



**Mutuaruchiu v Mbui & another (Environment and Land Appeal
24B of 2020) [2022] KEELC 3994 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3994 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 24B OF 2020**

**CK YANO, J
JULY 27, 2022**

BETWEEN

NICHOLAS MWITI MUTUARUCHIU APPELLANT

AND

JOSEPH KABURU MBUI 1ST RESPONDENT

SUSAN KAGWIRIA 2ND RESPONDENT

*(Being an Appeal from the Judgment and decree of Hon. H.N Ndungu CM Meru
in Meru CMCC No. 9 of 2015 dated and delivered on 26th February 2020)*

JUDGMENT

A. Introduction

1. The appellant, Nicholas Mwit Mutuaruchiu and two others moved the subordinate court vide a plaint dated July 14, 2008 seeking for judgment against the respondents jointly and severally for the following orders.
 - a. A declaration that L.R No. Abothuguchi / Githongo/ 1184 is family land and the 1st defendant was registered to hold the same in trust for the plaintiffs.
 - b. A declaration that the sale and subsequent conveyance of L.R No. Abothuguchi/ githongo/1184 by the 1st defendant to the 2nd defendant is wrongful, inequitable, illegal, null and void ab initio for all intents and purposes,
 - c. An order for cancellation of transfer and registration of L.R No. Abothuguchi/ Githongo/1184 in the name of the 2nd defendant and transfer and registration of the same in the names of the plaintiffs as joint owners.



- d. A permanent injunction restraining the defendants whether by themselves, their respective representatives, assigns, employees, servants, agents or whomsoever claiming and/or acting for on behalf of or through them, from howsoever interfering with the plaintiffs' peaceful possession, user and occupation of L.R No. Abothuguchi/Githongo/1184.
 - e. Costs of the suit and interests at court rates.
2. It was pleaded that the 1st respondent herein was the registered proprietor of the suit land measuring 0.81 hectares or thereabouts and that the same was family land whose first registered owner was the late Jedah M'tuaruchiu Munjaa, the consanguineous father to the appellants and the late Geoffrey Mutuma Mutuaruchiu. The appellants pleaded that on July 22, 1988, their late father Jedah M'tuaruchiu Munjaa transferred the suit land to the Geoffrey Mutuma Mutuaruchiu (now deceased) to hold the same in trust for the family members of the said Jedah M'tuaruchiu Munjaa (deceased). The appellants contended that in breach of the said trust sometime in the year 2007 the late Geoffrey Mutuma Mutauruchiu sold and transferred the suit land to the 1st respondent herein. It was the appellants contention that the said sale and transfer was without their consent and or authority and therefore was wrongful, inequitable, unlawful, null and void ab initio.
 3. The appellants claim was denied. The 2nd respondent filed a statement of defence dated August 14, 2008 which was amended on August 30, 2013. It was his contention that the late Jedah M'tuaruchiu Munjaa was the registered owner of the suit land parcel No. Abothuguchi/Githongo/493 which was subsequently subdivided into parcel Nos. 1182 – 1186 on 30th June 1986. That the appellant was given land parcel No. Abothuguchi/Githongo/1183 which he later subdivided into 8 plots namely parcel Nos 1309 – 1315 and sold all of them except parcel No. 1315 which remained in his name. The 2nd respondent averred that parcel No. Abothuguchi / Githongo/1184 was hers absolutely and had all the rights and powers to sell the same to the 1st respondent
 4. The 1st respondent filed a statement of defence and counterclaim dated August 11, 2008 in which it was admitted that the appellant lived in land parcel No. Abothuguchi/Githongo/1184 but was not entitled to the same. The 1st respondent averred that he was the absolute registered proprietor of the suit land having lawfully purchased it for valuable consideration from the 2nd respondent on or about July 7, 2007 and subsequently obtained good title to the same. It was further stated that from July 31, 2007, the 1st respondent has openly and legally been in possession and occupation of the suit land, the appellant having lawfully and formally sold part of his development in the suit land to the 1st respondent with an undertaking to vacate therefrom on or before July 31, 2008.
 5. The 1st respondent averred that he entered into an agreement on January 4, 2008 and July 7, 2008 with the appellant whereby the appellant sold to him the eucalyptus trees thereon at a consideration of Kshs. 8,000/= and the appellant covenanted inter alia that he was to vacate from the suit land, remove his five (5) semi-permanent premises therefrom, but in breach of the agreement the appellant unlawfully refused to vacate and remove his premises and continued to stay on the land.
 6. In the counterclaim the 1st respondent sought for judgment against the appellant as follows-;
 - a. A declaration that the 1st plaintiff is in unlawful occupation and utilization of the 2nd defendant's land parcel No. Abothuguchi/Githongo/1184 and that the 1st plaintiff ought to vacate the land parcel No. Abothuuchi/Githongo/1184 forthwith failing which an eviction order do issue.
 - b. An order of permanent injunction restraining the 1st plaintiff, his legal representative(s), assign(s), employee(s), servant(s), agent(s) or any other person(s) acting and or claiming on his



behalf from interfering in any way and whatsoever with the 2nd defendant possession, user, occupation, utilization, development and management of the land parcel No. Abothuguchi/Githongo/1184,

- c. Costs of counterclaim and interest at court rates, and
 - d. Any other relief the court may grant to the 2nd defendant
7. The matter was ultimately set down for hearing and the learned trial magistrate delivered his judgment on February 26, 2020 whereby the trial court dismissed the appellant's case and allowed the counterclaim partially. The trial court held that the appellant was in unlawful occupation and utilization of the 1st respondent's land parcel No. Abothuguchi/Githongo/1184 and ought to vacate or be evicted. The trial court also granted an order of permanent injunction as well as costs and interest of the counterclaim.
8. Being aggrieved by the said judgment and decree of the trial court the appellant filed this appeal vide the Memorandum of Appeal dated March 17, 2020 on the following grounds-;
1. That the learned trial magistrate erred in law and fact by holding that land parcel Number Abothuguchi/Githongo/1184 (suit land) was not family or ancestral land despite her finding that the ownership of the said parcel of land had flowed from Jedah Mutuaruchi who was father to the appellant and the 2nd respondent.
 2. That the learned trial magistrate erred in law and fact by failing to properly evaluate the evidence presented by the appellant and his witnesses particularly the evidence that the 2nd respondent was registered as the owner of the suit land as a trustee for the appellant so that he could share the suit land with the appellant, the 2nd respondent having benefited from land parcel Number Ntirimiti/ Settlement Scheme/70 which was also family land.
 3. That the learned trial magistrate erred in law and facts in failing to find that the 2nd respondent's action of allowing the appellant to settle, develop and live on the suit land for a considerable long period of time was a confirmation and an acknowledgment that the (sic) held the suit in trust for the appellant.
 4. That the learned trial magistrate erred in law and fact by placing over reliance on a memorandum of understanding whose authenticity was challenged and thereby arrived at an erroneous conclusion that the appellant had agreed to vacate from the suit land.
 5. That the learned trial magistrate erred in law and fact by failing to find that the 1st respondent's title to the suit land was vitiated by the trust in favour of the appellant and failed to cancel the title in favour of the 1st respondent and also failed to dismiss the 1st respondent's counter-claim.
 6. That the judgment of the learned trial magistrate is against the law and weight of evidence on record.
9. The appellants prays for orders that-;
- i. This appeal be allowed with costs.
 - ii. The order dismissing the appellant's suit before the trial court be set aside and in lieu thereof an order be made allowing the suit before the trial court.
 - iii. The 1st respondent's counter claim before the trial court be dismissed with costs to the appellant.



10. With the agreement of the advocates for the parties, the court on May 24, 2022 directed that the appeal be canvassed by way of written submissions. The appellant filed his submissions dated June 10, 2022 on June 13, 2022 while the respondent's filed their submissions dated June 29, 2022 on July 1, 2022.

B. The Appellant's Submissions.

11. The appellant's advocate submitted on four main issues; whether the land parcel No. Abothuguchi/Githongo/1184 is family/ancestral land, whether the 2nd respondent was registered as the proprietor of the suit land in trust for and on behalf of the appellant, and whether the 1st respondent obtained a good title from the 2nd respondent, as well as costs of the appeal.
12. Counsel for the appellant submitted that the appellant adduced sufficient evidence to support his claim which was corroborated by his two witnesses called before the trial court. It was the appellant's submissions that a customary trust need not be registered and argued that the parties herein held a family meeting in which the 2nd respondent agreed to hold the suit land in trust for himself and for the appellant. That the fact that the appellant has been in possession and using the suit land is also irrefutable proof that the 2nd respondent was in fact holding the suit property in trust and that the registration of the suit land in the name of the 2nd respondent did not in any way extinguish the rights of the appellant over the suit property as the same was only held in trust for the appellant. The appellant's counsel relied on the case of *Peter Gitonga vs Francis Maingi M'ikiara* (2007) eKLR in which was stated that-;

“a “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J to say this: “registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged”

13. The appellant also relied on the case of *Mukangu vs Mbui* (2004) 2KLR 256 where the court of appeal held that-;

“The new *Land Registration Act* 2012 makes it very clear in section 28 that unless the contrary is expressed in the register, all registered land shall be subject to various overriding interest without their being notice on the register and one such interest is a trust including customary trust A customary trust need not be registered”

14. The appellant further relied on the case of *Mwangi v Mwangi* (1986) KLR 328, *Mbui Mukangu vs Gerald Mutwiri Mbui* C.A No. 281 of 2000 in which it was stated that “for one to establish a claim in customary trust, one had to prove that they are in actual physical possession or occupation of the parcel of land” and the case of *Kanyi vs Muthiora* (1984) KLR 712.
15. It is the appellant's submissions that the 2nd respondent herein could not have possibly been in a position to pass a clean title to the 1st respondent and relied on the doctrine of nemo dat quod non habet, section 23 of the *Sale of Goods Act* and the case of *Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maina* (2019) eKLR and urged the court to allow appeal.

C. The Respondent's Submissions

16. The respondents submitted on whether the suit land is family/ancestral land, whether the 1st respondent obtained a good title from the 2nd respondent and costs.



17. The respondents' counsel relied on the case of *Jemutai Tanui vs. Juliana Jeptepkeny and 5 others* (2013) eKLR in which the court held that there was no automatic trust arising from inheritance, and that the proprietor was not bound to consult her children when she wanted to sub- divide the land and sell it. The respondents also relied on the case of *Susan Mumbi Waititu vs Mukuru Ndata & 4 others* (2007) eKLR.
18. It was the respondents' submission that it was not enough for the appellant to claim that the suit land was ancestral land but needed to avail tangible evidence to show that it was actually ancestral land. The respondents pointed out that the ancestral land L.R No. Abothuguchi/Githongo/493 was subdivided and shared out by the proprietor during his lifetime making what the 2nd respondent and also the appellant inherited as a gift vivos and therefore owned the land as absolute properties. The respondents further pointed out that there was an agreement between the appellant and the 2nd respondent whereby the appellant agreed to move out and even sold his trees to the 1st respondent and wondered why he did not raise any issue then. It was therefore submitted by the respondents that the land was not ancestral land to be held in trust, arguing that the appellant's action is an act of greed since he had his own parcel of land that his father gifted him.
19. The respondents cited the provisions of section 25 of the *Land Registration Act* No. 3 of 2012 and submitted that there are no restrictions in the title and that nothing indicates that the 2nd respondent was bequeathed the land to hold the same in trust for the appellant and therefore the 2nd respondent owns the land as an absolute proprietor and can transfer a good title. It is the respondents' submissions that the evidence brought before the trial court was sufficient to say that the 1st respondent was given a good title since the 2nd respondent was the absolute proprietor of the suit land. The respondents argued that the trial court was right in holding that the appellant had not proved their case against the respondents and payed for the dismissal of the appeal with costs.

D. Analysis and Determination

20. I have considered the record of appeal, the grounds of appeal and the submissions by the counsel for the parties. As this is a first appeal, I am conscious of the court's duty to reconsider the evidence and evaluate it myself in order to draw my own independent conclusions of course, bearing in mind that I neither saw nor heard the witnesses testify and making due allowance for this as was held in the case of *Selle v. Associated Motors Boat Company* (1968) E.A 123.
21. It was also held in the case of *Mwangi v Wambugu* (1984) KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on a misapprehension of the evidence, or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.
22. The issue for determination in this appeal as I can deduce from the grounds of appeal are-;
 - i. Whether or not trust had been established over the suit property.
 - ii. Whether the 1st respondent obtained a good title from the 2nd respondent
 - iii. Costs of the appeal.
23. On whether or not trust had been established over the suit land, the appellant's contention is that the land was family/ancestral land while the respondents argued that it was not. The trial court held that the suit land was not family land and that the same was not held by the 2nd respondent in trust for the appellant.



24. From the material on record, it is clear that the appellant and others had sued their half-brother who is now deceased Geoffrey Mutuaruchiu and the 1st respondent herein who had bought the suit land from the deceased. The suit land parcel No. Abothuguchi/Githongo/1184 is registered in the name of the 1st respondent. The appellant claims that the said land is trust land registered in the name of the deceased to hold in trust for the family. The appellant's claim was denied and there was a counter claim filed for the eviction of the appellant.
25. From the material on record, it is clear that the late Jedah M'tuaruchiu Munjaa who was father to the appellant and the late Geoffrey Mutuaruchiu was the registered owner of land parcel L.R No. Abothuguchi/Githongo/493. It is also apparent from the evidence on record that the deceased owner subdivided his parcel of land L.R No. Abothuguchi/Githongo/ 493 into L.R Nos. Abothuguchi / Githongo / 1183, 1184 and 1186. Parcel No. 1183 was given to appellant while parcel No. 1184 was given to the late Geoffrey Mutuaruchiu. All these were done during the life time of the said Jedah M'tuaruchiu Munjaa (deceased). It is therefore clear that the said parcels of land were gifted by the late Jedah M'tuaruchiu Munjaa inter vivos to his children and retained others for himself. I am in agreement with the finding by the learned trial magistrate that such an act did not give rise to any trust and the owner's action could not be challenged.
26. In the case of *Juletabi African Adventure Limited & another vs Christopher Michael Lockley* (2017) eKLR, the court of appeal held-;
- “It is settled law that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because the law never implies, the court never presumes, a trust, but in case of absolute necessity the court will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied”
27. In the case of *Wambugi vs Kimani* (1992) 2 KAR 58, the court of appeal held that it is trite that trust is a question of fact and has to be proved by evidence. The elements to be considered for one to qualify to be a trustee were also set out by the Supreme Court in *Isack M'Inanga Kieba vs Isaaya Theuri M Lintari & another* (2018) eKLR. The burden of proving that the suit parcel of land was family/ ancestral and that the respondents were registered as proprietors of the same in trust squarely lay on the appellant. In this case the evidence on record is clear that the appellant's deceased father was the owner of the land before he sub-divided it and gifted his children in his lifetime while retaining some portions for himself. This evidence is captured in the appellant's statement. There is no evidence on record to show that the appellant objected to the said subdivision and distribution to the late Geoffrey Mutuaruchiu. In my view I think as the registered owner of parcel 493, the late Jedah M'tuaruchiu Munjaa had all the rights that a registered owner would be vested with, including sub-dividing the same and distributing it as he wished.
28. The rights of a proprietor are contained in section 25 of the *Land Registration Act* No. 3 of 2012 which provides as follows-:
- 25 The rights of a proprietor, whether acquired on first registration or
(1) subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-;



- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- b. To such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

29. The overriding interests set out in section 28 are as follows-;

- a. Spousal rights over matrimonial property;
- b. Trusts including customary trusts;
- c. Rights of way, rights of water, and profits subsisting at the time of first registration under this Act;
- d. Natural rights of light, air, water and support;
- e. Rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- f. Leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;
- g. Charges for unpaid rates and other funds which without reference to registration under this Act, are expressly declared by any written law to be a charge upon land,
- h. Rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription,
- i. Electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law, and
- j. Any other rights provided under any written law.

30. From the foregoing, there was no legal obligation on the part of the registered owner of the land to sub divide and distribute the same as he wishes. The owner, while still alive, had total control over his land and whoever was gifted by the owner, could not be regarded as holding it in trust for others, unless otherwise expressly stated. In this case, there was no indication whatsoever that the late Geoffrey Mutuaruchiu was bequeathed the suit land to hold the same in trust for the appellant and other family members. The court, therefore finds no fault with the sale of the suit land by the 2nd respondent to the 1st respondent. The appellant, not only entered into a memorandum of understanding with the 2nd respondents to move out but also sold his growing trees which were on the land to the 1st respondent. This in my opinion, was an admission that the land rightly belonged to the respondents. Since there is evidence on record that shows that the 1st respondent was sold the suit land by the 2nd respondent who was then the registered owner, the finding and holding of the trial court that it was not proved that the suit land was family/ancestral land or was held in trust cannot be faulted.

31. Regarding the issue whether the 1st respondent obtained a good title from the 2nd respondent, it was clear from the evidence on record that the late Geoffrey Mutuma Mutuaruchiu was gifted the suit land



by his late father while he was still alive. By the time parcel No. Abothuguchi/Githongo/1184 was sold to the 1st respondent, it was already registered in the name of the 2nd respondent. It is also apparent from the material on record that following the sale by Geoffrey Mutuma Mutuaruchiu (deceased), the appellant also entered into a memorandum of understanding with the 2nd respondent to move out and also sold his trees to the 1st respondent. In my view this was an admission that the land belonged to the respondents. The court finds no reason not to find that the 1st respondent acquired good title to the land for being a bona fide purchaser for value.

32. Section 26 of the Land Registration Act provides that “the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except on ground of fraud or misrepresentation to which the person is proved to be a party, or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme” In addition, section 24 of the same Act provides that “the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights, and privileges belonging or appurtenant thereto.....”
33. In the instant case, no fraud or misrepresentation was proved against the respondents in the manner they acquired the title to the suit land. It was also not proved that the respondents’ title was acquired illegally, unprocedurally or through a corrupt scheme. I find that the evidence on record was sufficient to prove that the respondents had proved their counter claim against the appellant while the appellant had failed to prove their case and the same was rightly dismissed. The 1st respondent had demonstrated that he was the bona fide registered owner of the suit land, and as a bona fide registered owner of the property, the 1st respondent was therefore protected under the provisions of Article 40 of the Constitution. The appellant had no right to remain on the suit land.
34. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am satisfied that the learned trial magistrate was justified in arriving at the decision he made. The finding and holding of the learned magistrate were well founded and I find no basis to interfere with the same. In the result, I find no merit in the appeal and the same is dismissed.

Who shall bear costs of the appeal?

35. Although costs of an action or proceedings are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act, Cap 21. A successful party should ordinarily be awarded costs of an action unless the court for good reasons directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* (1957) EA 287. The court finds no good reason why the successful litigant should not be awarded costs of the appeal. Accordingly the respondents shall be awarded costs of the appeal to be borne by the appellant.

E. Conclusion and Disposal

36. The upshot of the foregoing is that the court finds no merit in the appeal. Accordingly the appellant’s appeal is hereby dismissed in its entirety with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF JULY 2022.

C.K. YANO

ELC JUDGE



In presence of:-

C.a Mwenda

Ms Masamba for appellant

No appearance for respondent

C.K. YANO

ELC JUDGE

