



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 40 OF 2018

M'MBIJIWE M'MUTUOTA.....APPELLANT

VERSUS

JANE KATHANGA.....RESPONDENT

JUDGMENT

A. Pleadings

1. The appellant had been sued in the lower court by the respondent for breach of customary trust over parcel No. Ntima/Igoki/222. She sought to be declared the owner of half share of the suitland. The appellant defence was that the land had been transmitted to him out of a succession cause in the estate of his late father with no objection at all from the respondent.

B. Testimony

2. The respondent testimony was that she was the only child of the late M'Twamwari Kanokana, a brother to the appellant's late father allegedly chased her from the suitland following which she filed a land dispute tribunal seeking for a share.

3. She produced the Land Dispute Tribunal proceedings in case no. 16/2003. She told the court they used to live on the suit land with her mother, had developed it and erected a house but the appellant allegedly chased them away. Her wish was the court to order she gets four acres out of the suit land.

4. The appellant's testimony was that the land in issue belonged to his late father M'Mutuota, a brother to the respondent's late father. He denied that the respondent's late father had any such share though he acknowledged that his remains were interred in the suitland and that during his lifetime he used to cultivate the said shamba. Further the appellant admitted the respondent was the only surviving child of his late uncle but was already married. As regards the Land Dispute Tribunal case the appellant confirmed the same was heard and determined but denied that the outcome was that he gives out a portion of the suitland to the respondent.

5. In re-examination the appellant told the court he did not know why the respondent's late father used to utilize and or was buried on the suitland. DW 1 adopted his witness statement dated 4.7.2015 and confirmed that the respondent's late father used to live on the suitland, was buried therein and that the Land Dispute Tribunal case existed between the parties.

C. Grounds of Appeal

6. The appellant faults the trial court for; holding that the customary trust had been proved; miss-appending the law relating to customary trust; disregarding his evidence; failing to appreciate that the clan had initially handled the matter and found that the land absolutely belonged to the appellant and lastly holding against the available evidence and the law.

D. Written Submissions

7. With leave parties filed written submissions dated 30.11.2021 and 10.11.2021 respectively.

8. The appellant submitted the burden to prove customary trust rested with the respondent which was not discharged at all. Reliance was placed on **Felista Muthoni Nyaga vs Peter Kayo Mugo (2018) eKLR Mary Wambui Mbuta vs Jane Wanja Gitau (2017) eKLR Muchungu vs Muchungu (1984) KLR 202.**

9. On the issue of the burial, the Land Dispute Tribunal decision by clan elders the appellant submitted the elders had ruled the land was

solely owned by the appellant's late father and ordered the respondent to vacate the land by 30.8.1998. Similarly it was submitted that the respondent had misled the trial court yet there had been a Meru High Court HCA No' 91 of 2007 as included in the supplementary record of appeal which overturned the provincial land appeals committee at Embu decision.

10. On her part the respondent submitted the suit land was ancestral in nature, her late father used to occupy the land, she was the sole surviving child whose late father was buried there since it was inherited land.

11. Further the respondent submitted it did not matter that she was a lady and married for her to be entitled to half share of the suitland. She relied on **Margaret Nkirote vs Winston M' M'Ringer and 3 others (2016) eKLR**. As regards the Meru HCA 91 of 2007 the respondent submitted the tribunal award was set aside since it could not determine land already registered under the Registered Land Act Cap 300 now repealed.

12. Lastly the respondent submitted she had pleaded and proved that her deceased father was a brother to the appellant's late father, that both were living on the suitland as ancestral, she also used to live, cultivate and had a homestead therein and the remains of her late father were interred on the suit land. Given the testimony she submitted the trial court was right in finding the claim proved as pleaded based on clear and simple testimony. She insisted there was no evidence that the clan had declared the suit property as belonging solely to the appellant.

13. This being an appeal the court under section 78 of the Civil Procedure Act is required to revisit, rehear and rehearse the lower court record and come up with independent findings and conclusions while alive to the fact that the trial court had the benefit of seeing and hearing the witnesses first hand.

14. The court has gone through the pleadings, evidence, grounds of appeal and the written submissions. The issues commending themselves for my determination are:-

i. If the respondent pleaded and proved the existence of a customary trust.

ii. If the appellant's appeal has any merits.

15. The law relating to customary trust was settled by the Supreme Court in Isaac K M'Inanga Kiebia vs Isaya Theuri M'Lintari (2015) eKLR.

16. In order to found a trust the respondent party had to prove the key ingredients that:- the land in question was before registration family land; She belonged to the family; her relationship with the family was not so remote or tenuous as to make the claim adventurous; she would have been entitled to the registered owner or beneficiary but for some intervening circumstances and lastly her claim was directed against the registered owner of the land who was a member of the family.

17. As regards the degree of the burden to prove customary trust the Supreme Court of Kenya in Isaack Kiebia case (supra) held each case had to be determined on its own merits and quality of evidence.

18. In this case the respondent had pleaded her late father who had no male heirs had consolidated and registered his land in the names of his nephew, the appellant to hold in trust for her as the only daughter.

19. She pleaded that they were blood relatives and that the land was ancestral in nature.

20. In his defence the appellant submitted they were blood relatives sharing grandparents and that there existed a Land Dispute Tribunal case whose outcome was that she was entitled to half share of the property.

21. A copy of register produced for parcel no. Nthimbiri/Igoki/222 showed the register entry no. 1 of 3 1963 was in the name of M'Mutuota S/o Muthini but eventually a title deed was nevertheless issued to M'Mbijiwe M'Mutuota on 1.2.2000, even though the respondent had lodged a caution on 1.9.1997 on account of a beneficial interest.

22. From the copy of records it is obvious the land initially belonged to M'Mutuota S/o Muthini before it came to be owned by the appellant's late father. So the land was ancestral in nature going by the above entries. It cannot therefore be true as pleaded and testimony tendered by the appellant that his late father allegedly gathered the land.

23. Further evidence was tendered and admission was made that the respondent's late father lived, occupied and established a family and a homestead and later on was buried on the suit land. The appellant admitted all these facts but insisted the deceased was only on the suit land because he had no other land. The appellant late father was the only brother to the respondent's late father who he did evict from the suit land during his lifetime. He even allowed him to raise a family and establish a homestead therein.

24. The inference is that he was on the land with appellant enjoying ancestral rights and privileges which did not extinguish upon his demise. **See Peter Moturi Ogutu vs Emelda Basweti Matunda & 3 others (2013) eKLR**. The respondent was consistent in her evidence right from the land disputes tribunal proceedings over the circumstances under which they lived on the land but were chased away from it in 2000 by the appellant's late father.

25. The appellant was unable to tell why the defendant's late father would live on the suitland together with his late father. DW 2 confirmed the respondent was a daughter of Mutuota who used to live on the suit land and was buried therein, and as at.

26. With all the above admissions of basic facts pointing at the elements of customary trust, my finding are that the respondent had proved all the key ingredients as required in the Kiebia case (supra) her claim to the required standards.

27. In the premises I find the appeal lacking merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 6TH DAY OF APRIL, 2022

In presence of:

Miss Maore for appellant

HON. C.K. NZILI

ELC JUDGE