



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 73 OF 2021**

**VERONICA KANYAMU M'IBARI (Suing as the legal Representative and administratrix  
of the estate of SAMSON KIRIMI NDATHO (deceased .....APPELLANT**

**VERSUS**

**SILAS MUTUA NDATHO .....RESPONDENT**

**JUDGMENT**

**A. Pleadings**

1. The appellant had sued the respondents in the lower court claiming a breach of customary trust by fraudulently subdividing LR No's Abothuguchi/Lower Kijja parcel no's 348, 198 and 7009 into P/No's 1434, 1435, 1436 in respect of LR 348, no's 1602 – 1607 (198) and 1592 – 1600 (1009) she sought declaratory orders that the said parcel were ancestral lands held in equal shares and that the respondents to be ordered to transfer half share of the land to her in default the executive officer of the court to execute the transfer documents.
2. The respondent defence that he was unaware of the alleged trust or breach of the same or that the appellant had any entitlement to the suit land. He pleaded the suit was resjudicata, time barred and denied any fraud as alleged or at all.
3. In reply to defence the appellant insisted as a family they had developed part of the suit parcel and hence the suit was properly before the court.

**B. Testimony**

4. The appellant's case was that she was the wife of the late Samson Kirimi Ndatho suing on her behalf and that of her children , Mercy Kanyua, Janet Kanana, David Kimathi and George Kiogora who had through an authority to sue dated 12.3.2018 allowed her to bring the case. She told the court she was husband got married to the deceased husband under Ameru customary rites and was never divorced. In her testimony land parcel no's 348, 198 and 1009 Abothuguchi / L- Kijja were initially jointly registered under the names of her late husband and the respondent's father Ndatho – Muungania. In support of her claim she produced a death certificate dated 147.93 as p. exhibit (1), a limited grant as p. exhibit (2) the chiefs letters as Mfi 3 (c) and (6), a grant obtained by the respondent as p. exhibit 4, copies of the register for the three parcels of land as p. exhibit (6), an order in Meru Misc. 88/14 as p. exhibit (7), notice of withdrawal of succession cause Chuka as p. exhibit (8) and court filing receipts as p. exhibit 9.
5. The appellant insisted that though the names of her husband appeared on the green cards, the respondents had secretly filed a succession cause and transferred the land parcels to himself without giving her a portion or any of her siblings. She testified she was still in possession of the suit land though she was always under threats and harassment from the respondent.
6. In cross examination the appellant told the court she was a second wife to her deceased husband who by the time they got married to in 1983, he had another wife, the mother to Kanyua and Kanana.
7. The appellant testified that she used to live with the deceased husband in Mukurweni village. She told the court that she was not aware if her late husband's family was involved in their Ameru customary marriage ceremony save she had no birth certificates indicating that her children were born by the said deceased.
8. As regards the deceased husband, the appellant stated she did not attend his funeral since she had left him when he got sick. She stated she was utilizing a portion of the suit land until she was chased away by the respondent. Pw2 and Pw 3 told the court the appellant was married by the deceased while working in Mombasa which marriage was blessed with children who lived in the land as belonging to Ndatho M'Mungania.

9. In their view PW 2 & PW 3 said the appellant and her children were entitled to a portion of the deceased three parcels of land on account of marriage.

10. The chief Kijja location produced mf1 p. 3 (a) & (b) as exhibits and confirmed Cyrons Ndatho was a brother of the deceased, the parties came from his location and that he had dealt with the family after the respondent allegedly declined to allow the appellant to occupy a portion of the suit land.

11. He however denied being aware of the finer details of the family, the life of the deceased or seeing any birth certificates indicating the appellant's children belonged to the deceased.

12. As regards the Chuka succession cause the pw 4 chief recalled issuing a letter thereof though in which he had left out some names of the beneficiaries.

13. The respondent told the court the land in dispute belonged to his late father and he had successfully lodged succession cause at Chuka law courts where the suit land was transmitted to him after the appellant allegedly withdrew her objection.

14. He denied that the appellant was a wife of his late brother since his only wife was Nzaria Karuta with whom they had one son by the name Lawrence Gitonga (deceased). He denied knowing the alleged children of the deceased.

15. Further the respondent confirmed his brother passed on in 1981 and left no offsprings. He told the court the appellant had filed objection in the Chuka matter but later on withdrew it. About ownership the respondent insisted that he was the one in occupation and that the appellant had never lived on the suitland.

### **C. Grounds of Appeal**

16. The appellant has faulted the trial court decision for failing to find that she was a lawful wife of the deceased; disregarding her evidence; failing to find she was unaware of the chuka Law Courts succession cause; for relying on extraneous issues not before the court for determination; failing to find the respondent's evidence contradictory and or insufficient; finding the area chief an interested party to the suit without such evidence; making adverse findings against her witnesses; failing to analyze the evidence of trust; failing to consider her submissions and authorities; acting against the weight of the testimony she had produced.

### **D. Written Submissions**

17. With leave parties filed written submissions dated 22.12.2021 and 16.1.2022. The appellant submitted there was evidence of the deceased leaving her and her children staying on the suitland and secondly indicating that the suit parcels initially belonged to the deceased before they were transferred to the respondents.

18. Further it was submitted that the deceased was buried on the suit parcels of land before the subdivision occurred hence therein existence the element of customary trust.

19. Reliance was placed on **Isaac M'Inanga Kiebia vs Isaaya M'Lintari and another (2015) eKLR Margaret Nkirote and 2 others vs Mutwiri Mutangi (2019) ekLR, Justus Maina Muruka vs Jane Waithira Mwangi (2018) eKLR, Mbui (2004) eKLR, M'Ikiugu M'Mwirichia and another vs Esther Nthiba M'Ikiugu and others Nyeri civil appeal no. 95 of 2009.**

20. The respondent submitted there were three issues for the court's determination namely; whether the appellant was the deceased wife, if they had sired children and whether customary trust was established.

21. It was submitted the respondent duly sought and obtained absolute ownership of the suit parcels after a successful succession cause and that the appellant had failed to plead and prove marriage and children between her and the deceased under African customary law or any other known system. Reliance was placed on ***Atemi vs Filmanjaro***, ***Earnest Kinyanjui Kimani vs Muiru Gikanga and another (1965) E.A 735***, ***Hortensia Wanjiku Yawe vs Public trustee C.A No. 232 1976*** on burden and the degree of proof for the existence of trust and presumption of marriage.

22. As regards customary trust the respondent submitted the appellant had failed to satisfy the prerequisites as set out in the Isaack Kiebia case (supra).

23. On the question of the issues of the alleged marriage with the deceased the respondent took the view that the appellant had failed to tender any such evidence in terms of paternity. Reliance was placed on ***Lewis Karuuga Waruiro vs Moses Muriuki Muchiri***.

24. This being a first appeal the court is mandated to rehearse, rehear and re-evaluate the record and come up with its own independent findings and conclusions while alive the trial court had the occasion to see and hear the witness first hand.

### **E. Issues for Determination**

25. In my view the issues commending themselves for my determination are:

*(i) If there existed a valid marriage on whatever system of law between the deceased and the appellant.*

(ii) If the appellant and her children proved any family relationship with the deceased and by extension with the respondent.

(iii) If there was any prove of customary trust held in favour of the respondent over the suit parcels in favour of the deceased and her children.

26. The appellant's case was that there was a marriage between her and the deceased who was initially a recorded owners of the three parcels of land alongside the respondents father Ndatho M'Mungaania and which parcels were allegedly fraudulently subdivided and transmitted to the respondent.

27. In order to found a customary trust the appellant had the duty to prove that the suit land before registration belonged to the family, she belonged to that family; her relationship with the family was not remote or tenuous; she could have been entitled to be registered as the owner or other beneficiary of the land but for some intervening circumstances and that the claim was directed at the registered owner as a family member, as held in Isaack Kiebia case (supra).

28. The appellant pleaded the suit lands were initially registered in the name of the deceased Samson Kirimi Ndatho alongside Ndatho M'Mungania.

29. The deceased passed on 24.3.1991. She obtained a limited grant on 26.2.2019, whereas the respondent sought and obtained a certificate for confirmation of grant for the estate of the same deceased on 1<sup>st</sup> May 2013.

30. The copy of records/register produced before court for parcel no. 198 indicated the file was opened on 12.8.1988 in favour of Ndatho Mungania a 3<sup>rd</sup> title deed was issued on 21.8.1989 and eventually on 20.8.2013 in favour of the deceased, after a succession cause no. 961 of 2012 at Chuka law courts. Regarding parcel no. 1009 the copy of the register was opened on 8.6.1999 in favour of Ndatho M'Mungania and the land was eventually transmitted to the deceased Silas Mutua Ndatho on 20.8.2013 out of a succession cause in Chuka law courts.

31. In her pleadings, the appellant based her case on both the customary trust and fraud. The appellant averred and produced copies of register indicating that the three parcels of land initially belonged to the late Samson Kirimi Ndatho and Ndatho M'Mungania as ancestral land. Therefore my finding is that the suit parcels were ancestral in nature. The next step for the appellant to prove was that she belonged to the family of the deceased.

32. As indicated above, the appellant based her claim on both customary trust, the fraudulent subdivisions and withholding of information at the succession cause that the deceased had other beneficiaries.

33. It is trite law that fraud has to be pleaded and proved. *See Verjay Morjaria vs Nansingh Madhusingh Darbar & another (2000) eKLR*. The certificate of confirmation of grant was issued in 2013 whereas the appellant obtained a limited grant to sue in 2019.

34. Evidence tendered indicated the appellant withdrew her succession cause in Chuka by a notice dated 26.3.2019. There was no evidence tendered to establish any fraud in the filing and the issuance of the succession cause of Chuka chief magistrate's succession cause no. 96 of 2012. No evidence was tendered that the appellant sought for the review and or setting aside of the confirmation of grant on account of misrepresentation, mistake or fraud. Further there was no evidence tendered that the appellant had appealed against the confirmation of grant and or tried in any way to block the subdivisions on account of fraud, misrepresentation and or mistake. Even in this suit there was no evidence lead and produced to indicate that the respondent had misrepresented the facts and/or obtained the subdivisions and transmission of the parcels in his favour, in a fraudulent manner.

35. As regards, the appellant and her children being part of the family of the deceased, it was upon the appellant to lead and produce evidence of marriage under Ameru customary law.

36. According to *Eugene Contran in Restatement of African Law Kenya volume 1, the Law of marriage and divorce at page 38*, under Ameru customary law, it was not essential to pay any dowry in deposit before cohabitation could begin but there had to be an agreement to pay and that the marriage was valid as long as there was an agreement to pay dowry.

37. In this matter the appellant produced no evidence of a customary marriage or ceremony. There was no evidence of any agreement to pay dowry leave alone the payment of dowry. *See C.K.N vs P.M (2019) eKLR; in Re estate of Justus M'Murithi M'Bagiri (2019) eKLR*.

38. In the estate of **Mbiya Koinange deceased (2015) eKLR** the court held there could be a presumption of marriage if there was positive evidence of a marriage ceremony of some sort having been performed following cohabitation by and or acceptance of the parties by the community, which is rebuttable in nature.

39. In this matter the evidence of PW 2, PW3 and PW 4 as as compared with that of the appellant appears inconsistent and or contradictory given the fact that she admitted she allegedly left the cohabitation before the deceased got sick and eventually died hence the reason she did not attend his burial ceremony.

40. Further the children who gave the appellant authority to sue and plead, failed to testify and/or corroborate her evidence that they were sired by the deceased and lived with him on the suit land before his demise.

41. Additionally and moving to the issue of the appellants entitlement to the suit land it was not clear why there was inordinate delay in filing for the limited grant. Pw 4 was also unable to explain why he issued a letter to the respondent excluding the appellant and her children if at all he knew they were genuine beneficiaries to the estate of the deceased.

42. Therefore, I am not convinced that under the circumstances the appellant proved any nexus by way of marriage with the deceased and by extension any existence of any beneficial interest to the suit parcels of land to found a customary trust, claim. The appellant has therefore failed to prove any or all the ingredients to find a customary trust to the required standard.

43. Consequently the appeal herein lacks merits. The same is dismissed with costs.

Orders accordingly.

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

**THIS 6<sup>TH</sup> DAY OF APRIL, 2022**

**IN PRESENCE OF:**

**MR. KABURU FOR APPELLANT**

**HON. C.K. NZILI**

**ELC JUDGE**