



REPUBLIC OF KENYA



**Nyaga v Mbogo (Land Case Appeal 10 of 2019)
[2025] KEELC 3713 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3713 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
LAND CASE APPEAL 10 OF 2019**

AK BOR, J

APRIL 24, 2025

BETWEEN

NJURURI ANGELO NYAGA APPELLANT

AND

LEWIS MUTHEE MBOGO RESPONDENT

JUDGMENT

1. In this appeal, the Appellant faults the Learned Chief Magistrate, M. N. Gicheru for the findings made in Embu CM ELC Case No. 38 of 2018 delivered on 1/2/2019. The Appellant faults the trial court for arriving at the conclusion that the suit was ancestral land subject a customary trust. Further, for finding that the suit land was occupied based on the tea bushes and for determining that the Appellant should have consulted the wives and children of the seller before entering into the sale agreement.
2. The Appellant also took issue with the trial court for not making any finding on his status with respect to the purchase of suit land. The other ground of appeal was that trial court gave a judgment date without allowing parties to adduce oral evidence in court. These are the main grounds set out in the memorandum of appeal dated 23/4/2019.
3. The appeal was canvassed through written submissions. The Appellant referred to the finding by the trial court that the suit land was ancestral land and that Section 28 (b) of the *Land Registration Act* protected such land from sale by the registered owner because a customary trust overrides the title. The Appellant submitted that the green card produced showed that the suit land did not fall within the purview of customary land because it was bought in 2004 from Grison Ngwiga Paul, Moses Njeru P. Kamitambo and Zakayo Njagi.
4. That having purchased the suit land for valuable consideration, it could not be said that it was ancestral or customary land. The Appellant urged that the Respondent did not seek a declaration of customary trust and that the trial court erred in making a determination on what was not pleaded. Further, he



submitted that the Chief's letter dated 29/10/2013 confirmed that no one lived on the suit land since there were no building on the land. The Appellant relied on decisions showing that the doctrine of customary trust is recognized in this country and maintained that no evidence was adduced to prove customary trust which in any event was not pleaded. The Appellant went further to argue that to establish a customary trust physical occupation was mandatory and the crops referred to by the Learned Magistrate would not suffice.

5. The Appellant urged that the findings of the trial court were contrary to the evidence on record and that his evidence which the court did not consider was clear that he followed due process in acquiring the suit land. He elaborated that there was an agreement for sale in which the consideration was paid and the parties attended the Land Control Board (LCB) for consent. He urged that this fact was not controverted and the only issue taken up was the failure to involve family members who had no interest over the suit land.
6. Further, he submitted that the sale should only have been illegal if there was fraud proved against the Appellant or the seller of the land which was never proved. The Appellant added that there was no claim that the suit land was matrimonial property to warrant consent from the seller's wives. Additionally, that children need not be consulted when their father wishes to sell his lawfully acquired land in which they had no interest. The Appellant went on to argue that there was no law providing that a father had to consult his children before disposing of his land. The Appellant submitted that the fact that the seller's family members were aware of the sale was not controverted.
7. The Appellant maintained that he was a bona fide purchaser for value without any notice of any impropriety and faulted the Learned Magistrate for failing to evaluate his evidence which showed that he acquired the suit property procedurally.
8. The Appellant asserted that the case never went to full hearing because the Learned Magistrate only relied on the documents and the statements on record and that since it was a claim based on customary trust, there was need for the parties to be heard and their evidence tested on cross examination. He maintained that parties never adduced oral evidence and faulted the trial court for giving a judgment date without hearing the parties. He urged the court to allow his appeal.
9. The Respondent submitted that the appeal was defective for failing to include the defence filed by the Appellant in the magistrate's court. He contended that the appeal offended Order 42 Rule 2 of the Civil Procedure Rules which makes it mandatory for an Appellant to file a certified decree or order appealed against.
10. He submitted that the sale and transfer of the land known as Ngandori/ Kiriari/4329 was void because under Section 93 (2) of the *Land Registration Act*, the Respondent had acquired an interest over the suit property as the wife of the 1st Defendant who had since died. He added that by virtue of this provision, she had acquired an interest in the nature of ownership in common of the suit property such that her consent was mandatory before the land on which they had lived, worked and developed for over 40 years could be sold. The Respondent submitted that the sale transaction was null and void because the wives were never involved and that the Appellant failed to adduce evidence to show that he obtained the LCB consent to have the suit land transferred to him. Further, that the Appellant merely produced minutes of the LCB held on 30/8/2013 which he urged could not be treated as consent for the transfer of land.
11. The Respondent explained that the parties consented to rely on the statements, documents and submissions and that that is what the Learned Magistrate went by and that as such, the Appellant could not turn around and claim that the evidence was not tested through cross examination. He referred the court to the proceedings of 17/9/2018 where parties agreed by consent to exchange statements,



documents and submissions. He emphasized that the Learned Magistrate did not force parties to rely on documents on record and added that parties were represented by advocates so that this could not have happened.

12. The issue for determination is whether the court should allow the appeal. The initial plaint in the suit was filed as Kerugoya HCC No 777 of 2013 in which Jane Gitiri Njue and Dorothy Werimba Kariuki claimed that they were the wives of Peter Mbogo and that they had been married for over 40 years. They claimed that the suit property was their family land where they had lived with their 10 children and that they had extensively developed the land. They stated that in August 2013, they got information that their husband had sold the suit land to the Appellant. They argued that the sale and transfer of the suit property was void since they were never informed and sought a declaration that the sale and transfer of the suit land by their husband to the Appellant was null and void. They sought cancellation of the Appellant's title so that the suit land could be jointly registered in the names of the wives and their husband.
13. In the judgment delivered on 1/2/2019, the trial court flagged two issues for determination, being whether Peter Mbogo would have sold the suit land without involving the family members and secondly, whether the suit land was not occupied as the Appellants contended. On the first issue, the trial court found that the Respondent's father could not have lawfully sold the suit land without the consent of his family. The court noted that the suit was filed by the seller's wives and that the Respondent took over the matter after his mother died.
14. The trial court noted that the Respondent's father also died before the case was concluded. The Learned Magistrate relied on Article 45 (3) of *the Constitution* which states that parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage. According to the trial court, that meant that the deceased husband did not have a better right to the suit land than his wives.
15. The Learned Magistrate went on to state that it seemed that the suit land was ancestral land which was protected by Section 28(b) of the *Land Registration Act* from sale by the registered owner because the customary trust overrides the title. The court found that it was not enough for the Appellant to have dealt with the deceased husband only and that he ought to have consulted the wives and children of the seller before he purchased the land. The trial court found that the land was occupied based on the photographs of the tea bushes growing on the land which were submitted in support of the application for injunction. The court concluded that the purported sale of the suit land to the Appellant was unlawful regardless of whether or not it was occupied.
16. Among the documents which the Appellant tendered before the trial court were the sale agreement dated 1/8/2013, the further land agreement dated 14/8/2013, acknowledgement slip dated 1/9/2013, letter of consent dated 30/8/ 2013, minutes of LCB showing that the sale transaction was approved and the title deed issued to the Appellant on 13/9/2013. The other documents included a copy of the white card showing that Peter Mbogo Njiru bought the suit land on 22/12/2004 from 3 persons and that he transferred the land to the Appellant on 11/9/2013.
17. The encumbrances section of the title deed showed that the suit land was charged to the Agricultural Finance Corporation (AFC) to secure borrowings on 27/9/2005 and 28/2/2007. The land was discharged on 22/7/2013. Entry no. 7 registered on 17/9/2013 showed that no dealings were to be registered against the suit land without the consent of Muthoni Ndeke & Company Advocates. Entry no. 8 is a restriction registered on 2/10/2013 based on the letter written by AP Karithi Advocates.
18. There was no evidence led to show that the suit land was ancestral land. From the copy of the green card, it is apparent that the Peter Mbogo acquired the land in 2004 from Grison Ngwiga Paul, Moses



Njeru P. Kamitambo and Zakayo Njagi. At some point, Peter Mbogo charged the suit land to AFC to secure borrowings which he later repaid. The suit property was not matrimonial land as the trial court regarded it to be. As such, there was no legal requirement for the wives and children of the seller to be consulted before the registered owner could sell the land.

19. The court does not agree with the interpretation which the Learned Magistrate ascribed to Article 45 of *the Constitution*. In any event, it was not proved to the trial court that the suit property constituted matrimonial property or that it was jointly owned by Peter Mbogo and his wives.
20. The Learned Magistrate relied on Section 93 of the *Land Registration Act* which deals with co-ownership and other relationships between spouses. It stipulates that subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use of both spouses or, all the spouses there shall be a presumption that the spouses shall hold the land as joint tenants unless the certificate of ownership clearly states that one spouse is taking the land in, his or her own name only, or that the spouses are taking the land as joint tenants.
21. There was no evidence led to prove that Peter Mbogo acquired the suit land for co-ownership with his two wives. It was not also proved that the spouses contributed by their labour or other means to the productivity, upkeep and improvement of the suit land, to support the view that the spouses had acquired an interest in the suit land in the nature of an ownership in common of that land with the Peter Mbogo in whose name the suit land was registered.
22. The court allows the appeal and sets aside the judgment and decree of the trial court. The Respondents claim before the trial court is dismissed.
23. Each party will bear its own costs for the suit and the appeal.

DELIVERED VIRTUALLY AT EMBU THIS 24TH DAY OF APRIL 2025.

K. BOR

JUDGE

In the presence of: -

Mr. Victor Andande for the Appellant

Diana Kemboi- Court Assistant

No appearance for the Respondent

