



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mwithimbu v Mwithimbu (Environment and Land Appeal 1 of 2022)
[2023] KEELC 22212 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22212 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 1 OF 2022**

CK YANO, J

DECEMBER 7, 2023

BETWEEN

CHARLES KIMAITA MWITHIMBU APPELLANT

AND

FLORENCE KARWITHA MWITHIMBU RESPONDENT

*(Being an appeal from the judgment/decree of Hon. T.M Mwangi (S.P.M)
delivered on 23rd December, 2021 in Meru CM E.L.C NO. 361 OF 2014)*

JUDGMENT

1. By a plaint dated 17th December, 2012, Florence Karwitha Mwithimbu the respondent herein and her sister one Maria Regeria Mwithimbu, sued their brothers Charles Kimaita M’Mwithimbu, the appellant herein and one Andrew Muguna Mwithimbu seeking orders of a declaration that the appellant and the said Andrew Muguna Mwithimbu were registered as owners of land parcel Number Ntima/Ntakira/2217 as trustees to hold in trust for themselves and for the respondent and their other sister and an order for subdivision of the said parcel of land into four equal shares with each portion being registered in the names of each of the siblings, as well as costs and interest. It was pleaded that the four parties are sons and daughters of the Kanyuru M’Mwithimbu who was the initial owner of land parcel number Ntima/Ntakira/429 measuring 0.829 ha or 2 acres but was registered in the name of the appellant to hold in trust for himself and for the family. That in breach of the said trust, the appellant subdivided land parcel number Ntima/Ntakira/429 into the suit land and another parcel which he sold to one Andrew Muchiri Munyi.
2. The respondent and her sister further pleaded that they were born and were still living on the suit land with their children and that it was their only home, though the appellant and their other brother had threatened to evict them therefrom. That Andrew Muguna M’Mwithimbu cautioned the suit land in 2002 to protect his interests and that is when the appellant caused the land to be registered in both their names as tenants in common with the appellant getting 5/13 share and Andrew Muguna



M'Mwithimbu getting 8/13, but the respondent and her sister were given nothing. The particulars of trust and breach of trust on the part of the appellant and Andrew Muguna Mwithimbu were given. That the suit land measures approximately 1.6 acres and therefore each of the siblings should get 0.4 acres.

3. Maria Regeria Mwithimbu later withdrew her suit on 12th October, 2020.
4. The appellant and Andrew Muguna Mwithimbu filed their respective statements of defence dated 28th January, 2013 and 28th February 2013. They denied the claim. The appellant specifically pleaded that the respondent was staying on part of the suit property as his tenant. On his part, Andrew Muguna Mwithimbu averred that he sued the appellant claiming his share of the suit property.
5. Upon considering the matter, the trial court held that the respondent and her sister had proved their case on a balance of probabilities and entered judgment against the appellant and his brother jointly and severally as prayed in the plaint save for costs.
6. The appellant was aggrieved by that judgment and filed this appeal on the following grounds-;
 1. That the learned trial magistrate erred in law and in fact in exceeding its jurisdiction in ordering that the respondent was entitled to the prayers sought in the plaint without evidence to the effect, and no prove of eviction.
 2. The learned trial magistrate erred in law and fact in proceeding to hear the matter, the same having been heard to its logical conclusion and/or determined by the local elders, otherwise the appellant had no other option than to leave the matter to the court for consideration and determination.
 3. The learned trial magistrate erred in law and facts failing to strike off the respondent case since the elders' award was not challenged by the respondent despite the appellant application to do so.
 4. The learned trial magistrate erred in law and fact in failing to rely on the laid down principles of Articles 159 (2) © of [the Constitution](#) 2010 which ADR was under the umbrella of the court.
 5. The trial learned magistrate erred in law and in fact in not implementing and or adopting the award of the ADR as the judgment of the court and in lieu thereof proceeded with the case notwithstanding.
 6. The learned magistrate erred in law and in fact in condemning the appellant unheard and denied him opportunity to put his case despite his application to dismiss the respondent case dated 11th January, 2021.
 7. The learned trial magistrate erred in law and in fact in not finding that the fact that the whole pleadings before the court raised insults (sic) of family land, and the respondent admitted she was taken care of in her entire life by the appellant, and the appellant was in occupation since his life time which warranted the appellant to be heard in the matter and further failed to note the 2nd defended (sic) withdrew from the case.
 8. That the learned trial magistrate erred in law and in fact is not noting and considering the original LR Ntima/Ntakira/429, was originally registered in the name of the appellant as a first registration, and who is a life (sic) hence the court had no jurisdiction to entertain matters related to ownership over title to land when the head is alive.



9. The entire judgment is totally unfair, biased and inequitable as it never took all the circumstances of the case, and the fact that the appellant was interested in the matter and consequences of not hearing appellant had grave consequences.
7. The appellant prays for the appeal to be allowed, the judgment of HON. T.M Mwangi dated 23rd December, 2021 be set aside and costs of the appeal be awarded to the appellant and any other relief.
8. The appeal was canvassed by way of written submissions. The appellant filed his undated submissions on 7th July, 2023 while the respondent filed hers dated 27th July 2023 through the firm of G.M Wanjohi, Mutuma & co. advocates.
9. There are also submissions dated 28th July, 2023 in the file filed by Andrew Muguna Mwithimbu who is not a party to the appeal. I will therefore not take them into consideration in this judgment.

Appellant's Submissions

10. The appellant submitted that he is the first registered owner of parcel No. Ntima/Ntakira/429 which was sub-divided into Ntima/Ntakira/2216 and Ntima/Ntakira/2217. That parcel No. Ntima/Ntakira 2217 was subdivided into 4793 and 4794. That their father the late Kanyuru M'Mwithimbu never owned any land. It is the appellant's submissions that a title deed is sacrosanct and should be respected as such unless there is proof of fraud or trust for the respondent. The appellant further submitted that the learned trial magistrate erred in law in finding that the appellant holds land in trust for the respondent. The appellant further submitted that his late father could not have made him a trustee of unborn children and over an unregistered parcel of land and stated that his name was Mwitii M'Mwithimbu.
11. The appellant submitted that parcel No. Nitma/Ntakira/2217 does not exist as it was subdivided by a court ruling into Ntima/Ntakira/4793 belonging to Charles Kimaita and Ntima/Ntakira/4794 belonging to Andrew Muguna. The appellant argued that his first land parcel No. Ntima/Ntakira/429 which was subdivided into Ntima/Ntakira/2216 and 2217 and that parcel No. 2217 went to Andrew Munyi Muchiri jointly with Andrew Muguna leaving the appellant landless. The appellant stated that he filed court proceedings against Munyi and Mwirigi and part of parcel No. 2217 which belonged to Munyi was reinstated to the appellant's name, jointly with Andrew Muguna. The appellant further stated that his part was parcel No. Ntima/Ntakira/2217 which was sub-divided by a court ruling into Ntima/Ntakira/4793 and 4794. The appellant wondered why the respondent did not claim her share from the original land parcel No. Nitma/Ntakira/429 when it was being sub-divided. The appellant argued that the land was registered in his name as first registered owner and has been transacting the portion from parcel No. 429 to 2216 and 2217 and 2217 to 4793 and 4794 without any interference or objection from the respondent. The appellant therefore prayed that the judgment of the lower court dated 23rd December, 2021 and the decree thereof dated 19th February, 2022 be set aside and the appellant be awarded costs.

Respondent's Submissions

12. Learned counsel for the respondent gave a brief background of the matter and submitted that the trial court did not exceed its jurisdiction in ordering that the respondent was entitled to the prayers sought. The respondent's counsel cited Articles 169(1)(a) and 169(2) of *the Constitution*, Section 8(1) and 9(a) of the Magistrate's Court Act, 2015 which confers Magistrates jurisdiction to deal with Environment and Land matters subject to their pecuniary jurisdiction. The respondent's counsel also cited section 26(3) of the *Environment and Land Court Act*, 2012.



13. With regard to grounds 2,3,4 and 5 of appeal, the respondent's counsel submitted that the trial court directed the parties to try and settle the matter at home, and submitted that the court was not bound by such decision as the elders did not hear and determine the matter, but proposed on how the parties should share the suit land. That that did not bar the trial court from proceeding to hear and determine the matter.
14. Regarding grounds 6 and 9 of the appeal in which the appellant alleges that he was condemned unheard, counsel for the respondent submitted that the appellant was granted a chance to give evidence but was adamant against doing so. That the trial court noted that the appellant had refused to adduce his evidence, and submitted that the appellant cannot now turn around and allege that he was condemned unheard.
15. With regard to grounds 7 and 8, learned counsel for the respondent submitted that the appellant did not adduce any evidence to controvert the evidence of the respondents or to substantiate the allegations in this defence and therefore remain mere allegations. The respondent's counsel relied on the case of George Mbiti Kiebia & another Vs Isaya Theuri M'LIntari & another [2014] eKLR and cited Section 28 of the [Land Registration Act](#) No. 3 of 2012.
16. It was their submissions that the respondent proved her case on a balance of probabilities that the appellant was registered as owner of the suit land as trustees to hold in trust for himself and the respondent and urged the court to dismiss the appeal with costs to the respondent.

Analysis and Determinations

17. I have perused and considered the record of appeal, the submissions made and the authorities cited. This being a first appeal, I am obliged to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusions reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. This was settled in the case of *Selle & another V. Associated Motor Boat Co. Ltd* (1968) EA 123.
18. The issues I find for determination are-;
 - i. Whether the learned trial magistrate exceeded his jurisdiction.
 - ii. Whether the learned trial magistrate was bound by the decision made by the elders.
 - iii. Whether the appellant was condemned unheard.
 - iv. whether the existence of trust had been proved in the matter
 - v. what is the order on costs.
19. Jurisdiction is everything and without it, a court has no power to make any step. This was stated in the classic case of the *Owners of Motor Vessel "Lillian S" V Caltex Oil (Kenya Ltd)* (1989) KLR. In the case of *Samuel Kamau Macharia Vs KCB & 2 others* Civil Application No. 2 of 2011 the Supreme Court of Kenya stated that a court's jurisdiction flows from either [the constitution](#) or legislation or both. That a court of law can only exercise jurisdiction as conferred by [the constitution](#) or other written law and cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
20. Some four years after enactment of the [Environment and Land Court Act](#) 2011, parliament enacted the Magistrate's Court Act, 2015 so as to among others give effect to Article 23 (2) and 169 (1) (a) and



(2) of *the Constitution* and to confer jurisdiction, functions and power on the Magistrate's Court. The Act came into operation on 2nd January, 2016 and Section 9 (1) thereof provides:-

A magistrate's court shall-

- (a) in the exercise of the jurisdiction conferred upon it by Section 26 of the *Environment and Land court Act* (Cap 12A) and subject to the pecuniary limits under Section 7(1), hear and determine claims relating to -;
 - (i) Environmental, planning and protection, climate issues, land use, planning, title tenure, boundaries, rates, rents valuations, mining, minerals and other natural resources;
 - (ii) Compulsory acquisition of land;
 - (iii) Land administration and management;
 - (iv) Public, private and community land and contracts, leases in action or other instruments granting any enforceable interests in land; and
 - (v) environment and land generally.

21. The upshot of the provisions of Section 26(3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the Magistrate's Court Act 2015 is that magistrates who are duly gazetted and have the requisite pecuniary jurisdiction have jurisdiction and power to handle cases involving occupation of and title to land. Therefore, the trial court had the jurisdiction to deal with a matter on land involving trust land.
22. It is not in dispute that on 14th June 2018, parties were given directions to go home and settle the matter amicably out of court as provided under Article 159 (2) © which provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. In this case, the parties are siblings. The appellant requested the court that they sort out the matter out of court which was agreed by all parties. The parties met and deliberated on the issue wherein elders ruled inter alia that Andrew Muguna Mwithimbu should give to the respondent herein a portion or plot measuring 100 X 50 feet to own the same as tenant at will while the appellant herein was to give Maria Regeria Mwithimbu a similar size of plot to also own as tenant at will. From the proceedings, it is apparent that some parties did not agree with the findings of the elders. The parties therefore went back to court for determination by the trial court. In my view, nothing prevents a court from referring a matter for reconciliation and settlement by the parties, especially in a case involving very close family members such as this. However, where they fail to reach an agreement, nothing stops the court from determining the matter. Therefore, the trial court was right in proceeding to hear the matter to conclusion. Further, and in view of the disagreement between the parties, the trial court was not under any obligation to be bound by a decision which was not consensual. Therefore, the trial court cannot be faulted for not relying on the ruling by the elders since not all parties to the dispute agreed to it.
23. The appellant alleges that he was condemned unheard and submitted that he was denied an opportunity to adduce evidence in support of his case. I have perused the court record. On 29th April 2021, the appellant asked the court to have his application dated 11th January, 2021 heard first. In its ruling, the trial court noted that the matter had substantially progressed and evidence taken and the appellant was the last witness. The trial court therefore dismissed the appellant's application. In this case, the record is clear that the appellant filed his defence. However, the appellant did not adduce his



evidence on the date given and he could not hold the court at ransom. Whereas the right to be heard is cardinal and cannot be derogated, the appellant cannot be heard complaining that he was condemned unheard when he is the one who was not diligent to adduce his evidence. What is of paramount is that the trial court gave the appellant an opportunity to be heard and where the appellant on his own volition chooses not to testify as directed by the court, he should not blame the trial court. Section 1A (3) of the Civil Procedure Act requires a party or a counsel on record to assist the court in furtherance of the overriding objectives which includes the just and expeditious resolution of disputes.

24. The other issue to consider is whether the existence of trust had been proved. The respondent's claim was for a declaration that the appellant holds the suit land in trust and that the land should be shared equally.

25. The Court of Appeal in *Juletabi African Adventure Limited & another Vs Christopher Michael Lockley* [2017] ECLR held:-

“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-

The law never implies, the court never presumes, a trust, but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

See *Gichuki Vs Gichuki* [1982] KLR 285 and *Mbothu & 8 others Vs Waitimu & 11 others* [1986] KLR 171.”

26. Concerning proving customary trusts, the Supreme Court in *Isack M’Inanga Kiebia Vs Isaaya theuri M’Lintari & another* [2018] eCLR held as follows;-

“Each case has to be determined on its own merits and quality of evidence. It is not every clam of right to land that will qualify as a customary trust. In this regard, we agree with the High court in *Kiarie Vs 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 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.”

27. The burden of proving that the suit parcel herein was ancestral land and that the appellant was registered as proprietor of the suit land in trust lay squarely on the respondent. On trust, the respondent's evidence was that the original suit property belonged to their father and that the same was



registered in the appellant's name to hold in trust for himself and other siblings. The respondent and her sister Maria Regeria Muthimbu who was a co-plaintiff had sued their brothers so that they can be given their share of the land since it belonged to their deceased father. The uncontroverted evidence on record follows that the respondent is living on the suit land with her children. The respondent testified that that was where she was born and brought up.

28. The evidence on record also indicates that Andrew Muguna Mwithimbu who was also the 1st defendant in the case before the lower court, testified that he had sued the appellant vide Meru CMCC NO. 238/1985 and was given a share of the land. He also admitted that his two sisters were entitled to get a share of the land from the appellant since the same is family land. The appellant did not testify therefore the evidence by the respondent and their other brother stood unchallenged.
29. In my view, the respondent discharged the burden that there existed a trust over the suit property, and the trial court rightly held that the existence of a customary trust had been proved. In totality, my evaluation of the evidence and the applicable law to the facts of this case shows that the learned trial magistrate arrived at the right decision and I find no reason to upset the findings of the trial court.
30. In the result, I find no merit in the appellant's appeal and I dismiss it. Considering that the parties are siblings, I order that parties bear their own costs.
31. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF DECEMBER, 2023.

In the presence of;

Court Assistant- V. Kiragu /Lenah M.

Ms Gachohi for respondent

No appearance for appellant

C.K YANO

JUDGE

