



**Kamau v Thiga (Environment and Land Appeal 5 of 2021)
[2022] KEELC 2839 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2839 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL 5 OF 2021**

LN GACHERU, J

JULY 21, 2022

BETWEEN

ESTHER NYAMBURA KAMAU APPELLANT

AND

CATHERINE WANGARI THIGA RESPONDENT

(Being an appeal against the Judgement and Decree delivered on 7th September, 2021, by Hon. E.Muriuki Nyaga (S.P.M.) in Murang'a Chief Magistrates Court Civil Case No. 446 of 2014)

JUDGMENT

1. The Appellant Esther Nyambura Kamau, was the Defendant in Murang'a Chief Magistrates Court Civil Case No. 446 of 2014, while the Respondent herein was the Plaintiff in the said suit.
2. By a Plaint dated 18th November 2014, the Plaintiff(Respondent) sought for Judgement against the Defendant (Appellant) for orders that;
 - a. A permanent injunction be issued against the Defendant prohibiting her whether by herself, has servants, officers, or agents from entering upon, remaining upon, occupying upon, leasing, charging, constructing, assigning, or interfering with the plaintiff's quiet possession, use and enjoyment of the land Parcel No.Loc.10/kahuti/4056, (suit property).
 - b. A declaration that the Defendant holds the title to Loc.10/kahuti/4056, in trust.
 - c. A mandatory injunction do issue compelling the Defendant to dissolve the trust and transfer Loc.10/kahuti/4056 to the Plaintiff.
 - d. Costs of this suit and interests
 - e. Any other relief the Court may deem fit to grant.



2. It was the Plaintiff's claim that the Loc.10/kahuti/14, initially belonged to Beth Wanjiru Kahuhu, who then transferred it to the Defendant to hold it, in trust for herself and the Plaintiff. That the Plaintiff and the Defendant are sisters with the Defendant being the older one of the two. That she has been using half of Loc.10/kahuti/14, while the Defendant has been using the other half. That the Defendant obtained consent to subdivide the Loc.10/kahuti/14, and the resultant parcels are Loc.10/kahuti/4055 and 4056, with the Plaintiff being entitled to the latter. That in total disregard of her rights under the trust, the Defendant continues to interfere with her use and quiet possession of Loc.10/kahuti/4056. That the two portions being Loc.10/kahuti/4055 and 4056, are registered in the Defendant's name to hold them in trust for herself and the Plaintiff.
3. The suit was contested by the Defendant via a Statement of Defence dated 25th February 2020. It was the Defendant's contention that LOC.10/Kahuti/14, measuring about 0.575 hectares, or thereabouts was initially registered in the name of Beth Wanjeri Kahuhu (deceased). That Loc.10/kahuti/14, was transferred to her by the said Beth (her mother) in 1983 as a gift *intervivos* without any encumbrances, inhibitions, cautions and restrictions.
4. Further that the Plaintiff has her own parcel of land to wit LOC.10/Kahuti/18, measuring 7 acres, where she had established her matrimonial home. That sometime in the year 1990, the Plaintiff approached the Defendant requesting that she be allowed to cultivate a small portion of land on the suit property and the Defendant allowed her to till the said portion as a licensee. That in the year 2014, the Plaintiff, her husband and the area Assistant Chief by threats and harassment illegally took the Defendant's title deed for the suit property from her and caused it to be subdivided into two land parcels more specifically being LOC.10/Kahuti/4055 and 4056, without her prior consent and authority.
5. After the close of Pleadings, the matter proceeded by way of *viva voce* evidence. The Plaintiff gave evidence for herself and thereafter closed her case. The Defendant also gave evidence for herself and called no witness.

Plaintiff's (Respondent's) Case

6. PW 1 Catherine Wangari Thiga, adopted her witness statement filed in Court on 18th November 2014, as her evidence in chief. She also produced her list of documents as P Exhibits.
7. On cross examination, she testified that she was married and she lived in LOC.10/Kahuti/18. That she has been working on the suit land and had raised her children there. That the Defendant was her sister and the late Beth Kahuhu was their mother. That the Defendant was registered as the owner of the suit land in 1983, but she did not remember when her mother gave the Defendant the suit land to hold it in trust for herself and the Plaintiff. That the Defendant lives on the suit land with her husband. That the said Esther and herself had been using the suit land together since 2014. That the Defendant had subdivided the suit land into 2 portions and she had refused to give the Plaintiff, her share of the same. That her late mother is the one who allowed the Plaintiff to use the land, but she died before the suit land was subdivided. That their mother instructed the Defendant sister to subdivide the suit land into two portions to be shared between the Plaintiff and the Defendant. That when the suit land was eventually subdivided, one portion measured 0.6 acres, while the other measured 0.9 acres. That the Defendant maintained use of the bigger portion while she used the smaller portion.

Defendant's (Appellant's) Case

8. DW 1 Esther Nyambura Kamau adopted her witness statement dated 25th February 2020, and her list of documents dated 10th July 2020, as her exhibits in Court.



9. On cross examination, she testified that she was forced to subdivide the suit land. That she did not obtain consent to aid the said subdivision. That the suit land was subdivided into 2 portions and she had in her possession the two title documents. That she was the elder sister of the Plaintiff and the Plaintiff had started working on the suit land in 1990. That the Plaintiff and herself were the only two children born to their late mother. That the Plaintiff grows nappier grass on the suit land and that she did not use the entire portion she claimed until she got orders from the Court.
10. On re-examination, she testified that she allowed the Plaintiff to use a small portion of the land in 1990. That she later subdivided the suit land with the Chief without her consent and that was not proper.
11. After viva voce evidence, the parties filed their written submissions and on 7th September 2021, the trial Court entered judgment in favour of the Plaintiff (Respondent) and stated as follows;

“in my view, the Plaintiff has met the requirements of a trustee as mentioned in the aforementioned Supreme Court Decision. I do hereby enter judgment for the Plaintiff against the Defendant as prayed, however each party shall bear its own costs.”
12. The Appellant was aggrieved by the above determination of the Court and has sought to challenge the said Judgment through the Memorandum of Appeal dated 6th October 2021, and sought for orders that;
 - a. That the appeal be allowed.
 - b. That the judgement and/or Order made on 7th September 2021 be vacated.
 - c. That the costs of this appeal and the proceedings in the Chief Magistrate’s Court at Murang’a be awarded to the Appellant.

The grounds of Appeal are: -

 - a. That the learned Magistrate erred in law and in fact by making a lopsided judgement in favour of the Respondent contrary to the facts and evidence presented before him.
 - b. That the learned Magistrate erred in law and in fact in giving undue weight to the pleadings and submissions of the Respondent thereby arriving at a biased finding.**
 - c. That in all the circumstances of the case and in so far as the Appellant is concerned, the learned magistrate failed to complete justice before him.
 - d. That the learned Magistrate erred in law and in fact in allowing the Respondent’s suit as prayed.
 - e. That the judgement of the learned magistrate is against the weight of the evidence and the law.
13. On 8th February, 2022, the Court directed that this Appeal be canvassed by way of written submissions. The Appellant through the Law Firm of Mbui Ndegwa & Co Advocates, filed her written submissions dated 16th June, 2022. It was the Appellant’s submission that the Respondent herein had failed to establish that the suit land was held in trust and is underserving of the orders issued in her favour by the trial Court. That the Respondent herein had caused the suit land to be subdivided without the consent of the registered owner and she could not be allowed to benefit from her illegality. The Appellant relied on a litany of cases inter alia; The Court of Appeal case of *Peter Njenga v. Sophia Ndungu* (2000) eKLR, in which the Court held as follows:

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties.



The intention of the parties to create a trust must be clearly determined before trust is implied. See *Ayoub versus Standard Bank of South Africa* (1963) E.A 619.”

Further she also relied on the case *Michael Njoroge v. Peter Munene; Beatrice Kori (interested party)* (2019) eKLR, in which the Court held:

“The principle of public policy is this *ex dolo malo non oritur actio*. No Court will lend its aid to a man who found his cause of action on immoral or illegal acts. If from the Plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or via transgression of a positive law of this country, there the Court says that he has no right to be assisted.”

14. On the other hand, the Respondent filed her written submissions dated 26th April 2022, through the Law Firm of Mwaniki Warima & Co Advocates. She submitted that the concept of customary trust was elucidated in the case of *Isack Kieba M'inanga v Isaaya Theuri M'Lintari & another* [2018] eKLR, where the Court outlined elements to be considered where an issue for customary trust has been raised. The Respondent submitted that she had established the elements outlined in the *Isack Kieba* case (*supra*) and therefore the only conclusion that could be reached was that the suit land was held by the Appellant in trust.
15. The Respondent further relied on the case of *Kanyi vs. Muthiora* (1984) KLR 712 CA, where the Court held that the registration of land in the name of a proprietor under the Registered Land Act did not extinguish right under Kikuyu Customary Law or relieve a proprietor of her obligations as a trustee. The Respondent based on the foregoing, urged this Court to uphold the decision of the trial Court and dismiss the instant Appeal with costs.
16. The Court has considered the evidence adduced in Court as well as the rival written submissions thereafter by parties. The Court recognizes that it neither saw nor heard the witnesses and must therefore give allowance to that. The Court has carefully considered the findings of the trial Court, and the Submissions of Counsels thereto and in this Court.
17. As this is a first Appeal, it is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by Section 78 of the *Civil Procedure Act*. See the case of *Kenya Ports Authority versus Kusthon (Kenya) Limited* (2009) 2EA 212 where the Court of Appeal held *inter alia*, that:-

“On a first appeal from the High Court, the Court of Appeal should 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 allowance in that respect. Secondly that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”
18. The Court is under a duty to delve at some length into factual details and revisit the facts as presented before the trial Court, analyze the same, evaluate it and arrive at an independent conclusion, but always remembering, and giving allowance for it as the trial Court had the advantage of hearing the parties.
19. However, in *Ephantus Mwangi and Another vs. Duncan Mwangi* Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278, the Court of Appeal held that:

“A member of an appellate Court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if



the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

20. As this Court proceeds to determine this Appeal, it will take into account that it will only interfere with the discretion of the trial Court only where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of *Mbogo vs Shab* (1968) EA at Page 93, where the Court held that: -

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court, unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

21. Having now carefully read and considered the Record of Appeal, the Grounds of Appeal, the written submissions by the parties, and the Judgment by the trial Court, the Court finds the issues for determination are: -
- a. Whether the Respondent(Plaintiff) made a case for existence of a trust over the suit land.
 - b. Whether the Appeal is merited.

Whether the Respondent made a case for existence of a trust over the suit land.

22. It is not in dispute that the Appellant and Respondent herein are siblings, with the Appellant being the elder one of the two. That the suit land is registered in the name of the Appellant herein. That the suit land was transferred to the Appellant by Beth Wanjiru Kahuho (deceased), who was their mother during her lifetime. Further it is not in dispute that originally the land was registered as Land Parcel number Loc.10/Kahuti/14, but it has since been subdivided into two portions being Loc.10/kahuti/4055 and Loc.10/kahuti/4056.
23. The Appellant contends that she acquired the Loc.10/kahuti/14 in 1983, as a gift from her late mother, while she was still alive. That the Respondent has her on parcel of land being Loc.10/kahuti/18, measuring 7 acres, where she had built her matrimonial property. That the Respondent approached her sometime in 1990, and requested to be allowed to cultivate a small portion of parcel Loc.10/kahuti/14 measuring approximately 1886 metres and she allowed the request. That sometime in 2014, the Respondent(Plaintiff), her husband and the area Chief, by intimidation and coercion caused her to subdivide Loc.10/kahuti/14 into Loc.10/kahuti/4055 and 4056.
24. The Respondent on the other hand contends that while the Appellant is the registered owner of the suit land, she was holding the same in trust for the two of them. That their late mother had transferred the suit land to the Appellant, being the older daughter to hold it in trust for herself and the Respondent. That after the demise of their mother in 2007, she approached the Appellant to subdivide Loc.10/kahuti/14, into 2 portions, but the Appellant refused. That the refusal of the Appellant is what prompted her to approach the area chief and District Officer for help. That the Appellant agreed to subdivide the land after the intervention of the District officer. That pursuant to that agreement, she paid all the survey costs and the land was subdivided into Loc.10/kahuti/4055 and 4056. That it was their agreement that after subdivision, the Appellant would transfer the smaller portion being Loc.10/kahuti/4056, to the Respondent but the Applicant refused to transfer it, despite numerous requests. That it is the Appellants actions therefore that prompted her to move to Court for orders.



25. The rights of a registered owner of property are clearly set out under sections 24, 25 and 26 of the [Land Registration Act](#), 2012. Section 24(a) provides:

24. Subject to this Act

- (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

26. Section 25(1) provides that such a registered owner’s rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. The rights of a registered owner are however subject to overriding interests declared by section 28 of the [Land Registration Act](#) as not requiring noting in the register.

Section 28 of the act/2012/3 Land Registration Act provides that:

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a)
- (b) trusts including customary trusts;”

27. Customary trust was well explained by the Supreme Court in the case of *Isack Kieba M’inanga v Isaaya Theuri M’Lintari & another* [2018] eKLR where it held as follows:

Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land.
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

28. The provisions of the law above are to the effect that the overriding interest such as **customary trust** need not be noted on the Register of the suit land. It therefore follows that registration of a person as a proprietor of land does not preclude him from holding an interest in trust for another. Customary trust is an encumbrance on land. These are non -registrable rights which run with the land. They are



overriding. They subsist on the land. In the case of *Kanyi vs Muthiora* (1984) KLR 712, the Court stated that;

The registration of the land in the name of the Appellant under the Registered Land Act(Cap 300) did not extinguish the Respondents rights under Kikuyu Customary Law and neither did it relieve the Appellant of her duties or obligations under section 28 as trustee.....The trustees referred to in section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under Customary law, if the Act had intended to exclude Customary law rights it would have been clearly so stated.”

29. The legal burden of proving the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person claiming must proof that: -the suit properties were ancestral clan land;during adjudication and consolidation, one member of the family was designated to hold on behalf of the family;the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. In essence, one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.

30. In the case of *Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others* [2005] eKLR, which quoted with approval the holding in the case of *Muthuita –vs- Muthuita* [1982 – 88] 1 KLR 42, the Court of Appeal held that customary law trust is proved by leading evidence. Trust is a question of fact, which must be proved by whoever is claiming a right under customary trust. A trust can never be implied by the Court unless there was intention to create a trust in the first place. Further in *Peter Ndungu Njenga vs. Sophia Watiri Ndungu* [2000] eKLR, the Court held,

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parities to create a trust must be clearly determined before a trust is implied.”

31. Further,In *Juletabi African Adventure Limited & Another v Christopher Michael Lockley* [2017] eKLR the Court also held that It is settled 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 Courts 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.”

32. Going by the decision of the Supreme Court referred to herein above, it follows that evidence must be led that points to the root of the land. Pertinent question that must concern this Court are such as;how was the land first registered? Was it clan, communal or family land before registration?Was the land inherited or passed down from the family lineage?How did the Respondent acquire this land? Did he inherit it or was it acquired by way of purchase or a gift?

33. From the evidence led by both parties, they agree that the land was originally registered and owned by the late Beth Wanjiru Kahuho, who later transferred it to the Appellant herein. It is the Respondent’s allegation that the suit land is trust land and the Appellant was registered as the owner in keeping with Kikuyu Customary law as she was the older sibling. The Appellant on the other hand claims that the suit land is hers exclusively, having received it as a gift from her mother when she was alive. That the Respondent had another portion of land Loc.10/kahuti/18, where she lived with her family.



34. The Court notes that none of the parties called witnesses to corroborate their allegations, and therefore the Court test the veracity of the documentary evidence placed before it. The Court notes that while the Appellant alleged to have acquired the suit land as gift from her mother (deceased), she did not substantiate her claim. Further, the Appellant failed to substantiate the Claim that the Respondent had another portion of land. In any case, having another portion of land does not preclude the Respondent from laying claim over the suit land.
35. The Court notes that the onus was on the Appellant to show that Loc.10/kahuti/18, which she alleged was the Respondent's portion was given to her by their late mother as well. The Appellant however did not discharge this burden. In addition, the Appellant alleges that the Respondent in collusion with the area Chief and her husband coerced her into subdividing the suit land.
36. The Court notes that even this allegation was not substantiated and it appears like the Appellant was being economical with the truth. The Respondent on the other hand appeared more truthful as she produced in the trial Court letters as evidence that she indeed has tried to resolve the dispute with the area Chief and receipts to show that she indeed paid Surveyor's fees to procure a subdivision of the suit land which was eventually done.
37. What begs the answer is whether the Respondent as the one claiming trust over the suit land had satisfied the evidentiary burden of proof.
38. In answering this question in the affirmative, this Court is persuaded by the decision of the Court in *Justus Maina Muruku v Jane Waithira Mwangi* [2018] eKLR cited with approval by the Court of Appeal in *Henry Mwangi vs Charles Mwangi* CA 245 of 2004 where it stated that

under Kikuyu Customary Law, to which both parties are subject to, the eldest son inherits land as a Muramati to hold in trust for himself and other heirs. It would follow that even when the suit land was under the name of the Plaintiff's father it was subject to customary trust. The registration of the Plaintiff pursuant to the grant of administration did not extinguish the trust on behalf of the lineage of Romano Kung'u. The land was already subject to customary trust."
39. This state of affairs appears to be similar in some aspect with the instant case. As stated above, it is trite that customary trust must be proved. From the above analysis, and based on the evidence adduced and weighing it on a balance of probabilities, the Court finds and holds that customary trust subsists on the suit land in favor of the Respondent.

2. Whether the Appeal is merited.

40. Having found that the Respondent has discharged the evidentiary burden on a balance of probability, this Court holds and finds that the trial magistrate rightly appreciated the law when he found for the Respondent herein.
41. The upshot of the foregoing is that this Court finds and holds that the Appeal herein as contained in the Memorandum of Appeal dated 6th October 2021, is not merited and the same is dismissed entirely.
42. On the issue of costs, Section 27 of the *Civil Procedure Act* requires that costs to follow event, but the Court has the discretion to rule otherwise. The Court in Machakos ELC Pet No. 6 of 2013 *Party of*



Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR quoted the case of *Levben Products vs Alexander Films (SA) (PTY)Ltd* 1957 (4) SA 225 (SR) at 227M held:

It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (*Fripp vs Gibbon & Co.*, 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

43. This Court notes that the Respondent is the successful party herein and she was also the successful party in the trial Court, and it proceeds to award her costs of this Appeal and costs at the lower Court.
44. In a nutshell, the Court finds and holds that the Appeal herein is not merited and the same is dismissed entirely with costs to the Respondent, both for this Appeal and the Lower Court.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 21ST DAY OF JULY, 2022.

L. GACHERU

JUDGE

Delivered virtually in the presence of; -

Joel Njonjo – Court Assistant

Mr Ndegwa Mbue for the Appellant

Mr Mwaniki Warima for the Respondent

L. GACHERU

JUDGE

21/7/2022

