



**Liyokho v Liyokho & another (Environment and Land Appeal
20 of 2021) [2022] KEELC 3831 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3831 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL 20 OF 2021
E ASATI, J
JULY 21, 2022
FORMERLY KAKAMEGA ELCA NO E10 OF 2021**

BETWEEN

MARTIN NGAIRA LIYOKHO APPELLANT

AND

CHARLES LIYOKHO 1ST RESPONDENT

LAND REGISTRAR VIHIGA COUNTY 2ND RESPONDENT

(Being an Appeal from the entire judgement and decree delivered by the Chief Magistrate's court at Vihiga on the 23rd March 2021 in Vihiga SPM ELC Case No. 21 of 2018)

JUDGMENT

Introduction

1. The appellant was the plaintiff in Vihiga SPMC ELC No 21 of 2018 wherein he had sued the respondents for the following relief:
 - (a) A declaration that the plaintiff has beneficial rights/interests over the suit parcel by virtue of Luhya customary Law.
 - (b) A declaration that the 1st defendant holds the land as a trustee for the plaintiff and his brothers and that he has breached both the beneficial and constructive trust bestowed upon him as a trustee.
 - (c) An order of permanent injunction restraining the defendant either by himself or through his agents, employees, or any other person deriving authority from him from sub-dividing or evicting him and his brothers from the suit parcel No East Bunyore/Ebusamia/60 and or interfering with the plaintiff's peaceful occupation of the land.



- (d) Costs of this suit.
 - (e) Any other relief this court may deem fit to grant.
2. The suit was filed as Kisumu ELC No 58 of 2017 at the Environment and Land Court Kisumu, but later transferred to Vihiga SPM's Court for hearing and disposal.
 3. The 1st respondent vide his defence and counterclaim dated February 9, 2018 denied the appellant's claim and claimed for removal of a caution placed on the suit land by the appellant.
 4. The 2nd respondent vide the statement of defence on behalf of the 2nd defendant dated February 13, 2017 denied the appellant's claim.
 5. The suit was heard by the Senior Principal Magistrate, Vihiga, who delivered his judgment (the judgement) on March 23, 2021 dismissing the plaintiff's suit and allowing the counterclaim by the 1st respondent. The judgement is the subject of this appeal.
 6. Aggrieved by the judgment, the appellant vide the memorandum of appeal dated April 7, 2021 and filed in court on April 26, 2021 lodged the appeal herein. He presented six (6) grounds of Appeal namely;
 - (a) The learned trial magistrate erred in law and in fact in failing to properly evaluate the entire evidence and law as required with the matter on the first instance.
 - (b) The learned trial magistrate erred in law and fact in failing to properly interpret the Luhya customary law regarding trusteeship and land ownership in family lineage.
 - c. The learned trial magistrate erred in law and in fact in dismissing the plaintiff/appellants suit and allowing the counterclaim in blatant disregard of the evidence on record and the plaintiff's counsel's submissions.
 - (d) The learned trial magistrate erred in law and fact in finding that the plaintiff /appellant had no case and further that the import of the judgment has rendered the appellant homeless with no place to go.
 - (e) The learned trial magistrate erred in law and in fact in making a finding that is going to result in eviction of the appellant and his brothers.
 - (f) The learned trial magistrate was totally biased against the plaintiff/appellant and gave judgment against the weight of the evidence.
 7. The appeal seeks orders that; -
 - (a) That the entire judgment of the honourable court delivered on March 23, 2021 be set aside and an order allowing the plaintiff's suit in the trial court.
 - (b) That the court be pleased to find that the appellant has beneficial rights/interests over the suit parcel by virtue of Luhya customary law.
 - c. A declaration that 1st respondent holds the suit land in trust for the appellant and his brothers and that the 1st respondent is in breach of the trusteeship bestowed upon him.
 - (d) An order of permanent injunction restraining the 1st respondent either by himself through his agents, servants, employees or any other person deriving authority from him from sub-dividing or evicting him and his brothers from the suit parcel No East Bunyore/Ebusamia/60 and or interfering with the Appellant's peaceful enjoyment and occupation of the land.



- (e) The court be pleased to make any necessary orders including orders on costs in favour of the appellant in this court and the court below.
8. The 2nd respondent did not participate in the appeal.
9. Directions on the appeal were taken on April 20, 2022 by consent that the appeal be canvassed by way of written submissions. Pursuant to the directions, both parties filed their respective written submissions.

Submissions for the Appellant

10. The appellant's counsel submitted that the suit land had been given to the appellant and his brothers 30 years ago in accordance with Luhya customary law. That with the blessing of the 1st respondent the appellant had developed the portion given to him by building a house, living therein and farming on the land. That the appellant and his brothers had acquired, over a time, proprietary and beneficial right over the suit land. That the threats to disinherit them therefore amounts to infringement of their constitutional rights to beneficial ownership and use of the land.
11. That having inherited the land customarily from his fore fathers, the respondent cannot deal with the land whichever way he wills but upon customary law. That having apportioned the land among his sons, the 1st respondent ceased to have control over the land and henceforth held the title for them.
- That the 1st respondent owed a duty to the appellant to surrender the title deed so that the land could be sub-divided and registered in the names of the appellant and his brothers.
- That the respondent became *functus officio* and ceased having any rights over the suit parcel of land the moment he distributed the land to his sons. That immediately assumed his position as a trustee, and any dealing, with the suit land had to be by consent of the current owners who are the appellant and his brothers.
12. Counsel relied on the case of *George Mbiti Kieba & another v Isaya Theuri M'Linturi & another* Nyeri Civil Appeal No 24 of 2010 to support this submission.
13. Counsel further submitted that the respondent did not bring any evidence to show that the suit land was not ancestral. He relied on the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another*, Nyeri Civil Appeal No 345 of 2000 to demonstrate that under section 116 of the *Evidence Act* the burden of proof was unto the respondent. That it was incumbent upon the respondent to dislodge or rebut the appellant's claim that the respondent held the suit land in trust.
14. That the respondent was in breach of the trust bestowed upon him by law and Luhya customs. That though the appellant is not opposed to his sisters being allocated land by their father he is opposed to being evicted from the land he has settled and developed for the past 30 years. Such action will render the appellant homeless.
15. That under Luhya customary laws, a last-born son is entitled to inherit his parents' home. Counsel relied on the case of *Mbui Makangu v Gerald Mutwori Mbui*, Nyeri Civil Appeal No 281 of 2000 [2004] eKLR. Counsel also relied on the case of *Nabashon Kamuge & another v Lawrence Kareng'e* [2014] eKLR where the court stated that whereas a child cannot compel a parent to distribute his estate during his lifetime, a child who is in occupation of his/her parents property that is held in trust has occupational right that should be protected.



16. That although the law under which the respondent was registered as a proprietor conferred indefeasible title on him, it also recognised the existence of trusts and did not relieve the respondent of the duties or obligations of a trustee.

Counsel prayed that the court make a finding that the trial Magistrate erred in law in failing to make a declaration that the respondent holds the suit land in trust for the appellant and his brothers and that he has breached both the beneficial and constructive trust bestowed upon him.

17. Counsel submitted further that the trial court erred in failing to issue an order of permanent injunction against the respondents. That unless the permanent injunction is issued the appellant will suffer irreparable loss. The appellant relied on the case of *Jane Wanjiku Kiarie & another v Maria Wanjiku & another* [2008] eKLR.

Submissions For The 1st Respondent

18. Counsel for the respondent submitted that the 1st respondent as the registered absolute owner of the suit land does not hold the same in trust for the appellant. Counsel outlined the rights of a registered owner of land as contained in section 25 of the *Land Registration Act* No 3 of 2012 and the overriding interests to which registered land is subject as contained in section 28 of the same Act.
19. That the appellant has not adduced any evidence to impeach the 1st respondent's title as provided under section 26 of the *Land Registration Act*. Counsel relied on the case of *Mariga v Muriuki* [2008] KLR (G & F) 1075 of 1077/1078 to submit that where the owner of the suit property was still alive it was upon him to decide to distribute the land accordingly to his free will.
20. Relying further on the case of *Patrick Mbaso v Meshack Odhiambo Mbaso & another* [2020] eKLR the 1st respondent submitted that the appellant did not prove that the 1st respondent held the suit property in trust for him and his brothers. That as stated in the case of *Jutelalei African Adventure Ltd & another v Christopher Micheal Lockey* [2017] eKLR a party relying on the existence of a trust must prove it through evidence. That the law never presumes a trust.
21. That the element that would qualify a claimant under trust were itemised in the case of *Isaac Minanga Kieba v Isaya Theuri M'Lintari & another* [2018] eKLR have not been proved. That the burden of proving that the suit land is ancestral land lay with the appellant and that the appellant did not discharge the burden.
22. In distinguishing the authorities relied on by the appellant, the 1st respondent submitted that in the present suit the suit land was not ancestral land. But in the authorities relied upon by the appellant, the claimant were claiming shares on account that the parents were holding land under inheritance from either grandparents or on transmission. He relied on the case of *Susan Mumbi Waititu v Mukuru Ndata & 4 others* [2007] eKLR where it was held *inter alia* that:

’For trust, the plaintiff must prove with cogent evidence that the suit premises was ancestral land and thus family land.’

Analysis and Determination

23. This is a first appeal. The principles guiding handling of a first appeal are well settled. They are that the appellate court has a duty to consider the whole evidence produced before the trial court, re-evaluate it and arrive at its own independent conclusion. While doing so, the court keeps in mind the fact that the trial court had the advantage, which this court does not have, of seeing and hearing the parties and their witnesses first hand. In the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR



the court held that the principles upon which a first appellate court proceeds are well settled and stated that:-

“Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”.

(Also see *Selle & another v Associated Motor Boat Company Ltd & another* (1968) I EA 123 and *Peter M Kariuki v attorney General* [2014] eKLR)

24. The appellant’s evidence on record is that the 1st respondent was his biological father. That on January 8, 1992 the 1st respondent allocated the suit land to the appellant and his (appellant’s) brothers namely; Chrisantus Abulala and Blasio Wafula as he did his other parcels of land to other of his sons. That the appellant occupied and developed the portion allocated to him and settled there for over a period of about 30 years. That the suit land was ancestral land because the land originally belonged to the appellant’s grandfather known as Joab Lipesa Musitsa and was passed down from the said grandfather to the 1st respondent. That he (appellant) built his house on the piece of land allocated to him which is within the homestead of the 1st respondent. The appellant further contended that according to Luhya customs, he is supposed to inherit ancestral land from his father and as a last-born son his share thereof should be within the homestead of his parents.
25. PW2 stated that under Luhya (Abanyore) customs the last-born son is supposed to remain in the homestead of the parents. That where the appellant is laying claim is the portion of land which was passed down from the grandfather to their father the 1st respondent and hence the appellant is entitled to the same.
26. The evidence of the 1st respondent was that martin (the appellant) had a cottage within his homestead. That the appellant was his last born son. That it is not a must that the last born son remains in the homestead of the parents although it is the case sometimes. That where he (1st respondent) had erected his homestead was not ancestral land but land he bought from one Aggrey Masasia. He stated that it is true that his father gave him a small piece of land which cannot fit all his 13 children and that it is not where his homestead is. He stated further that the property belongs to him and he has a right to distribute it as he wished. DW2, the mother of the appellant testified that the appellant is her last-born son and according to customs in the past he was supposed to remain in the homestead. That where the 1st Respondent’s homestead is, is land that was bought. That the appellant had built a house on the suit land but had abandoned it. That her husband (the 1st Respondent) decided to give some land to the daughters. That the children should take what their father gives them.
27. I have considered the grounds of appeal as contained in the memorandum of appeal, the evidence, the rival arguments in the written submissions and the record of appeal generally. The substantive issue in the appeal, as I see it, is the sharing out or distribution of property registered in the name of the 1st respondent and particularly the suit land herein.
28. The evidence produced is not conclusive on whether the suit land is ancestral land. While the appellant claims that the land was given to the 1st respondent by the appellant’s grandfather, the 1st respondent claimed that he bought the land. That the small piece of land he was given by his father was not part of what the appellant is claiming in this case. The burden of proof under sections 107, 108 and 109 of the *Evidence Act* is with the appellant to demonstrate that the suit land or the specific portion he is claiming is ancestral land.



29. The authorities relied on by the appellant to demonstrate that the 1st respondent had a responsibility under customary law as a trustee in respect of the land for the benefit of the appellant and his siblings over the suit land are different from this case. In the authorities, the parties produced evidence that the land was ancestral land. For instance, in the case of *Mbui Mukangu v Gerald Mutwiri Mbui* [2004] eKLR the court noted that that

“the land registered in the name of Mbui was ancestral land that devolved to him on death of his father. It was unregistered land under custom but the tenure changed during the land consolidation process and subsequent registration and the Registered Land Act. It is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations.”

The appellant in this case did not dispute that the 1st respondent bought the land where his (1st respondent's) homestead is situate. There was no evidence that the Luhya custom that requires that the last born son be entitled to inherit the homestead of the parents was mandatory. Further there was no evidence that the same custom that the last-born son remains in or inherits the homestead of the parents apply to land that is not ancestral land.

30. The 1st respondent died in the pendency of the appeal. It is clear that as at the time of his death, the suit land was still registered in his name. The current 1st respondent one Florence Elusa Oginda took out Limited grant of letters of administration *ad litem* and was substituted in place of the 1st respondent.

31. Following the death of the original respondent, the suit land devolves to his estate to be administered in accordance with the provisions of the *Law of Succession Act*. The current 1st respondent was substituted in place of the original 1st respondent on the strength of the limited grant of letters of administration *ad litem*. A copy of the limited grant of letters of administration *ad litem* dated March 3, 2022 in the court record shows that the grant was issued for the purpose only of filing/defending suit until further representation is granted. The limited grant does not give the current 1st respondent capacity to administer the estate of the deceased.

32. As such, the appellant will have to await for the formal succession proceedings in a probate and administration cause to agitate his claim therein. It is the probate and administration forum that will have the jurisdiction to determine the extent of the estate of the deceased, the beneficiaries thereof and their respective shares and to distribute the estate accordingly.

Conclusion

33. The upshot is that the appeal lacks merit and is hereby dismissed. Since the parties are close family members each party to bear own costs.

Orders accordingly.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT VIHIGA THIS 21ST DAY OF JULY 2022.

E ASATI

JUDGE

In the presence of:

Nevile-- Court Assistant.

Shijenje—holding brief for Mwamu for the appellant.



Rabote h/b for Ombiro for the 1st respondent.

E ASATI

JUDGE.

