner and the occupant of LR Nthimbiri/Igoki/782. The interested party was allowed to join the suit by a ruling delivered on 4.3.2015. The respondents opposed the suit by a notice of preliminary objection dated 7.11.2017, that the suit was res-judicata Meru CMCC No. 300 of 2000. Further, the 1st and 2nd respondents filed statements of defence dated 1.10.2019 and 19.8.2019, respectively. The 1st respondent averred he gathered the suit land in his capacity and not in trust to anyone. He denied the suit land belonged to the deceased M'Arimi Mutweri.
 4. Similarly, the 1st respondent averred that the land was subdivided after the 2nd respondent obtained a decree in Meru CMCC No. 300 of 2000. He denied any alleged resultant or constructive trust as averred or at all or a breach thereof. The defence was accompanied by a list of issues, witness statements and documents dated 1.10.2019.
 5. On his part, the 2nd respondent averred there was Meru CMCC No. 300 of 2000, which was determined in his favour; the suit was res-judicata. He admitted the initial land as belonged to the late M'Arimi Mutweri. He also admitted the subdivisions were occasioned by a court decree after which he acquired L.R. No. Nthimbiri/Igoki/660, which he subdivided and transferred to various persons. He denied the alleged trust or breach thereof since his title was indefeasible. A list of documents dated 19.8.2019 accompanied the defence.
 6. Tabitha Gacheri, now the 3rd respondent in this appeal, filed a defence and counterclaim as a third defendant contrary to the leave granted by the court to join as an interested party. Describing herself as the 3rd defendant, she denied the contents of the plaint. She indicated she was a bona fide purchaser for value without notice of the alleged fraud and trust of No. L.R Nthimbiri/Igoki/782, which material facts were not disclosed in the plaint.
 7. By way of a counterclaim, the 3rd respondent joined issues with the appellants in the plaint. She indicated that on 16.11.2011, she bought L.R. No. Nthimbiri/Igoki/782 from the registered owner Joseph Kimaita Kiugu, for Kshs.650,000/= obtained a title deed, took vacant possession and embarked on developing it. The 3rd respondent averred she had conducted due diligence and established the seller was the registered owner free of any encumbrances or objections from the appellants. The 3rd respondent sought a dismissal of the suit, a declaration she was a bonafide purchaser for value without notice and a permanent injunction restraining the appellants from interfering with her quiet enjoyment and possession of the land. The defence and counterclaim was accompanied by a list of witness statements and documents dated 15.5.2015, a case summary, a list of issues, a further list of documents dated 25.7.2017, witness statements dated 24.10.2017, a further further list of documents dated 24.10.2017.
 8. By a reply to the 3rd respondent's defence dated 27.8.2019, the appellants reiterated that Meru CMCC No. 300 of 2000 was between the 1st and 2nd respondents and was determined exparte; hence, it was not a bar to the suit. The appellants averred that the 1st and 2nd respondents shared the suit land held in trust for deceased children and excluded them, with the 2nd respondent withholding material facts on the parties to the court. The appellants admitted that the 2nd respondent had subdivided the land in favour of the 3rd respondent as her daughter.



9. At the trial, John Anampiu M'Arimi testified as PW 1 and told the court that the 1st & 2nd respondents were his elder brothers. The 1st appellant's evidence, as per a witness statement dated 10.4.2019, was that the late M'Itonga was his brother, while the 2nd and 3rd appellants were his sisters-in-law and the legal administrators of his brother's estate. PW1 told the court his late father was the owner of L.R. No. Nthimbiri/Igoki/78, measuring 3.30 ha per the green card. He said his late father died in 1958 before the demarcation started in the area; hence, his elder brother, the 1st respondent, became the registered owner in 1972, to hold the land on behalf of the siblings.
10. PW 1 told the court that interventions by the Thangaine clan for him to share the land were in vain, though they had directed the 1st respondent to share to each of them 2 acres. He said the 2nd respondent resorted to filing meru CMCC No. 300 of 2000 and obtained a share from the family land. PW 1 said the share for the interested party should come from the 2nd respondent. He urged the court to grant the prayers sought. PW 1 produced a gazette notice as P. Exh No. (1), copy of record for L.R. No. Nthimbiri/Igoki/78 as P. Exh No. (2), decree in Meru CMCC No. 300 of 2000 as P. Exh No. (3) and limited grant of letters of administration ad litem to the 2nd & 3rd appellants as P. Exh No. (4).
11. In cross-examination, PW 1 told the court that the 1st respondent became the registered owner in 1963 as a trustee, even though his late father's name was not in the register. PW1 acknowledged he had filed an LDT Case No. 45 of 2010, which was set aside on appeal. PW 1 said he had been tilling the land, though he had not built any structure. PW 1 also said he was 17 years old in 1963 and used to live on his land in Kiirua. His view was that the land was ancestral or family land. He said his late father owned two parcels of land in the Kiamiriru land, where the 2nd and 3rd appellants lived, while the 1st and 2nd respondents lived in the Mpakone land. According to him, his homestead was on his land in Kiirua, and he had a title deed for it. PW 1 said he requested the 1st respondent about his share in 2008, was shown where it was, and then started tilling it. He said he was unaware of any subdivisions made on the land in 2001.
12. In cross-examination by the 3rd respondent, PW 1 said his claim was directed at the 1st respondent for the family land. He said the tribunal directed that they continue tilling the land. As to Case No. 300 of 2000, PW 1 told the court he used to attend the court case but never sought to be joined as a party or challenge the decree. PW 1 denied attending a dispute over the land before the area chief on 19.8.1997. Regarding subdivisions No's. 782, 783, 784, 785, 786, and 787 by the 1st respondent, PW 1 said he was unaware of the same. Further, PW 1 told the court that none of his sisters-in-law had lived in the Mpakone or suit land. He could not ascertain when his late brother used or lived on the suit land.
13. In re-examination, PW 1 told the court he was the 3rd born son of his late father and was brought up in Mpakone land until he became an adult. PW1 said he moved out of the Suitland after he was given government land in the Kiirua area. He believed the suit land belonged to his late father, so the 1st and 2nd respondents shared the land in CMCC No. 300 of 2000 but failed to include him in the suit.
14. Salome Makandi M'Itonga, as PW 2, adopted her witness statement dated 10.4.2019 as her evidence in chief. Her evidence was that her father-in-law had two parcels of land in the Mpakone and Kiamiriru areas. She said she was married by the late M'Itonga before independence and settled in Kiirua Nkando land, which his late husband bought and was registered under his name since he was not given government land. PW2 said she was aware of the tribunal proceedings and their award in 2011. She said she was not privy to the history of the suit land, nor could she ascertain when the land was demarcated. PW2 said her late husband did not erect any structure in the suit land. Her evidence was that her late husband had never filed any claim over the suit land, notwithstanding that the rest of his siblings



- acquired a share of their late father's inheritance. Her evidence was that her late husband used to till the suit land, hence the claim against the 1st respondent.
15. In re-examination, PW 2 told the court her late husband passed on 16.7.2017. That the 1st respondent took over the land in the Kiamiriru area while the 2nd respondent occupied the Mpakone land. She said she continued to agitate for the land at the clan level after her tribunal case was dismissed.
 16. M'Maitima M'Arimi testified as D.W. 1. He disowned his witness statement dated 1.10.2019 as his evidence in chief. This left his advocate on record with no option but to cease representing him. He said he had a title deed for LR Nthimbiri/Igoki/78 as per D. Exh No. (1) & (2), a green card and a title deed. He admitted the appellants were his relatives. He admitted that the 2nd respondent was residing on his land. He denied that the court gave him 3 acres out of his land since it proceeded exparte.
 17. D.W. 1 admitted that during the tribunal proceedings, he gave truthful evidence that his late father had three parcels of land in the Kiguru, Ngurumani and Kiamiriru areas, but told him to go and gather land in Nthimbiri while in school. He said his late father was buried at Chogoria Hospital while his mother was buried in the Nthimbiri/Igoki land, where he was living, which he acquired on his own in 1958 at the age of 19. He disowned all that he had said during the tribunal proceedings. He termed the 1st appellant as a brother. He also admitted that no land was left for the 1st appellant when his late father passed on. DW2 admitted that the 2nd respondent acquired 3.5 acres out of his land. He termed it as land grabbing. He admitted that demarcation occurred long before his late father passed on. He admitted that he had the largest share of land of all his family members. He denied that the land was family land. He denied any subdivision over his land following the court case with the 2nd respondent. In cross-examination, D.W. 1 disowned his D. Exh No's. (1) & (2). He admitted a clan meeting took place over the claim by the 2nd respondent in 1997. Further, D.W. 1 denied any resultant subdivisions over his land.
 18. M'Rukaria M'Arimi testified as D.W. 2 and adopted his witness statement dated 7.11.2017 as his evidence in chief. He told the court that he sued the 1st respondent in Meru CMCC no. 300 of 2000 on his behalf and that of his children since L.R. No.Nthimbiri/Igoki/78 was family land, for it initially belonged to his late father, alongside his other land in Kiamiriru. He confirmed that when his father passed on, they were all living in the suit land and he was buried in Chogoria Hospital due to pending medical bills. D.W. 2 told the court he was decreed 3.25 acres out of the 8 acres by the court, leaving D.W. 1 4.75 acres. He said the appellants were equally entitled to a share of the family land. Further, D.W. 2 admitted attending the tribunal case seeking a share of the family land. D.W. 2 insisted the land came under D.W. 1 on behalf of his siblings since his father passed on in 1978. He said the appellants should not pursue his share, which he legally pursued in court without objection from the appellants or the 1st respondent. D.W. 2 told the court that he proceeded to share the land with his children, and one of his sons sold his portion to the 3rd respondent.
 19. D.W. 3 was Tabitha Gacheri, who adopted her witness statement dated 15.5.2015 as her evidence in chief. She told the court that she lawfully acquired, possessed, and developed L.R. No. 782 as per a copy of a sale agreement dated 16.11.2011, banker's cheque, copy of the green card, search certificate, the court ruling dated 4.3.2015 and photographs of all produced as P. Exh No's. 3, 4, 5, 6, 7 & 8, respectively. She asked the court to hold that she was a bonafide purchaser for value without notice, which was not disputed, and allow her counterclaim. In cross-examination, D.W. 3 told the court she bought the land from his uncle Joseph Kimaita, who had obtained the land. She said she was prevented from developing it due to the inhibition orders. Her view was that if the appellants' suit is allowed, it would mean her land would be subjected to the trust, yet she was not privy to the history of the land before she became the owner on 25.11.2011 as per entry number 2 in the copy of the records.



- Further, D.W. 3 said the 2nd respondent acquired the land on 21.9.2011 and transferred it to the seller on 26.10.2011 and eventually to her name as per entries numbers 1, 2 and 3 in D. Exh no. (5).
20. Joseph Kimaita Kiugu testified as D.W. 4 and adopted his witness statement dated 24.10.2017 as his evidence in chief. He told the court that his parcel of land L.R No 782 was a subdivision of the suit land previously belonging to the 1st respondent. In addition, D.W. 4 said that on 29.8.1997, the 2nd respondent called elders demanding a portion from his brother, the 1st respondent, in the presence of the 1st appellant. He said the elders resolved that the 2nd respondent be given a portion measuring 3.25 acres in default to move to court for redress. D.W. 4 said the elders visited the land and placed the beacons on the identified portions.
 21. Unfortunately, the 1st respondent failed to follow the elders' recommendations, making the 2nd respondent file Meru CMCC No. 300 of 2000, which the 1st respondent failed to defend. D.W. 4 said the matter went to formal proof, a judgment and decree were issued, and during execution, the 1st respondent refused to surrender the original title deed to the land registrar or sign the necessary transfer forms or consents, which were signed instead by the court's executive officer.
 22. D.W. 4 told the court that the 2nd respondent attended the land control board for the subdivisions of the suit land into L.R. No. 660 and 661, the former going to the 2nd respondent, while the remainder was in the respondent's name. He also told the court that the 2nd respondent subdivided his portion into L.R. No.782, which he eventually sold to the 3rd respondent. He said the 1st respondent never appealed, set aside or sought a review of the said judgment or decree, yet he was all aware. He acknowledged there was LDT No. 45 of 2010, which award was never appealed against at the provincial level by the appellants. Lastly, D.W. 4 said the appellants' claim was untenable because of the decree from the lower court described above. He said he was a lawful owner who sold the land to the 3rd respondent.
 23. D.W. 4 produced exhibits per his list of documents dated 24.10.2017, namely clan elders' proceedings at the chief dated 29.8.1997, as D. Exh No. (9), copy of the Meru CMCC No. 300 of 2000 decree as D. Exh No. (10), Kenya Gazette as D. Exh No. (11), application for land control board consent as D. Exh No. (12), copy of the consent as D. Exh (13), copy of transfer forms as D. Exh No. (14), copy of mutation form as D. Exh No. (15), copy of the search certificate as D. Exh No. (16), consent to subdivide L.R. No. 660 as D. Exh No. (17), copy of the application to transfer Parcel No. 782 to the 3rd defendant as D. Exh No. 18, copy of the consent to transfer to him L.R. No. 782 as D. Exh No. (19), copy of a letter dated 24.6.2011 to court as D. Exh No. (20) and lastly, a copy of the proceedings, findings and ruling in Meru LDT no. 45 of 2010 as D. Exh No. (21). He said the 1st appellant failed to attend or challenge the CMCC No. 300 of 2000 or make a claim. However, he urged the court to declare the 2nd respondent as the lawful owner of L.R. No. 660.
 24. In cross-examination, D.W. 4 told the court the 1st respondent and the appellants were his maternal uncles and aunties. He said that his late grandparents used to live in the Ngurumo area but eventually moved to where the 1st respondent lived. He denied any fraud in acquiring the land. Similarly, he said he saw no need to involve his other relatives when he was selling the land to the 3rd respondent.
 25. Following the closure of the defence case, the trial court dismissed the appellants' suit and allowed the 3rd respondent's counterclaim.
 26. The appellants have appealed against the said judgment on the basis that the trial court:
 - i. Failed to appreciate the entire evidence and reached a wrong judgment.
 - ii. Failed to find the appellants as entitled to a portion of suit land despite finding the existence of a trust.



- iii. Failed to grant the prayers sought despite finding the existence of a trust.
 - iv. The suit was based on trust, yet it failed to grant the reliefs sought.
 - v. Dismissed the suit for no reason.
27. As a first appellate court, the role is to rehear, re-appraise and re-assess the lower court record, reach independent findings on facts and law, but give credence to the trial court, which had the benefit of hearing and seeing the witness testify first-hand. See *Selle vs Associated Motor Boat Co.* (1968) E.A 1, 2, 3 Abok.
28. With leave of court and following directions given on 9.11.2023 the parties were directed to canvass the appeal through written submissions. Further, following an application dated 8.11.2023, the court, under Order 42 Rule 22 of the Civil Procedure Rules, allowed the 3rd respondent who was, the 3rd defendant at the trial court, to join the appeal and file written submissions. By written submissions dated 19.10.2023, the appellants submitted that the trial court correctly established the history of the suit land and the evidence of trust but failed to find proof of user, yet the oral and documentary evidence was available to sustain the claim. The 2nd respondent, by written submissions dated 31.10.2023, submitted the suit land. L.R No. 78 was family or ancestral land registered in the name of the 1st respondent to hold in trust for the benefit of his siblings, out of which he acquired a share as LR. No 660, leaving out L.R No. 661. Therefore, the 2nd respondent urged the court to find his land and resultant subdivisions were not available or did form part of the family and ancestral land in the appellants' favour. The 3rd respondent, by written submissions dated 14.11.2023, urged the court to find the appeal was not against the decree in favour of her, but the claim against the 1st and 2nd respondents, which claim in any event, was not defended by way of a defence in the lower court. Reliance was placed on *Joseph Muriithi Njiru vs Mathenge Njeru* 2016 eKLR, and *Kenya Commercial Bank Ltd vs Mwanzau Mbaluka and another* (1998) eKLR. Further, the 3rd respondent submitted no preliminary objection or opposition to the inadvertently filed counterclaim or on capacity to participate in the suit or even as a ground of appeal before this court. Reliance was placed on *Michael Makau vs Simon Nganga* (2018) eKLR.
29. On to whom the counterclaim was directed at, the 3rd respondent submitted that only the appellants were affected by her pleadings and the reliefs sought. On whether the appeal should be allowed, the 3rd respondent submitted that since the decree in her favour was not appealed against, L.R. No. 782 should not be affected by the appeal. Reliance was placed on *Japhet Nkubitu and Anor versus Regina Thirindi* (1998) eKLR and *Stephen Ndolo Wambua vs Beatrice Mbula Mutila and others* (2019) eKLR.
30. The court has carefully reviewed the pleadings, grounds of appeal, written submissions and the law. The issues calling for my determination are:
- i. If the appellants established their claim to the required standards.
 - ii. If the appellants were entitled to the reliefs sought.
 - iii. If the appellants' suit was res-judicata.
 - iv. If the 3rd respondent's counterclaim was competent.
 - v. If the 3rd respondent proved her counterclaim to the required standards.
31. The appellants claimed that they were entitled to an equal share of the suit land and its resultant subdivisions, namely L.R No. 660 and 661 and 782 – 787 since the land was ancestral or family land belonging to the late M'arimi Mutweri and that the registration in the name of the 1st respondent was



in trust for them. They averred that the 1st respondent only shared the land with the 2nd respondent, who acquired L.R. No. 660 and later shared it solely with his children and the 3rd respondent, instead of subdividing and transferring it to them. They prayed for a declaration of the trust and an order for the parcels to be consolidated and subdivided into four equal portions between them and the 1st and 2nd respondents.

32. In *Isaack M’Inanga vs Isaaya Theuri M’Linturi & another* (2015) eKLR, the Supreme Court of Kenya held;

“Each case had to be determined on its own merits and quality of evidence. Some of the elements that would qualify a claimant as a trustee were (a) the land in question was before registration family, clan or group land, (b) the claimant belonged to such family, clan or group, (c) the relationship of the claimant to such family, clan or group was not so remote or tenuous as to make his or her claim idle or adventurous (d) the claimant could 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 who was a member of the family, clan or group”.

33. In *Meru HCC No 46 of 2000, Peter Gitonga vs Francis Miangi M’Ikiara*, the court observed that the registration’s circumstances must be examined to determine the purpose of the registration since registration, is a creation of the law. In *Geoffrey Mugambi and 2 others vs David KM. Mugambi and 3 others* (1992) eKLR, the court said that the law is that if the customs in question were notorious enough, the court could take judicial notice of them. The court observed that even though parties had not adduced evidence to prove the relevant Meru customary law on land distribution, the custom was notorious and well documented for the court to take judicial notice of it without calling any evidence.

34. In the *Re-Estate of M’Murungi M’Mbwiria* (2019) eKLR, the court observed that according to Eugene Cotran *Restatement of African Law: 2 Kenya II; Law of Succession* (Sweet & Maxwell 1969) at page 30, in the estate of a deceased in Meru and Tharaka community, the land was divided among the sons, and the daughters and widows received no share from the estate. In *Stephen Gitonga M’Muirthi vs Faith Ngira Murithi* (2015) eKLR, the Court of Appeal observed that Section 38 of the *Law of Succession Act* enshrines the principles of equal distribution of the net estate of the surviving children, irrespective of gender. Further, in *David Kinuu M’Mugambi & others vs M’Mugambi M’Imanyara and others* (1989) eKLR, the court observed that generally, in a polygamous family amongst Meru tribe members, the land was distributed according to the house of each wife. The court said it was not the habit under Meru customs for a man to render some of his children landless by giving the whole land or a large chunk of it to his few selected children and have the rest landless.

35. In *J.M. 1 vs J.M. 2* (2009) eKLR, the court observed that where land was during adjudication and demarcation gathered by one son with the permission or consent of the father, such gathering and land subsequently registered in the name of the son is held in trust for the family as is envisaged in Section 28 (b) of the Registered *Land Act* (Cap 300) repealed). As to pleadings on customary trust in *Elijah Ouko Matagaro & another vs Roselyne Dola Ouko & 4 others* (2017) eKLR, the court cited with approval *Richard Nyamemba Auka & 2 others vs Josephine Motarohi & others*, that the existence or not of a customary trust was a matter of fact, which must be pleaded, particularized and proved, since it was an overriding right which may not necessarily appear in the register. In *Susan Mumbi Waititu vs Mukuru Ndata & another* (2007) eKLR, the court said that in trust, the plaintiff must prove with cogent evidence that the suit premises were ancestral land and thus family land.



36. In this appeal, the appellants testified as PW 1 and PW 2. They told the court that the 1st and 2nd respondents were their brothers and brothers-in-law. They said the title to the initial land was acquired in the name of the 1st respondent in 1963 as per the green card to hold in trust for them since their father had passed on in 1957. The appellants testified they followed up their share through the land disputes tribunal as per D. Exh No. (21) and through the clan, as per D. Exh No. (9). PW 1 told the court that all his brothers, save for the late brother and husband to 2nd and 3rd appellants acquired a share of their late father's land and that where he was living, he had acquired the land from the government, while his sisters-in-law lived on land that his late brother had bought.
37. PW 1 & PW 2 told the court the clan had intervened for them and the 1st respondent to give out part of his land to them, which he declined until a case was filed in court for the same as per D. Exh No. (10) by the 2nd respondent. PW 1 told the court that when his late father passed on, he did not have any land. He believed the land belonged to his grandfather, which his late father acquired but was registered in trust for the family under the name of the 1st respondent. According to him, his father, as of 1958, had two other parcels of land in Kiamiriru and Mpakone, and it was his elder brother's family (M'Itonga) which was occupying the Kiamiriru land while the 1st and 2nd respondents were occupying the land in Mpakone where his late father used to live before he passed on. He said he had his land in Kiirua by 1958. PW 1 said he used to live in the house of M'Itimo on the disputed land while cultivating it. Further, PW 1 said he demanded his share of the land from the 1st respondent only for him to give out a share to the 2nd respondent, who proceeded to subdivide his share among his children. He said he left the suit land in 1957/58, to his land in Kiirua. He said he started formally demanding his share in 2010 before the tribunal after he was allegedly chased away from the suit land in 2009, by the 1st respondent.
38. The 1st respondent in his defence dated 1.10.2019 averred he solely and individually gathered the land. He denied it was family or ancestral land, which he held in trust for the appellants. He denied acquiring the land for and on behalf of his late father or the appellants. The 1st respondent admitted that the suit land was divided into L.R. No. 660 and 661, under a Meru CMCC No. 300/2000 decree. He denied any alleged constructive or resultant trust or a breach of the same on his part.
39. The 2nd respondent, by a defence dated 19.8.2019, admitted the decree in Meru CMCC No. 300 of 2000 against the 1st respondent, out of which he acquired L.R. no. 660. In paragraph 6 of the defence, he admitted that L.R. No. Ntihmbiri/Igoki/78 belonged to his late father, M'Arimi Mutweri and was registered under the name of the 1st respondent, to hold in trust for the family. He admitted the existence of the LDT Case No. 45 of 2011. Further, the 2nd respondent, admitted that he lawfully subdivided L.R. No. 660 and transferred its resultant subdivisions to another person. PW2 denied any alleged trust against L.R. No. 660 in favour of the appellants or any breach of any such trust since his title was indefeasible.
40. In reply to the 2nd respondent's defence, the appellants denied that the previous decree favouring the 2nd respondent was a bar to the suit. On the contrary, the appellants averred that the 1st and 2nd respondents shared ancestral land, held it in trust for the deceased children, and excluded them without disclosing all the facts or parties entitled to the land to the trial court. Further, the appellants averred that the 2nd respondent had subdivided and transferred his parcel to his children, including the 3rd respondent.
41. In support of his defence, the 1st respondent testified as D.W. 1 and adopted his witness statement dated 1.10.2019. In defence, the 1st respondent said his late father passed on in 1958, before the adjudication process started in the area. He said the title to the suit land, was opened on 3.4.1963 and was issued with a title deed in 1977. DW1 admitted giving the 2nd respondent 3 ½ acres out of his land since he had nowhere to live or farm. He said the 1st appellant left their home in 1957 for the Kiirua and Timau areas



- to go and look for government land in the settlement scheme. In his view, the 1st appellant acquired 2 acres in Maitei area, while the 2nd appellant acquired 19 acres in Mbaria. He insisted the suit land belonged to him and was not held in trust for the appellants, who voluntarily left their homestead to acquire land elsewhere. He denied that the appellants ever settled, lived or developed any temporary structures on the suit land.
42. D.W. 1 admitted that the appellants had tried in vain to demand a share of the suit land through LDT No. 45 of 2010. He produced a copy of the records and title deed as D. Exh No. (1) and (2), respectively.
43. In his testimony, D.W. 2 M'Rukaria M'Arimi told the court he had always lived on the suit land registered in the name of D.W. 1 without his brother sharing the land until he had to move to court and obtained a decree for 3.25 acres out of which the land was subdivided into LR No's 660 and 661. He said he retained LR No. 660, which he later subdivided into L.R. No's. 782 – 787, retained Parcel No. 787 under his name and transferred the rest to third parties. He said the appellants were given a share of his late father's land elsewhere, where they all settled. He termed the appellant's claim over his land as invalid. In cross-examination, D.W. 2 told the court that his late father was the owner of L.R. No. 78, had five sons and termed the land family land among the other one at Kiamiruru. He said their father settled them in L.R. No. 78 before he passed on, and that was where they lived when their mother passed on. He said the 1st-born son Dominic Itimitu occupied Kiamiruru land while the 1st respondent was the 2nd born followed by the 1st appellant and that the late M'Itonga and husband to the 2nd and 3rd appellants was a stepbrother. DW2 said he sued the 1st respondent since the suit land was ancestral and family land.
44. Cross-examined by D.W. 1, D.W. 2 insisted the land belonged to their late father, who died in 1958, long before the title deed was issued. He said the 1st respondent was registered as the owner since his father passed. D.W. 2 told the court the appellants should pursue the 1st respondent and not him over their share; otherwise, he had subdivided and transferred his portion to third parties. The evidence of D.W. 2 was also corroborated by DW 4, a nephew who produced D. Exh No's. 9-21. He told the court his grandparents used to live in the Ngurumo area but eventually moved to the land occupied by D.W. 1. D.W. 4 confirmed that this late grandfather had three parcels of land in Kiamiruru, Ngurumo and Mpakone.
45. From the pleadings, oral and documentary evidence tendered before the trial court, there is no doubt that the late M'Arimi Mutheri had four pieces of land in Kiguru, Ngurumo, Kiamiruru and Mpakone. D.W. 1, in his evidence as captured in D. Exh No. (2 1), told the elders that his late father had directed him to go to Nthimbiri and see one elder called M'Irura, to show him some land. D.W. 1 admitted how he lived with D.W. 2 on the said land. Further, D.W. 1, in his defence, pleaded that his land was not ancestral or family land where his late parents lived before they passed on. The 1st respondent admitted that his late father had directed him to the gathering while still young and in school. It is in this land that the deceased parents were occupying and living before they passed on, going by the testimony tendered.
46. D.W. 1 did not dispute the pleadings by the 2nd respondent and the evidence of DW4 that the land was family or ancestral land. Even after D.W. 2 sued the 1st respondent in Meru CMCC No. 300 of 2000, D.W. 1 did not defend himself in the previous suit. Instead, he allowed the suit to proceed undefended. Subsequently, L.R. No. 78 was subdivided into L.R. No's. 660 and 661 without any objection by D.W. 1.
47. D.W.2 pleaded and testified that the suit land belonged to his late father, M'Arimi Mutweri and was only registered in the name of the 1st respondent as a trustee for the family. D.W. 2 told the court that his late father had five boys, among them, PW 1, unfortunately, was the only. The 2nd and 3rd appellants who did not get a share of the four parcels of land belonging to the deceased father. The respondents'



- evidence is that the appellants left the homestead and went to look for and acquire land on their own outside their locality.
48. The only reason or justification by the respondents why the appellants should not and are not entitled to acquire a portion of their inheritance is because they left their ancestral or family land, acquired lands elsewhere and have never developed or occupied the suit land all their lives. In *Justus Maina Muriuki vs Jane Waithira Mwangi* (2018) eKLR, the court cited with approval *Kanyi vs Muthiora* (1984) KLR 712, that the registration of land did not extinguish the respondent's customary rights neither did it relieve the appellant's duties or obligations as a trustee. The court cited with approval *Gathiba vs Gathiba NRB HCCA No. 1647 of 1984*, that the notion of trust was inherent in African customary law. Further, the court cited with approval *Mbui vs Mukangu C.A No. 281 of 2000*, that customary trust was a concept of intergenerational equity where land is held by one generation for the benefit of the succeeding generations, which key aspects to determine it included possession and occupation. Additionally, the court cited with approval *Mwangi vs Mwangi C.A 245 of 2004*, on the concept of *Muramati* under Kikuyu customary law.
 49. From the evidence tendered by parties, the source of the suit land was the late M'Arimi Mutweri. There is evidence that none of the sons of the deceased were registered as owning any of the deceased land except the 1st respondent. There is evidence that the 1st appellant was an occupant of the suit land at a young age before he left to acquire land on his own. The appellants have been consistent and persistent in seeking their share together with the 2nd respondent, from the 1st respondent, including invoking the intervention of the area chief, clan elders, the defunct Land Disputes Tribunal and for the 2nd respondent, suit in court.
 50. Evidence was tendered by the 2nd respondent and D.W. 4 that out of all the appellants' and DW2's efforts, the suit land was eventually subdivided into two portions. D.W. 2 testified that if there was any trust, the same should be over L.R. No. 661 since L.R. No. 660, was already subdivided and transferred to third parties, including the 3rd respondent to this appeal who says that she was an innocent purchaser for value without notice of the alleged trust. I think the circumstances surrounding the land registration, occupation, use and possession point to an intention to create a trust for and on behalf of the appellants. D.W. 2 told the court that the 2nd and 3rd appellants were sisters-in-law and wives to his stepbrother, the late M'Itonga M'Arimi. There is no evidence that the 2nd and 3rd appellants' deceased husband was allocated any portion by his deceased father and, by extension, the 1st appellant.
 51. Regarding *res-judicata*, the issues raised by the appellants were not before the trial court in Meru CMCC No. 300 of 2000, in so far as the claims by the appellants. See *Mainas Kiai vs IEBC* (2017) eKLR. The 2nd respondent urged that his portions were not subject to the appellants' claim. He testified that they should be left out. Since there is evidence that the appellants were aware of the said suit, but failed to apply to be joined, I find they can only claim a share out of L.R. No. 661 and not against the 2nd respondent, who has pleaded and proved that he subdivided and transferred L.R. No. 660 into 782 – 787 to third parties, such as the 3rd respondent. The claim against the 2nd and 3rd respondents is herein dismissed.
 52. In *Bajeber Ltd vs Kenya Revenue Authority* (2021) eKLR, the court said a party cannot depart and file pleadings that are disparate from which leave was granted.
 53. In this appeal, the 3rd respondent filed the pleadings in an entirely different capacity from which she was granted leave to join the suit. If allowed to stand, then no leave was given to file such a pleading in such a capacity. See *Communication Commission of Kenya vs Royal Media Service & 7 others* (2014) eKLR. See also *Rose Njoki Kinyua & another vs Shaba Trustees LTD & A* (2018) eKLR, *Britam General Insurance Ltd vs Ukwale Agnes Ndungu* (2019) eKLR, *Luka Kipleitel Kotut vs Joseph Chebii*



- & another (2013) eKLR, where it was held a party who was not a defendant cannot simply walk into a proceeding by filing a statement of defence. See also *Marigat Group Ranch & 3 others vs Wesley Chepkoimet & others* (2014) eKLR.
54. In *Francis Karioko Muruatetu & Another vs Republic* (2016) eKLR, the court said third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the court. The court said an interested party may not frame its issues or introduce new issues for determination by the court. The court said an interested party is admitted to a case after demonstrating stake, and such stake cannot take the form of an altogether new issue to be introduced before the trial court.
55. In *Marigat Group* (supra), the court said an interested party was neither a plaintiff nor a defendant and that the contest was between a plaintiff and the defendant, and if a party has a claim over the subject matter, he has to apply to be considered as a plaintiff or a defendant and not as an interested party since an interested party would be someone with a close connection with the subject matter but not claiming any rights over it.
56. The court cannot impose another party, other than the respondents, upon the appellants. The 3rd respondent applied to come in as an interested party and not as defendant. She came in instead as a 3rd defendant and did not specify which defendant to the counterclaim was against. The claim against the primary plaintiffs, now the appellants, was not explicitly pleaded.
57. The defence and counterclaim filed on 18.5.2015 were also filed without an accompanying notice of appointment or appearance as an interested party under the leave granted on 4.3.2015.
58. The 3rd respondent filed a defence and counterclaim describing herself as a 3rd defendant, yet the plaint dated 8.4.2013 had no such defendant. The defence and counterclaim filed by the 3rd respondent dated 15.5.2015 did not comply with Order 7 of the Civil Procedure Rules. It has no titular heading. The leave granted to the 3rd respondent was to join the suit as an interested party, not as a defendant. The 3rd respondent has admitted this in her written submissions and termed it as an inadvertent mistake, which did not prejudice the trial or was not objected to in the lower court or raised as a ground of appeal before this court. A nullity is a nullity as held in *Macfoy vs United Africa Co. Ltd* (1961) 3 ALL ER 1169. The case of *Michael Makau* (supra) is distinguishable. It was about a verifying affidavit and not the substance of the counterclaim. It was not possible that the 3rd respondent got confused and changed roles to the extent of not knowing to whom to direct her claim and in what capacity. Court orders and procedural rules should not be ignored with impunity as held in *Michael Makau* (supra). A counterclaim is a stand-alone suit which falls or succeeds on its own merits. As held in *Kibona vs Transcan Timber Ltd* (1998)-1 EA 121 and *Samaki Industries vs Samaki* (1947) eKLR, it must have its title and parties. It must be treated independently. The 3rd respondent had an obligation to follow the court order and play by the rules and direct her claim to a specific party among the appellants or the co-respondents. The 3rd respondent wants this court to sanitize an irregularity which was fatal to her claim. The issue goes to the jurisdiction of the lower court and can be raised by the court as was in this case, raised when the 3rd respondent was allowed to address the issues. See *Kenya Ports Authority vs Modern Holding* (2017) eKLR and *Samuel Kamau Macharia vs (KCB) SC Civil Application No. 2 of 2011* and *Kabuito Contractors Ltd vs David Mereka* (2004) eKLR.
59. There is also no evidence that the pleadings were served upon the rest of the parties. The upshot is that I find the pleadings incurably defective and incompetent and therefore any attempt by the trial court to determine the pleading, evidence and reliefs on the pleadings amounted to nullity ab initio. I proceed to strike it out and set aside the decree. See *Macfoy vs United Africa*.



60. The upshot is I find the appeal with merits set aside the dismissal of the suit and proceed to allow it.
Costs of the appeal and at the lower court to the appellants to be met by the 1st respondent.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 15TH DAY OF NOVEMBER 2023**

HON. CK NZILI

ELC JUDGE

In presence of

Mutunga for the appellant

Ringera for 2nd respondent

Mr. Ngera for 3rd respondent

