



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. E021 OF 2021**

**JANE MWIRARIA.....1<sup>ST</sup> APPELLANT**

**STELLA KANYATA MBAYA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**TERESIA NAITORE MWANJA.....RESPONDENT**

*(Being an appeal from the Judgment of Hon. T.M. Mwangi (S.P.M.)*

*delivered on 30<sup>th</sup> July, 2018, in Meru CMCC No.42 of 2018)*

**JUDGMENT**

**A. PLEADINGS**

1. The appellants had filed a suit at the lower court for breach of customary trust by the respondent over **L.R No. Kiirua/Naari/Mwaja/1180** initially belonging to their late mother Harriet Kairigo Mwaja. They sought for the retransfer of the land to their names. The respondent totally denied the claim.

**B. TESTIMONY**

2. The 1<sup>st</sup> appellant adopted her witness statement dated 15.9.2017 stating that the respondent who was her sister had coerced and or lied to her late mother and got transferred the entire piece of land. She testified she had enquired from her late mother over the transfer but was told that the respondent was on holding the land in trust for them.

3. She testified that the dispute over the subdivisions in her favour went before the area chief and the respondent willingly agreed to subdivide the land. However, despite the preparation of mutation form and land control board, the respondent declined to execute the documents. She produced a copy of minutes by the area chief, a mutation form, a sketch map and a copy of records as **P exh 1-3** respectively.

4. She insisted her two brothers had been given some portions of land by her late mother. At that juncture, the court allowed for an amendment to reflect the new numbers from Parcel **No. 1860** namely **P.N. 1286 and 1287**.

5. Asked about the subdivisions, PW1 stated the alleged subdivisions had been done in secrecy hence the reason they did not object or place a caution over them while their mother was still alive. She maintained she did not sue the new owner(s) since she did not know them.

6. Lastly, she told the court they were still in occupation of the suit land.

7. The respondent adopted her witness statement dated 25.9.2017 and insisted she was not transferred the land by her mother to hold it in trust for them. In her view, the land was given to her for she used to assist and care for her late mother.

8. She told the court her late mother had also transferred part of her land to her two brothers namely John Muriuki and Joseph Karinguri but the appellants were not given any share. She confirmed that the appellants filed the suit without first discussing the issue with her.

9. As regards **P exh 1**, the respondent confirmed that she had attended the meeting over an access road authorized by her brother John Muriuki. She denied ever agreeing before the chief to sharing her parcel of land with the appellants even though the record indicated she had

alleged some people were trespassing into her parcel of land.

10. Asked about the farming activities by the appellants over her land, she disagreed with a suggestion that the appellants had demanded for their share of the land in their previous family meetings and categorically denied that her mother while transferring the land to her had indicated that she was to hold the land in trust for her sisters.

11. DW2 adopted his witness statement and told the court that her late mother's Parcel No. 1180 was subdivided and a portion was sold to some third parties. In his view, the land was only shared to the sons and the respondent at the rate of 1.34 Ha each as gifts in absolute terms and that the appellants were not given any share due to the existing differences they had with the deceased but he did not know the root cause.

12. DW2 confirmed that the appellants started occupying and or using the respondent's land after the demise of their late mother. He said he was unaware of any consent to share the land allegedly signed before the area chief on 21.7.2017. He insisted he had no bad blood with the appellants and was not demanding any share out of the suit land. He stated that he was not willing to say whether or not the appellants were entitled to a share out of the respondent's land though they cultivated on it.

13. In his view, the reason the appellants were denied a share by his late mother was because they were not caring about her.

### **C. GROUNDS OF APPEAL**

14. The appellants fault the decision of the trial court on the basis that it failed to find that the respondent held **Parcel No's Kiirua/Naari/1286 and 1287** in trust for them despite sufficient evidence; it failed to find the chief's letter disclosed that there was an undertaking that the respondent should transfer the land to them; failed to find the suit parcels emanated from ancestral land; misdirected itself on the principles applicable in cases of trust; failed to apply substantial justice and ruled against the weight of the evidence which was available.

### **D. WRITTEN SUBMISSIONS**

15. Parties were directed to file written submissions by 27.11.2021.

16. The respondent submitted the transfer of the suit parcels to her was an absolute gift **inter vivos** with no conditions or overriding interest in the nature of customary trust, and that the only reason she and her two brothers got a share from her late mother's land was because they were caring for her at old age unlike the appellants who had neglected their mother.

17. It was further submitted the subdivisions occurred in 2006 while their late mother died in 2017 after which the suit was filed 11 years after the transfer.

18. The respondent submitted the appellants knew that they had no right or power in law to compel her to grant them an inheritance as held in **Mbui Mukangu-vs- Gerald Mutwiri Mbui [2004] eKLR**.

19. The respondent submitted that ordinarily a customary trust created by patriarchs/matriarchs would go for the eldest sibling to hold the property in trust for the young siblings but in this case, it was unique which was a clear manifestation that her parcel of land as a gift **inter vivos** was not subject to any overriding interest in the nature of customary law.

20. The respondent further submitted it was worth noting one Jessica Gaiti did not join the appellants in claiming a portion since she knew there was no customary trust and on the same vein, the appellants were not targeting the parcels of land given to the two brothers which formed part of the ancestral land. The inference was that their late mother never intended any customary trust against any of the beneficiaries to her land.

21. The respondent submitted equity assisted those with clean hands and that the appellant's were all married with parcels of land belonging to their husbands so it could not be true that they had nowhere to live and hence under **Sections 24, 26 and 28 of the Land Registration Act**, the court should find the suit parcels as pleaded did not exist, and had been transferred to third parties who are not joined in this suit which fact the appellants were aware of yet they want the court to grant an unenforceable prayer.

### **E. ROLE OF AN APPELLATE COURT**

22. This being a first appeal, the court is mandated to re-hear and re-appraise itself of the lower court record, come up with its independent findings and conclusion while alive to the fact that the trial court had the benefit of hearing the parties first hand. See **Peter -vs- Sunday Post Ltd (1958) EA 424**.

### **F. ISSUES FOR DETERMINATION**

23. The issues for determination are whether the appellants had met the threshold of prove of customary trust and if the trial court applied the correct law to the facts and evidence.

24. The dispute in this matter in the lower court was whether the appellants were entitled to a share of **L.R No. Kiirua Naari-Maitai 1180, 1286 and 1287**.

## **G. PRINCIPLES ON CUSTOMARY TRUST**

25. The principles and factors to prove and satisfy for a finding on customary trust have been settled by Supreme Court of Kenya in **Isack M'inanga Kiebia –vs- Isaya Theuri M'lintari & another [2014] eKLR** namely:- that the land in question was before registration family, clan or group land; the claimant belongs to the clan, group or family; the relationship to such group, clan or family was proximate; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances and lastly that the claim was directed against the proprietor who was a family member.

26. It is against the above principles that this court would proceed to establish if the appellants had proved their claim to the required standards.

27. There is no dispute that the appellants were and are siblings of the respondent and the children of the late Harriet Kairigo Mwanja who passed on in 2017. The appellants pleaded that their late mother owned **L.R Kuuriua/Naari-Maitei/1180** and produced **P exh 1, 2 and 3** which related to L.R 1287 only. **P exh 3** did not show the nexus between the deceased and the siblings. The name of the appellant's mother did not appear on it and there was no search certificate or copy of records brought to show the history of the subdivisions of L.R No. 1286 and 1287.

28. The appellants did not lead any evidence tracing the aforesaid parcels of land to any of the alleged transfer(s) in 2006. The appellant averred the respondent used false presences and or tricks to cause the transfer without the consent of the other family members. It was upon the appellants to lead evidence on such allegation(s) and even produce the transfer form(s) and the land control board consents as exhibits. **See Vijay Morjaria –vs- Nansingh Madhusingh Darbar & another [2000] eKLR.**

29. Further, the appellants did not specify when they became aware of the alleged transfers and if so, why they did not formally raise any objection(s) prior to the death of their late mother on 7.3.2017.

30. The appellants had the onus to lead evidence that the land in issue was family, clan or group land before the registration. In this case, such evidence was not tendered at all.

31. Coming to the 2<sup>nd</sup> issue, there was no dispute the appellants were related with the respondent.

32. On the third issue as to whether the appellants could have been entitled to be registered as owners or other beneficiary of the suit land but for some intervening circumstances, the onus was on the appellants to explain why they were not registered as owners yet they were the elder sisters of the respondent and among the six children of the deceased.

33. The appellants' evidence was that the respondent used tricks and or caused the land to be transferred to her in 2006, efforts to seek the comments of the deceased elicited beweldment and surprise and that there was an assurance from the deceased the respondent was holding the land in trust for them.

34. The appellants did not state when they discovered the transfer and the action they took to confront either the respondent in the presence of their late mother and or in the presence of their other brothers.

35. On the other hand, the respondent called his siblings who explained the circumstances under which the land was subdivided into four portions in favour of the two sons, the respondent and a portion was disposed of to third parties by the deceased during her lifetime.

36. It is not lost to the court that the 1<sup>st</sup> appellant brought this case without the authority to plead and sue from the 2<sup>nd</sup> appellant. That authority has not been attached to the plaintiff. Similarly, the 2<sup>nd</sup> appellant did not file any witness statement in line with **Order 3 Rule 2 Civil Procedure Rules**. Likewise, the 2<sup>nd</sup> appellant did not testify before the trial court to collaborate the evidence of the 1<sup>st</sup> appellant. Her signature was also missing in **P exh 1**.

37. The statement of Jerica Gaiti Mwiti confirmed and gave strength to the respondent's testimony that the reason the appellants were denied a share was their failure to take care of their aged mother.

38. Evidence was also led that the appellants had abandoned their deceased mother and only came back to the suit land after her death in 2017 and in less than 9 months, they lodged the instant suit.

39. DW2 was emphatic that there was bad blood between her two sisters and the deceased mother. Further, the appellants only directed their claim against the respondent yet there was able evidence that two parcels of land owned by DW2 and his brother were also parcels of land which initially belonged to the deceased.

40. In my considered view therefore, the appellants failed to establish which intervening circumstances made them unable to be registered as owners of the suit parcels as opposed to the respondent.

41. The respondent testified that just like her brothers who got a share from their mother's land, her land was an absolute gift **inter vivos** which was not subject to any overriding interests such as customary trust.

42. In the **Estate of the late Gedion Manthi Nzioka (Deceased) [2015] eKLR**, Nyamweya J, as she then was, held a gift **inter vivos** was made through a deed or instrument and or a registered transfer and must be complete to be valid and was binding.

43. There is no evidence that the deceased lacked capacity or competence to transfer the land to the respondent and her two sons in 2006. The gifts were perfected. The appellants failed to object to the gifts either at the time they were given, perfected or so soon thereafter during the lifetime of the donor – their deceased mother. Such gifts in law take effect immediately upon the perfection and are in absolute terms. The gifts were also consummated through acceptance by the beneficiaries with full knowledge the appellants.

44. The respondent's land passed on and she accepted it by acquiring a title deed on 22.1.2016 which was a year and one month before the demise of the deceased mother.

45. The appellants did not lead any evidence to show that after the transfer and registration, they ever asserted any right on the land during the lifetime of their late mother and if not so, explain why they had to wait until her demise to move into the land and lodge the current suit.

46. If the appellants knew they had accrued rights and interests over the land, it is inconceivable that they had to await the demise of their mother to move in and claim the land.

47. The appellants failed to categorically deny the allegations that their relationship with their late mother had hit the rock bottom and hence the reason they were denied a share but now want to reap from the generosity of the very person they were not seeing eye to eye during her lifetime.

48. A trust can never be implied by court unless there was a clear interest to create it. Evidence must be led to show the intention and its existence. See *Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others [2005] eKLR*, *Muthuita –vs- Muthuita [1982-88]1KAR 42*.

49. The respondent had submitted on the facts that the appellants were married and hence did not deserve the suit properties. It is trite law that submissions however powerful or forceful are not evidence and parties are bound by pleadings. See *Daniel Toroitich Arap Moi – vs- Mwangi Stephen Muriithi & another [2014] eKLR*. Such pleadings and evidence was not tendered by the respondent in the trial court.

50. The appellants faulted the trial court for not looking at substantial justice and failing to find there was substantial evidence in favour of allowing the claim.

51. A claim must be founded firmly on facts which are proved through evidence. The 1<sup>st</sup> appellant did not call evidence to back her claim. She did not amend the plaint even after an oral leave was granted. She did not prove both possessory nor occupational rights that could be protected as overriding rights. She invaded the land after the demise of their late mother with no consent or approval of the respondent even though occupation or possession may not be a necessary ingredient for a trust to be established. See *James Kiarie –vs- Geoffrey Kinuthia & Another [2012] eKLR* and *Lucy Wangui Mwangi –vs- Benard Githii Mwangi [2019] eKLR*.

52. Given the severed relationship between the deceased and the appellants my finding is that the deceased while transferring the suit parcel to the respondent contemplated no any trust in favour of the appellants.

53. Looking at the totality of the circumstances of this matter, I am inclined to find the appellants to have failed to prove the suit parcels were encumbered by a customary trust. The appeal herein lacks merits and is dismissed with costs.

54. The lower court decision is upheld.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU**

**THIS 16<sup>TH</sup> DAY OF MARCH, 2022**

**In presence of:**

Otieno C. for appellants – present

Kaimenyi for respondent – present

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**