



M’Mwarama v M’Impwi (Sued as the legal representative Of The Estate of Petero M’Impwi Nabea) (Environment and Land Appeal E012 of 2023) [2023] KEELC 21641 (KLR) (15 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21641 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E012 OF 2023
CK NZILI, J
NOVEMBER 15, 2023**

BETWEEN

JOHN M’MAITIMA M’MWARAMA APPELLANT

AND

STANLEY M’ITWAMWARI M’IMPWI RESPONDENT

SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PETERO M’IMPWI NABEA

(Being an appeal from the Judgment of the Hon. L.N Juma – Senior Resident Magistrate in CMCC ELC No. 63 of 2019 delivered on 5.7.2022)

JUDGMENT

1. The appellant who was the plaintiff in the lower court, had sued the respondent as the defendant *vide* an amended plaint dated February 3, 2021 claiming ½ an acre out of LR No. Ntima/Igoki/1504, registered in Peter Nabea's name, on account of constructive trust. It was averred that the appellant was born and lived on the suit land with his parents and siblings with effect from 1952, and eventually, in 1975, he built his own house. He averred that the suit land was ancestral land initially belonging to his grandfather M’Nabea.
2. The respondent opposed the claim through an amended defense dated February 18, 2021. He denied that the appellant was born or brought up or occupied LR No. Ntima/Igoki/1504 as part of his family or ancestral land. On the contrary, the respondent averred that the appellant's occupation of a portion of the suit land has been with his permission and that the appellant and his family were mere licensees. He averred their ancestral land was in Kithirune village, which had been shared equally between the appellant's father and the respondent's father, the former having sold part of his share, causing the balance to be registered under his brother's name as LR No. Ntima/Igoki/1686.



3. Further, the respondent averred that as a licensee, the appellant had undertaken all the developments on the land with his consent. Additionally, the respondent denied the alleged existence of any constructive trust in favor of the appellant or its breach as alleged or at all. He termed the suit as lacking merits. The defense was accompanied by a list of witnesses and documents dated 18.9.2019.
4. At the trial, John M'Maitima testified as PW 1. He adopted his witness statement dated June 18, 2019 as his evidence in chief. The appellant told the court he was born in 1952 and found his parents living on LR No. Ntima/Igoki/1504, and in 1975, his father showed him a portion of the suit land to erect a house. He said the land was inherited from his grandfather but registered in the name of his uncle Peter Impwi Nabea, in trust for his father and the family.
5. PW 1 testified that the registration was in line with customs and that his elder son would hold the title in trust and later transfer it to his siblings. The appellant told the court his uncle and his late father passed on before effecting the transfers. PW 1 said that all his siblings were given land elsewhere, and only he was entitled to a portion of the suit land he had extensively developed as his birthright.
6. In cross-examination, PW 1 denied having any relatives in the Kithirune area and that his brother Gerald was on another land given to him by his late father, while the rest of his brothers went to acquire land in a settlement scheme.
7. Peter Andrew Rukunga testified as PW 2 and adopted his witness statement dated June 18, 2019 as his evidence in chief. He confirmed the appellant had been occupying the suit land, where he had erected a matrimonial home alongside his children, who had also put up more structures on the land. PW 2 told the court that the appellant had also planted assorted fruit trees, coffee trees, and livestock on the land.
8. PW 2 said that the appellant's parents used to live on the land and, after their death, were buried on the suit land. He said that as a neighbor of the appellant, he was aware the two families had at one point amicably disused a subdivision of the land, but unfortunately, the two brothers passed on before the said subdivision and transfer occurred. He confirmed that the two brothers of the appellant were occupying another land in Kiirua and, hence, were not laying any claim on the suit land.
9. Stanley M'Mwirichia testified as DW 1 and adopted his witness statement dated 1September 8, 2019 as his evidence in chief. He told the court this late father, Peter M'Impwi Nabea, was the registered owner of the suit land, which was transmitted to him following distribution No. 159 of 1999 among the beneficiaries. He said the appellant was a son of his uncle, the late Isaac Mwarania, and that their ancestral land was at Kithirune village, a kilometer away from the suit land, which they equally shared long before title deeds were issued at the time of Land Adjudication.
10. DW 1 said that the appellant's late father sold his share to one Gerald and registered the balance in the name of Gerald Kaaria as LR No. Ntima/Igoki/1686.
11. According to DW 1, his late father bought a portion of the suit land from M'Mbui, consolidated it with a piece he had inherited from his late grandfather, and registered it as LR. No. Ntima/Igoki/1504.
12. DW 1 said the appellant and his father moved to the Kiirua area, hoping to acquire government land available for landless people, after transferring his land to a son, Gerald Kaaria, who could not accommodate them.
13. Similarly, DW 1 said his late father had no option but to shelter his late brother and the appellant on his land as licensees. He denied that the land was ancestral in nature and that the appellant had any right of ownership. DW 1 told the court the appellant and his late father had severally promised to vacate the land before his late father passed on, only to change his mind and start demanding a share after his demise, yet all of it had been shared out during the succession cause in Meru HC Succession



- Cause No. 159 of 1990, where the appellant's objection was also dismissed. He produced a copy of the official search as D. Exh No. (5). DW 1 told the court that his late father gave the appellant's late father some house to live in while the applicant's son constructed another house despite being aware that the stay was temporary.
14. DW 2 was Naftaly Kiogora, a neighbor. He adopted his witness statement dated 18.9.2019 as his evidence in chief. Associating his evidence with that of the respondent, he confirmed that after failing to get an allocation of government land in Kiirua, the appellant and his late father were licensed to occupy the suit land since the appellant's father had already surrendered his share of the ancestral and at Kithirune to his son Gerald Kaaria after disposing the other share to a teacher called Mr. Gitonga.
 15. With this evidence, the trial court found the appellant's suit unsustainable, hence this appeal. By grounds of appeal dated February 14, 2023 following leave granted on February 8, 2023, the trial court is faulted for not considering the appellant had lived on the land since 1952, together with his family and parents and for not considering the suit land was ancestral land initially owned by his grandfather M'Nabea but registered under his firstborn Petero Impwi M'Nabea to hold in trust for their family and for not considering his late parents were buried on the suit land.
 16. The appellant relied on written submissions dated October 17, 2023 and urged the court guided by *Isaack M'Inanga Kiebia v M'Lintari* (2018) eKLR *Kanyi v Muthiora* (1984) KLR 712, *Gathiba v Gathiba* Nariobi HCC 1647/1984 and *Mbui Mukangu v Gerald Mutwiri Mbui* C. A No. 281 of 2000, to find the ingredients to found customary trust as established due to the pleadings, facts, and testimony tendered by the appellant at the lower court.
 17. On his part, the respondent, by his written submissions dated October 13, 2023, isolated two issues for determination. On whether a constructive trust was proved, the respondent submitted that the existence of trust is proved by way of evidence on the circumstances of the case as held in *Kazungu Fondo Shutu and another v Japhet Noti Charo* (2021) eKLR and *Twalib Hatayan and another v Saggara Ahmed Al-Heidy & others* (2015) eKLR.
 18. The respondent submitted that though the appellant pleaded particulars of constructive trust, it was never proved that the land was acquired by wrongdoing that led to unjust enrichment. The respondent submitted that the allegations in testimony pointed to the existence of customary trust that was never pleaded or proved. Reliance was placed on *Wareham t/a A.F Wareham and 2 others v Kenya Post Office Savings Bank* (2004) 2 KLR 91.
 19. On the proposition that cases were tried and determined based on pleadings made and the issues of fact or law framed by the parties or based on those pleadings and that in discharging the burden of proof, the only evidence to be adduced is evidence of the existence of the facts in issue or facts relevant to the issue and court should not make any findings on unpleaded matters.
 20. The respondent submitted that the appellant failed to prove that the suit land was ancestral land with tangible evidence. Reliance was placed on *M'Twamwari M'Imanyara & another v David Mukoronia Mutwamwari & others* (2020) eKLR.
 21. The respondent submitted the evidence, which was supported by PW 2, that each had its share of the ancestral land at Kithirune and that the appellant should only have staked his share against his father's land in Kithirune and not the one belonging to the respondent's father since there was no envisaged trust.
 22. The respondent submitted that the occupation of the land by the appellant per se did not prove the existence of trust since the same was permissive or under license as an act of mercy following the denial



- of access by their family members. Reliance was placed on [Samson M'Itwamwari Mumiira v Jackson Kabeteru, another](#) (2007) eKLR.
23. The issues calling for my determination are:
 - i. If the appellant pleaded and proved customary or constructive or resultant trust.
 - ii. If the appeal has merits.
 24. The gist of the appellant's claim was captured in paragraphs 4, 5, 6, 7, 8, 9, and 10 of the amended plaint dated February 3, 2021. In the paragraphs, the appellant pleaded how he was born and brought up in the ancestral land in 1952 and was later on shown where to erect his house by his late father in 1975. Further, the appellant traced the land to his late grandfather, M'Nabea, who had two sons. He pleaded that the father of the respondent was registered as the owner of the suit land in trust for their family where the deceased parents were all buried.
 25. In paragraph 11 A of the amended plaint, the appellant pleaded how the respondent acquired the title subject to his equitable rights, but had wrongfully and unjustly retained or disadvantaged him, despite knowing his ancestral rights, and trusteeship, duties which he had breached and sought the court to find and enforce, through declaratory orders and to direct a share to be excised out of the suit land.
 26. In the amended defense dated February 19, 2021, the respondent admitted occupation or possessory rights over the land by the appellant and his family members, termed it as permissive entry and or as a licensee. He denied that the land, was ancestral in nature. Further, the respondent admitted the appellant had initiated developments on the suit land but averred it was out of his consent as a licensor. The respondent denied the particulars of constructive trust or the breach thereof.
 27. The respondent has submitted before this court, based on [Anthony Wareham & others](#) (*supra*), that parties are bound by their pleadings and, therefore, no customary trust was pleaded for the trial court to make a finding on it or issue any relief in favor of the appellant.
 28. On the other hand, the appellant submitted that he had pleaded and proved the suit land was ancestral in nature.
 29. In [Heartbeat Ltd v Ng'ambwa Heartbeat Community Children Home and Rescue Centre](#) (2018) eKLR, the court cited with approval [Ndungu Njenga v Sophia Watiri Ndungu](#) (2000) eKLR, that the court will not imply a trust save to give effect to the intention of the parties, which intention must be determined before a trust was implied. The court cited with approval [Juletabi African Adventures & another v Christopher Michael Lockley](#) C. A No. 75 of 2016, that the court will examine how the title was issued to the respondent to establish that the party intended to found a trust. Additionally, the court cited with approval [Twalib Hatayan](#) (*supra*), that trust was created by operation of the law, among them constructive and resultant trust, the former being imposed by the court against one who had acquired the property by wrongdoing on circumstances such as would demand that equity treats the legal owner as a trustee or where a person who is already a trustee takes advantage of his position for his benefit, the proof of the intention of the parties, being immaterial for trust is imposed to guard against unjust enrichment.
 30. On the other hand, how customary trust is established and founded was settled in [Kiebia v M'Lintari](#) (*supra*). The court cited with approval [Kiarie v Kinuthia](#), that if the holding were for the benefit of other family members, then a customary trust would be presumed to have been created in favor of such other members, whether or not they were in possession or actual occupation of the land. The court said some of the elements to qualify a claimant as a trustee of the land in question were before registration, family, clan or group; the claimant belongs to such family clan or group, the relationship of the claimant



to such family clan or group is not so remote or tenuous to make a claim late or adventurous; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances and the claim was directed against the registered proprietor who was a member of the family, clan or group.

31. The way I understand the framing of the pleadings by the appellant is that he pleaded customary trust in paragraphs 4 – 10 of the amended plaint generally against the predecessor to, the successor in title who is the respondent. Regarding paragraph 11A of the amended plaint, the appellant specifically pleaded constructive trust on events surrounding the registration of the suit land and the sharing of the same by the respondent through a succession or transmission process while aware of and in total ignorance of his accrued interests or rights on possession and occupation on account of his customary trust.
32. Therefore, I find the appellant pleaded customary and constructive trust, which the respondent replied to in his amended defense.
33. It is trite law that parties are bound by their pleadings, and issues for courts determination arise out of the said pleadings. In this appeal, the onus was on the appellant to prove customary and constructive trust through tangible and cogent evidence. In the evidence tendered, what is not disputed is that the appellant and his late parents were accommodated by the respondent's father on the suit land and commenced permanent developments on it. The respondent termed the accommodation as temporal and as an act of mercy. The appellant's late father had disposed of his share of the ancestral land in Kithirune area through sale and transfer to the late Gerald Kaaria, who would not retake him.
34. It is constructive to note that the amended defense did not specify the terms and conditions of the license, consent and the length of the license or permission. The respondent did not plead whether notice to vacate was given by his late father and, by extension, himself after the acquired title out of transmission. There was no pleading on any limitation(s) imposed on the appellant, and his children are said to have established thier homes on the suit land. Further, the respondent did not seek for or plead vacant possession, eviction, or the termination of the appellant's alleged permissive entry or occupation of the suit land.
35. In *Justus Maina Muruku v Jane Waithera Mwangi* (2018) eKLR, the court observed it was customary among Kikuyus for the eldest son to inherit land as a 'muramati' to hold in trust for himself and the family. The appellant provided evidence that his deceased father and himself occupied the land as of right but not as licensees.
36. In *Geoffrey Mugambi & others v David K M'Mugambi & others* (1992) eKLR, the Court of Appeal said that without evidence being led, a court may take judicial notice of a custom in question if it was notorious enough, and in that case, a relevant Meru customary law on land distribution according to the house of each wife. Based on section 3 (2) of the *Judicature Act*, the trial court observed that under Meru customs, a man could not render some of his children landless by giving the whole of his land or a large chunk of it to his few selected children leaving the rest landless. The court said under sections 59 and 60(1) (a) of the *Evidence Act*, it could take judicial notice of some facts, laws, rules, and principles (written and unwritten), among which are customary laws.
37. The court cited with approval *Kimani v Gikanga* (1965) E. A 735 that where African customary law was neither notorious nor documented it must be established for the court's guidance by the party intending to rely on it or through expert opinions.
38. The court cited with approval Contran Eugene Restatement of African Law (Vol. 2) page 30, that inheritance under Meru customary law was patrilineal, based on the equal distribution of a man's



property among his sons, subject to the proviso that the eldest son generally gets a slightly larger share and in a polygamous marriage, distribution was by reference to the house of each wife, equally irrespective of the number of sons in the house.

39. Based on the evidence before the trial court, there was no dispute that the parties' parents were brothers, the patriarch being the late Peterp M' Impwi. Similarly, it was not disputed that the appellant's parents were in occupation of the suit land together with the appellant and his family before they passed on. Additionally, it was not in dispute, and the respondent admitted that his late father was the one who allowed his late brother and, by extension, his large family to come and live on the suit land. There is no evidence that the entry and occupation was conditional, limited, or terminated.
40. As much as the respondent termed the same as an act of mercy or humanitarian, I think there was much more to it than mere generosity.
41. I do not think the intention was to occupy the land temporarily. I think the occupation was to be indefinite and was intended to be perpetual; otherwise, the predecessor to the title and the successor to it would have shown evidence of termination notice or expressed or pleaded an intention to seek vacant possession or eviction.
42. In *Mbui v Maranya* (*supra*), Kuloba J noted the existence of African milk of generosity and kindness for mutual survival and progress at every level in the countryside.
43. In this instance, the respondent seems to be forgetting or ignoring the accrued interests of the appellant. He found them there and never sought an explanation from the predecessor to his late father's title, why they were there in the first instance and for how long. The respondent does not question the intention of his late father to allow his late brother and family and, by extension, his cousin, the appellant, to remain on the suit land.
44. The circumstances point to an intention to create a trust. As per Kuloba J, keeping on our land of landless relatives and clan members for an extended period is a known custom. The respondent did not plead trespass or illegal occupation. See *Beatrice Wanjeri Mwangi v Gathii Kangari* (2019) eKLR.
45. In *Samuel Kihamba v Mary Mbaisi* (2015) eKLR, the court said open and willing dispossession had been interpreted to mean the owner knew whether actual knowledge or not of the occupation of his land by the claimant. I discount the notion that the appellant is a licensee or has developed the land with the respondent's consent; otherwise, he would have stopped him or terminated his license. The license or consent was not pleaded, and its expiry period was given. See John *Baraza Ojiambo v Veronica Auma Ojiambo and 3 others* (2013) eKLR.
46. In *Rodgers Mwamboje v Douglas Mwamboje* (2014) eKLR, the court while dealing with a person staying on his brother's land for 12 years, said the issue of consent in such a situation was a rebuttable presumption on the part of the claimant. In *Michuki v Michuki* (2014) eKLR, the court said possession of land could be constructive. In this instance, the respondent knew of the constructive possession but went ahead to ignore those rights, while registering the land under his name and distributing it.
47. To my mind the said registration was and remains subject to the overriding interests of the appellant who was and has been in occupation of the land.
48. The upshot is I find the appeal with merits. The same is allowed. The lower court suit is hereby allowed. Costs of the appeal and the lower court to the appellant.

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



In presence of

C.A Kananu/Mukami

Appellant

Mr. Nyanga for Kariuki for respondent

HON. CK NZILI

ELC JUDGE

