



REPUBLIC OF KENYA



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**Ndege v Kamau & 2 others (Civil Case 11"A" of 2019)  
[2022] KEELC 3009 (KLR) (18 March 2022) (Judgment)**

Neutral citation: [2022] KEELC 3009 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
CIVIL CASE 11"A" OF 2019  
EC CHERONO, J  
MARCH 18, 2022**

**BETWEEN**

**SUSAN MUTHONI NDEGE ..... APPELLANT**

**AND**

**CATHERINE KARIMI KAMAU ..... 1<sup>ST</sup> RESPONDENT**

**SUSAN WAMBURA KAMAU ..... 2<sup>ND</sup> RESPONDENT**

**JANE MUTHONI MURIMI ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Judgment/Decree of the S.R.M the Hon.  
E.O. Wambo in ELC NO. 146 OF 2018 Delivered on 16/05/2019)*

**JUDGMENT**

1. This Appeal arises from the judgment by Hon. E.O. Wambo, SRM delivered on 16/05/2019 in which the trial Court held that the Appellant who was the defendant in the former suit was found to be holding the suit land parcel number Gichugu/settlement Scheme/3797 in trust for herself and the Respondents/plaintiffs. The Respondents who were plaintiffs in the former suit had filed a plaint dated 04/12/2018 seeking orders inter-alia that a declaration be made that the suit land parcel number Gichugu/settlement/scheme/3797 was registered in the name of the defendant to hold the same in trust for themselves and the plaintiff. The Respondents/plaintiffs had also sought an order compelling the defendant/appellant to sub-divide the said land into two equal portions and one portion to be registered in the name of the plaintiff failing which the executive officer of the court be ordered to sign all the relevant documents and the District Land Registrar Kirinyaga be ordered to dispense with the production of the Title deed, copy of I/D Card, KRA pin certificate and passport size photographs of the defendant.



2. The defendant Appellant filed a statement of defence dated 25/02/2019 denying the plaintiffs claim. After the trial Magistrate rendered himself on 16/05/2019, the defendant/Appellant was aggrieved and preferred the present appeal citing the following four grounds;
  1. He totally failed to appreciate that the Registration as owners of L.R. No. Gichugu/ settlement/scheme/3797 of the Appellant (who is the mother to the deceased son Kamau Ndege) was only because the deceased was the Appellants only son and the registration was for and on behalf of the entire family the deceased included but the registration was not for the purposes of having equal share Holding in terms of ownership of the land as the trial magistrate found.
  2. He failed to appreciate that the deceased (kamau Ndege) was a child like any of the other children of the Appellant, therefore entitled to an equal share of the family land- whether under the Land Act or the succession Act even if the Appellant was to have been the one who died first. The earlier death of the Appellant's deceased son did not at all create equal ownership of the land or at all.
  3. He failed to appreciate that he was handling the matter within the E.L.C Jurisdiction and not family or succession law Jurisdiction .The lack of appreciation & distinction by the trial magistrate got him Astray of the issues at hand and even went further to grant the Respondents orders that had not been sought for in the plaint dated & filed before court on 4<sup>th</sup> December, 2018
  4. Going through the judgment dated 16<sup>th</sup> may, 2019 as a whole the learned trial magistrate decided the entire case at the middle of the Judgment (page 3 paragraph one) judiciously it is near impossible to comprehend the rest of the arguments repeatedly up-to the end when the matter had only been filed on 4<sup>th</sup> December, 2018 and within five (5) months it was fully heard and concluded vide the subject Judgment. It was clear much as we are in the age of expeditious disposal of cases, the trial magistrate was in a visible hurry to determine the matter in a particular way as he ended up doing.
3. When this Appeal came up for directions on 11/11/2021, the parties through their Advocates on record agreed to canvass the appeal by written submissions. The appellant through the firm of Wambugu Kariuki & Company Associates Advocates filed their submissions on 16/12/2021 while the firm of Maina Kagio & Company Advocates for the Respondents filed theirs on 17/01/2022

### **Appellants Submissions**

4. The plaintiff combined grounds No. 1 & 2 of the Memorandum of Appeal and submitted that the trial Magistrate at some point ought to have sought to establish and appreciate who were the family for which the parties registered on the land were so holding the land in trust. She argued that the learned trial magistrate appreciated only the family of the deceased son to the Appellant but at no one time in his entire judgment did he appreciate who other part of the family the Appellant had indicated in her replying affidavit, that is to say "*Herself and her four daughters*"
5. She submitted that the trial magistrate failed to fully appreciate that the family for whose benefit and trust the land was registered in the names of the Appellant and her deceased son, especially when it was not in dispute that the same family/clan land had earlier been registered in the name of the father of the entire family in his lifetime clouded the magistrate's mind to misconceive that merely because the land was registered in the names of the Appellant & her son meant that it was to be on equal share holding to the exclusion of the other family members hence holding that the deceased son was entitled



to half share. The Appellant submitted that whether under the Land or Succession law now that there is enough evidence that the land is family/clan land, the deceased was and ought to be entitled to an equal share just like the rest of the family members who are the deceased's four sisters and mother who is the Appellant and still alive. That the same position would obtain even if it is the Appellant and Kamau Ndege are both deceased.

### **Ground No. 3**

6. On the third ground, the Appellant submitted that the learned magistrate got his mind clouded for failure to appreciate that the matter was not a succession cause before him hence got Astray in his consideration to even getting carried away regarding what was before him and ended up granting prayers not sought for in the plaint. She further submitted that in the plaint filed in court on 04/12/2018, the respondents had sought for prayers; (a), (b), (c), & (d). However, the trial magistrate granted prayers (a) & (b). She submitted that because the respondents' suit before the trial magistrate was successful, the Decree ought to have ended as it is at the end of page 46 of the record. She further submitted that the learned trial magistrate did not have any jurisdiction or any legal discretion whatever wide and/or however far stretched to amend on his own motion the Respondents prayers purportedly under guise of *Sections 1A, 1B and 3A of the Civil Procedure Act* which he stated to have invoked so as to grant the respondents orders they had not sought. She submitted that it is legally unheard of, it can't happen, it cannot be done legally. That the orders therefore granted by the trial magistrate in the Decree as order numbers 4(a), (b), & (d) ought not lie and cannot lie.

### **Ground No. 4**

7. The Appellant submitted that the learned trial magistrate by granting prayers not sought in the plaint to initiating negotiations in court and finalising the matter within a record of six (6) months leads to an inescapable signal that the matter was supposed to end in a particular way as it was concluded.

### **Respondents Submissions**

8. The Respondents through the firm of Maina Kagio & Company Advocates submitted that the only issue raised in this Appeal is whether the suit land parcel number Gichugu/settlement Scheme/3797 should be divided into 2 portions, one for the Appellant and the other for the family of Kamau Ndege (deceased) or equally among Kamau Ndege, his Siblings and mother. They submitted that the suit land was initially registered in the Appellant's husband who was also the father to Kamau Ndege (deceased). After the death of Kamau Ndege, the Appellant and her son Kamau Ndege (deceased) became the new owners of the land on transmission. They further submitted that there is no evidence that the other children of the Appellant namely; Rose Micere, Jane Wanjiru and Irene Wangechi have ever sought for revocation of the grant so that their names can also be included as beneficiaries of the estate of their father.
9. They argued that though the said Rose Micere, Jane Wanjiru and Irene Wangechi are aware that their names are not in the Title of the suit land, they have never sought to lay claim to the land or considered as part of those who should get the land or that their individual portions should be equal in size with that of their brother, Kamau Ndege (deceased). They submitted that it is not therefore legally possible for the Appellant to purport to hold brief for strangers to the suit and claim land on their behalf. They contend that though Kamau Ndege is now deceased, his estate is entitled to a share of the land. They submitted that since the registration of the suit land was not joint, one wonders under what circumstances the deceased Kamau Ndege was to share the land equally with the other co-owner and his sisters. They submitted that there was no basis, legally or factually, which would have made the trial magistrate to make a finding different from what he held.



- 10 In conclusion, the Respondents submitted that since Kamau Ndege (deceased) had two wives, the trial magistrate exercised his discretion judiciously in giving directions the way he did. They further submitted that after Catherine Karimi Kamau, the 1<sup>st</sup> Respondent died on 25<sup>th</sup> February 2021, Susan Wambura Kamau, the 2<sup>nd</sup> Respondent was substituted as the administratrix of her step-mother, the 1<sup>st</sup> Respondent herein. They submitted that the half (1/2) share of Kamau Ndege (deceased) should be divided into two equal portions as ordered by the learned magistrate with one portion being registered in the name of Jane Muthoni Murimi and Susan Wambura Kamau to hold in trust for themselves and siblings, if any, and the other portion to be registered in the name of Susan Wambura Kamau in trust for CWK (minor), SMK (minor) and JNK (minor).
11. Thereafter, the Appellant will be at liberty to deal with the other half (1/2) share of the suit land in whatever way she deems appropriate, including but not limited to sharing it with her 3 daughters, if she so wishes.

### Legal Analysis And Decision

12. I have considered the record of Appeal and the submissions by counsel for both the Appellant and the Respondents and the applicable law. As a first appeal, this court's obligation is to re-consider the evidence, re-evaluate and come up with my own conclusion as was succinctly put by the Court of Appeal in the case of *Sumaria & Another- V- Allied Industries Limited* (2007) 2 KLR 1 where it was held;

“Being a first appeal, the court was obligated to reconsider the evidence, re-evaluate it and make its own conclusions. A court of Appeal would not normally interfere with a finding of fact by the trial court unless;

- a. It was based on no evidence or
  - b. It was based on a misapprehension of the evidence or
  - c. The judge was shown demonstrably to have acted on wrong principle in reaching the finding he did-----”
13. I have also looked at the pleading and proceedings in CMELC NO. 146 of 2018 as well as the impugned judgment of the trial magistrate which is the subject of this Appeal. From the record of appeal, the Respondents who were plaintiffs in the former suit commenced by a plaint dated 4<sup>th</sup> December, 2018 were seeking for a declaration that land parcel Number Gichugu/settlement/scheme/3797 was registered in the name of the defendant/Appellant and Kamau Ndege (deceased) to hold in trust for themselves and the plaintiffs. The Plaintiffs/Respondents had also sought a second order compelling the defendant/ Appellant to sub-divide land parcel Number Gichugu/settlement/scheme/3797 into two equal portions and one portion being registered in the name of the plaintiffs and in default the Executive Officer of the court be ordered to sign all relevant documents and the District Land Registrar be ordered to dispense with the production of the old Title deed, copy of the I/D card, KRA pin certificate and passport size photographs of the defendant/Appellant.
14. The record of appeal indicates that the trial of former suit commenced on 14/03/2019 when Catherine Karimi Kamau, the 1<sup>st</sup> plaintiff testified by adopting her witness statement dated 04/12/2018. She also produced documents contained in her list of documents dated the same date as P-exhibits 1, 2, 3, and 4 respectively. From the record, the 1<sup>st</sup> plaintiff is the wife to Kamau Ndege (deceased) and daughter-in-law to the defendant/Appellant while Susan Wambura Kamau (2<sup>nd</sup> plaintiff) and Jane Muthoni Murimi (3<sup>rd</sup> plaintiff) are her daughters.



15. The Defendant/Appellant also testified the same day on 14/03/2019. According to the defendant/Appellant, She was blessed with four (4) Children namely Rose Munene Wachira, Jane Wanjiru Maina, Irene Wangechi Njagi and Kamau Ndege (deceased). She is on record to have said that the suit land which is measuring 10 acres is a clan land and that it would be unfair and unjust to give the plaintiffs half the suit land on behalf of the estate of Kamau Ndege (deceased) leaving out the other children who are also beneficiaries of the clan land. She wanted the land to be shared among all her children. Her evidence was corroborated by two witnesses namely Mwaniki Gitari and Mwangi Njoroge.
16. Having gone through the record and the evidence of the 1<sup>st</sup> plaintiff, the defendant and her two witnesses as well as the submissions by the counsels, the following in my view comments as undisputed facts;-
  1. The suit land parcel Number GICHugu/settlement/scheme/3797 is a clan land held by the Defendant and Kamau Ndege (deceased) in trust for the family.
  2. The defendant Susan Muthoni Ndege and Kamau Ndege (deceased) got registered as joint owners of the suit land by way of transmission.
  3. Catherine Karimi Kamau, the 1<sup>st</sup> plaintiff/Respondent is the widow to Kamau Ndege (deceased) while Susan Wambura Kamau and Jane Muthoni Murimi are some of her children.
  4. Beside Kamau Ndege (deceased), Susan Muthoni Ndege, the Defendant/Appellant was also blessed with three other children namely; Rose Micere Mucira, Jane Wanjiru Maina and Irene Wangechi Njagi.
17. In light of the un-disputed facts above, it comes out that the suit land parcel No. Gichugu/settlement/scheme/3797 is a clan land registered in the names of Susan Muthoni Ndege and Kamau Ndege to hold in trust for the family which include Rose Micere Mucira, Jane Wanjiru Maina and Irene Wangechi Njagi. Where a declaration is made that a registered proprietor holds land under Customary trust and the court is asked to determine the beneficiaries, the applicable test is whether the beneficiary's claim is one based on inter-generational or intra-generational equity. My re-evaluation of the evidence before the trial court indicates that the suit land parcel No. Gichugu/settlement/scheme/3797 is held in trust for the current generation (inter-generation) and that the beneficiaries must first be identified before passing over to the succeeding generation (intra-generation).
18. Catherine Karimi Kamau, the 1<sup>st</sup> plaintiff/Respondent in the former suit is the wife of Kamau Ndege (deceased) while Susan Wambura Kamau (2<sup>nd</sup> plaintiff) and Jane Muthoni Kamau (3<sup>rd</sup> Plaintiff) are the children of Kamau Ndege (deceased) and Catherine Karimi Kamau. The Defendant in her evidence on record stated that some of her children who are sisters to Kamau Ndege (deceased) namely Rose Micere, Jane Wanjiru Maina and Irene Wangechi Njagi who are members of her family and who are the substantive beneficiaries have not been included as beneficiaries and that it would be unfair and disadvantageous to exclude them in the determination of the trust being the current beneficiaries (inter-generational).
19. While rendering himself, the trial magistrate rubbished the defendant's evidence at page 10 of the judgment where he stated as follows;-
 

“ ----This court is not convinced that any of the registered parties was holding land in trust for the family as if they were to hold in trust then there was nothing that would have stopped the trust being registered against her title. The court also considered the evidence of the defendant and her witness who have made attempts to establish some sort of trust.



20. This court finds it rather odd wait for the son to die to claim that he was holding in trust for himself and the larger family.
21. The defendant ought to have challenged the son during his lifetime but in death this court will not be possible for the court to hear his views but rely on the document available which document shows that the defendant was registered with deceased son.”
22. I find from the analysis and evaluation that the trial magistrate mis-apprehended the evidence and the law in some material way thereby arriving at a wrong decision. I also find that the trial magistrate erred by failing to consider the evidence adduced by the defendant and her witnesses that customary trust is an overriding interest on land which need not be noted on the register. Grounds 1 & 2 of the Appeal in my view succeed.
23. As regards ground No. 3, the Appellant accuses the trial magistrate for granting the Respondents/ plaintiffs orders that were not sought for in the plaint dated 04/12/2018. Upon re-analysing the decision by the trial magistrate in the impugned judgment, one cannot fail to note that he went off the curve at page 11 & 12 where he stated as follows;
 

“----- Anyway having stated as above and entered judgment in favour of the plaintiff with no order as to costs. I invoke the provision of Sec. 1A, 1B and 3A of the Civil Procedure Code as follows. In addition to the order granted in the plaint it is clear to this court that the beneficiaries of Kamau Ndege deceased. According to Chief’s letter of 4.11.2018;

  1. Wambui Kamau - first wife deceased with children
  2. Susan Wambura Kamau - daughter
  3. Joseph Ndege Kamau - son deceased with no children
  4. Simon Muthike Kamau - son deceased with no children
  5. Jane Muthoni Murimi - daughter
  6. Catherine Karimi Kamau - 2<sup>nd</sup> wife
  7. CWK - daughter (minor)
  8. SMK - daughter (minor)
  9. JNK - son (minor)
24. This court orders that the 1/2 share of Kamau Ndege be partitioned into two halves. One half (1/2) to be taken by the household of Pauline Wambui Kamau (deceased) more specifically the portion where her grave and that of Joseph Ndege and Simon Muthike Kamau are situated or located.
25. The same be registered in the name of Jane Muthoni Murimi and Susan Wambura Kamau to hold in trust for themselves and sibling if any.
26. The other half portion be registered in the names of Catherine Karimi Kamau’s household in trust for herself and her children mainly CWK, S (minor), MK (minor), JNK (minor).
27. Permanent injunction do issue against the defendant restraining herself, her agents and/or servants or otherwise from evicting the plaintiffs, alienating and/or otherwise interfering with the plaintiffs half (1/2) portion of GICHugu/settlement/scheme/3797-----“.



28. It is clear from the above excerpt that the learned magistrate granted orders not prayed for under the guise of Section 1A, 1B and 3A of the *Civil Procedure Code*. A court has no discretion to give orders which are not sought in the plaint under the guise of Section 1A, 1B, and 3A. Those orders in my view cannot stand and the same are liable for setting aside.
29. The 4<sup>th</sup> ground is challenging the speed at which the trial magistrate heard and determined the former suit in a record of five (5) months. According to the Appellant, the reason why the trial magistrate concluded the case in a supersonic speed was to determine the matter in a particular way which he ended up achieving. I find that ground not based on law but conjecture. The overriding objective of the law governing Civil disputes including land claims in our courts is to facilitate the just, expeditious, proportionate and affordable resolution of these disputes. The Appellant cannot be heard to complain instead of complimenting the trial magistrate for resolving the dispute expeditiously. As such, I find ground four of the appeal without merit.
30. For all the reasons given herein above, I find this Appeal merited and the same is allowed as follows;
1. This Appeal is allowed and the decision/Judgment and/or Decree of the SRM-Hon. E.O. Wambo dated 16<sup>th</sup> may, 2019 be and is hereby set aside and substituted with a declaration that L.R. No. Gichugu/settlement/scheme/3797 is family/clan land to be shared equally among all the children of the Appellant including the deceased Kamau Ndege.
  2. This being a dispute involving a family, I hereby order that each party to bear their own costs of the former suit and this Appeal.

**JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS  
18<sup>TH</sup> DAY OF MARCH, 2022.**

.....  
**HON. E.C. CHERONO**

**ELC JUDGE**

**In the presence of:-**

Mr. Mugo holding brief for Mr. Maina Kagio for Respondent

Appellant – present

Kabuta – Court clerk.

