



**Mukangu v Mukangu (Environment & Land Case 88 of 2015)
[2022] KEELC 14787 (KLR) (16 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14787 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 88 OF 2015**

CK NZILI, J

NOVEMBER 16, 2022

BETWEEN

STEPHEN NDUMBA MUKANGU PLAINTIFF

AND

FREDRICK KINYURU MUKANGU DEFENDANT

JUDGMENT

1. The plaintiff sued his brother the defendant vide a plaint dated September 21, 2015 for breach of a customary trust over three acres out of LR No. Kiirua/Naari 302 (hereinafter the suit property). He sought for: declaratory orders that the defendant holds the property in trust for him and his family; subdivision of the land into two equal shares in favour of him and a permanent injunction restraining the defendant from interfering with his half share.
2. By a defence dated October 9, 2015, the defendant denied that he was holding the suit land in trust for the family. He also sought for the stay of this suit in view of Meru CMC No. 55 of 2015. The defendant filed a notice of preliminary objection dated 9.10.2015, on the basis that this suit offends section 6 of the *Civil Procedure Act* in view of the pendency of the aforesaid suit before the chief magistrate's court. Thereafter, by a notice of motion dated 19.9.2017, the defendant sought for the withdrawal of the CMCC No. 55 of 2015 and joinder with this suit. The plaintiff filed a reply to defense dated August 15, 2018.
3. The parties following directions and an order to consolidate the two suits complied with Order 11 of the *Civil Procedure Rules* by filing a paginated bundle of documents dated February 3, 2019, July 5, 2021 and February 4, 2019 and July 3, 2021 respectively.
4. The plaintiff adopted his witness statement dated September 21, 2015 as his evidence in chief. He also produced his list of documents as exhibits namely; a certificate of title for the suitland as P. Exh No. (1), official search as P. Exh No. (2), proceedings before the Land Registrar Meru Central over the caution



as P. Exh No. (3), proceedings of a meeting before the Chief Naari Location as P. Exh No. (4), letter dated August 19, 2014 from the lands office as P. Exh No. (5) and a copy of the green card as P. Exh No. (6) respectively.

5. PW 1 testified that his late father had two wives whose ancestral land was at Naari and not Ntakira area. He said that the suit land was first registered under the name of Fredrick Thurinira Mukangu. He stated that he has been living on the land as a matter of right while taking care of his late mother even when the defendant was living overseas.
6. As regards land in Timau, PW 1 said the same was not ancestral land hence the reason that after the mother passed on, she was buried on the disputed land. Further, PW 1 testified that he did not lift the caution hence the reason the land registrar resolved that the land was family land.
7. PW 2 testified that he was one of the land committee members during the adjudication period over the suit land way back in 1950-60's. He said that at the time, the committee members would establish through clans whether a clan had land in the area or not.
8. As regards the suit land, PW 2 said that the committee members established the family of the parties herein were entitled to the land and recorded the land in the name of the defendant in trust for the family. Similarly, PW 2 said that it was the plaintiff's mother who held the land in trust for the family through her son the defendant.
9. PW 1 said his claim was based on ancestral/customary trust, since at the time, the land was registered in the name of the defendant, their late mother had no identity card as well as the defendant and that the only reason the land was registered in the name of the defendant was because he was the firstborn son.
10. The plaintiff testified that his late mother passed on in 1986 and that he did not lodge any land complaint during her lifetime since the defendant had promised to subdivide/share the land into two portions.
11. Regarding Meru CMCC No. 55 of 2015, the plaintiff said that the defendant wanted to evict him from the land and was merely filing the suit on his own behalf since his other brothers had their parcels of land.
12. PW 1 admitted receiving a demand letter dated December 17, 1997 from the defendant. Similarly, PW 1 admitted that he lodged a caution to the land since the land did not exclusively belong to the defendant. PW2 said that late mother to the parties herein was the one who appeared before the land adjudication committee and since at the time women were not being allocated land and that she gave out the defendant's name as the first born to be allocated the land on behalf of the family.
13. PW 3 told the court that as the area manager and a village elder in the locality, he knew that land belonged to the late Zipporah Munyange. Similarly, as a neighbour of the deceased Zipporah, he knew that the defendant was holding the land in trust for the family, being the firstborn son. He confirmed that during the adjudication process, only men at the time could be registered as owners of the land. PW 3 also confirmed that the deceased mother to the parties was buried on the suitland.
14. PW 4 told the court that he attended the chief's meeting and took out the minutes as evidenced by P. Exh No. 4. The witness confirmed that the parties together with their late mother Zipporah Munyange were occupying the land which was held by the defendant in trust for the family. PW 4 said that this fact came out during the alternative dispute forum at the chief's office where despite notice by way of summons the defendant failed to attend. Further, PW 4 said that the issue was referred to the area chief to arbitrate by the land registrar following a caution lodged by the plaintiff on the suitland. He confirmed that the parties had been on the land for a long time.



15. PW 5, a neighbor of the plaintiff testified that the deceased Zipporah Munyange's wish was that the land be shared equally among his only two sons, since she was the one who initially gathered the land. He stated that should the wish of the late mother be ignored; a curse would follow the objector hence the reason she personally expressed her said wish to him. He could not however explain why Juliana Nchooro was not claiming a share of the land.
16. The defendant adopted his statement dated April 19, 2021 as his evidence in chief and produced a notice to caution dated January 22, 2015 from the land registrar as D. Exh No. (1), notice of intention to remove a caution as D. Exh No. (2), letter to the land registrar as D. Exh (3), demand notice dated December 17, 1997 as D. Exh No. (4), certificate of title as D. Exh No. (5), official search as D. Exh No. (6) and letter confirming ownership as D. Exh No. (7).
17. DW 1 stated that he acquired the suit land in 1962 through balloting at Kiirua area and started developing the land. He said that after initiation, he acquired his current name, the last name belonging to the clan. He denied that the 1st registration of the land in 1965 was done by his late mother who passed on June 26, 1986. Similarly, DW 1 said he did not attend her burial and therefore was not made aware of her last wishes.
18. The defendant said that since 1997 he had been trying to evict the plaintiff from his land after giving him a notice to vacate as well as filing a suit No. CMCC 55 of 1995. DW 1 admitted that the plaintiff had a permanent house on the suit land where he lived with his family. He said that after a caution was registered by the plaintiff, he had tried all in vain to remove it. He testified that the land was approximately 8 acres in size. Further, DW 1 told the court that their late mother used to live on the land and upon her death she was buried therein.
19. In addition, DW 1 said the plaintiff at one time tried to move out of the land after he offered an acre to him but later on reneged on the offer. He admitted that he attended a meeting at the land registrar's office whose verdict he did not appeal against. As concerns P. Exh No. 4, the defendant stated that most of the names appearing therein were strange to him and so were the plaintiff's witnesses.
20. DW 1 denied that his late mother was involved in registering the land under his name but clarified that the plaintiff came into the land out of his invitation despite the intention of his late mother that the plaintiff should go and occupy the land at Timau. The defendant said that his late mother had ordered the plaintiff out of his land severally and was at a loss why the neighbours to his land were in favour of the plaintiff yet he was not the owner of the land.
21. Answering questions by the court, the defendant said that he was born in 1943, joined Kiirua Primary school on 1952 and sat for his Kenya Primary Education in 1960 where after he joined the Kenya Police in November 1964. Therefore in 1965 he was about 24 years old.
22. The defendant said that his late father was known as M'Mukangu and passed on before 1952 at the time when he had two wives and five children, at which time of death all the family was living together but currently, they were living in Ntakira land.
23. The defendant said that his late mother never owned any land. Further DW 1 told the court that the plaintiff was born in 1948 and therefore in 1965 he was aged about 17 years. DW 1 said he could not deny the facts as contained in his witness statements particularly paragraph 9 of the plaint.
24. The plaintiff submitted that his evidence was clear that the defendant as the firstborn son of her late mother Zipporah Munyange M'Mukangu was registered as the owner of the land since she had no identity card, was the first born and that at the time women were not allowed to possess or own land.



25. Further the plaintiff submitted that as the matriarch the deceased parent and her entire family continued occupying and developing the land until her demise but after her death, the defendant turned around, breached the trust and purported to evict him from the land out of greed.
26. The plaintiff also submitted that his witnesses had proved the existence of a customary trust, which was an overriding interest as per sections 27 and 28, 30 and 107 of the [Land Registration Act 2012](#). He submitted that the title deed held by the defendant was subject to his overriding rights which remain valid. Reliance was placed on [Kanyi v Muthiora](#) (1984) KLR 712, [Gathiba v Gathiba](#), Nairobi HCCC 1647/84, [Mbui Mukangu v Gerald Mutwiri Mbui](#) [2004] eKLR.
27. On his part the defendant submitted that the plaintiff came into to the land due to his invitation so as to take care of his later mother from the ancestral land in Ntakira area, while he was abroad, but upon request he has failed to vacate the land.
28. The defendant urged the court to find that the plaintiff never denied he owned another land LR No. Nyayo/Settlement/178.
29. As to the existence of trust, the defendant relying on the caselaw in [Twalib Hatayan Twalib Hatayan & another v Said Saggat Ahmed AlHeidy & others](#) (2015) eKLR, [Peter Ndungu Njenga v Sophia Watiri Ndung'u](#) (2000) eKLR, he submitted that the plaintiff had failed to demonstrate the existence of the trust, who else was entitled to the land out of the siblings of the deceased apart from the plaintiff, the existence of other parcels of land; if the trust extended to the other siblings and if there was an intention to create the trust. Further, the defendant relying on [Isaack Kiebia M'Inanga v Isaaya Theuri M'Lintari & another](#) (2018) eKLR, submitted that the plaintiff's evidence short of the ingredients of an existence of a customary trust.
30. Concerning the burden of proof defendant submitted that the same undersection 107 of the [Evidence Act](#) fell on the plaintiff, which he had failed to discharge and guided by the caselaw of [Mumo vs Makau](#) (2003) Eldoret, [Susan Mumbi Waititu v Mukuru Ndata & 4 others](#) (19 of 2007) eKLR, the defendant urged the court to find no tangible, cogent, clear and consistent evidence had been presented that the land as registered was to be held by him in trust for the family, least of all to the plaintiff.
31. Having gone through the pleadings evidence produced and written submissions the issues for determination are:
 - i. Whether LR No. Kiirua/Naari/302 is held by the defendant in trust for the plaintiff.
 - ii. If the plaintiff has used the correct process to seek for customary trust.
 - iii. If the defendant has proved the claim to the required standard.
 - iv. What prayers is the plaintiff entitled to.
32. The law is that customary trust is one of the overriding interests that is recognized under sections 28 (b) of the [Land Registration Act 2012](#).
33. The manner, character and the elements to found a customary trust was set out by the Supreme Court in [Isaack M'Inanga Kiebia v Isaaya Theuri M'Lintari & another](#) (2018) eKLR. The ingredients are; whether:
 - a. the land in question was before registration, family, clan or group land.
 - b. The claimant belongs to such family clan or group.



- c. The relationship of the claimant to such family clan or group is not so remote or tenuous as to make his or her claim remote or adventurous.
 - d. The claimant would have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
 - e. The claim is directed at the registered owner who is a member of the family, clan or group.
34. The combatants in this suit are brothers and sons of the late Zipporah Munyange M'Mukangu who passed on while living, staying, developing her family land was eventually buried therein. The suit land was 1st registration in the name of the defendant on 6.1.1965 and a title deed was acquired on July 15, 1974 as per D. Exh No. 6, the copy of records.
 35. Section 26 of the [Land Registration Act](#) 2012 provides that a certificate of title as the one produced herein as D. exhibit (5) is to be taken by all courts as prima facie evidence that the person named therein is the proprietor of the land as the absolute and indefeasible owner, subject to interalia encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and such title shall not be subject to challenge except on account of fraud, misrepresentation or acquisition through corrupt scheme.
 36. Under section 28 of the [Land Registration Act](#), customary trust is one of the overriding interests to which a registered proprietor is subject to.
 37. In *Omollo v Oduor* (Civil Appeal 46 of 2017) 2022 KECA 371 (KLR) (18th February, 2022) {Judgment}, the facts were that for the two brothers, each had an individual and specific parcel of land registered in their names. Prior to their demise there had been no dispute regarding the registration of the land but only arose after the demise of one of the brothers. The court held that evidence must be led to prove the existence of such trust or otherwise binding the registered owner and that each case has to be determined on its own merits based on the quality of the evidence presented before the court.
 38. In *Charles Kabende Kinuthia & another v Naomi Nyabae Kamunyu* (2019) eKLR, the issue before the court was the nature and the circumstances of registration of the land in favour of the registered owner. The Court of Appeal found that the basis upon which the land was registered in the name of the deceased was on account solely of him being the first son of the Kamuyu Kinuthia and that the widow of Kamuyu Kinuthia had made the request to the court to have the deceased re-registered as the proprietor. The court held it could not construe the judgment of Kikuyu African court as a prohibition or determination that the other children of Kamuyu Kinuthia were not entitled to inherit the property. The court said Kikuyu customary law recognized the primacy of the position of firstborn son when it came to registration of land which was being inherited.
 39. In *Isaac Kiebia* (*supra*) the court said the content of customary trust can take several forms such as reservation of land for family, clan or group uses as to burial, traditional rites, construction of houses etc.
 40. In this suit the two parties are born by the same parents, are related, the claim is directed at the defendant in terms of the requirements in the [Isaac Kiebia case](#).
 41. The only issue for this court to determine is the nature and the circumstances under the land came to be registered under the name of the defendant and if at all there was an intention to create a trust.
 42. In his testimony the plaintiff said that the only reason the land came under the name of the defendant was because he was the first born in his family, his father was dead, that his late mother lacked an identity card and lastly, that at the time females were not being registered as owners of land. PW 2 who was a land



- committee member at the time of the land adjudication confirmed that it was a custom among Ameru people and in line with it, that it was indeed the late Zipporah Munyange who appeared before the land committee and said the land should be registered under the name of Fredrick Kinturi Thurania Mukangu then a minor on behalf of the family.
43. DW 1 also confirmed that the name Mukangu refers to his clan. To counter that evidence, DW 1 insisted that it was he who balloted for the land. He said that the land which was ancestral was at Ntakiira and not Naari area hence the plaintiff and her late mother were not entitled to the suit land.
 44. PW 2, 3 & 4 were consistent that the suit land was gathered by the late Zipporah Munyange who lived and developed the said land and not the other parcels of land as suggested by the defendant.
 45. The defendant failed to call any witnesses to counter the evidence of PW 1, PW 2, PW 3 and PW 4 as to the nature and circumstances of the registration under his name. Answering questions by the court, the defendant admitted that as at 1965, he was aged 24 years while the plaintiff was still a minor. As to the issue of the circumstances under which the plaintiff entered into, occupied and or constructed a permanent house on the suit land, the defendant said the plaintiff came under his invitation. The defendant could not however state when and how he extended the invitation to the plaintiff while out of the country yet the evidence by PW 1, PW 2, PW 3 and PW 4 was consistent that the plaintiff and her late mother had been in occupation of the suit land since 1960 or thereabouts.
 46. Therefore, it is unbelievable that the defendant would have been the one to invite his late mother and her children in 1960 to the suit land and allow them to establish permanent houses up to February 26, 2015, when he filed the suit for eviction against the plaintiff. Additionally, if the only reason the plaintiff had been invited into the suit land was to take care of their elderly and ailing mother, again it is improbable that after her death in 1986, the defendant would still allow the plaintiff to stay and live on his land up to February 26, 2015, if at all he had another homestead in Ntakiira. The defendant's evidence clearly contradicts his earlier witness statement dated February 25, 2015, in Meru CMCC No. 55 of 2015, where he was emphatic that he allowed the plaintiff to live on his land for he did not have anywhere else as his home.
 47. In *Mungai Njoroge & another v Kiarie Njoroge & another* (2020) eKLR, the court was considering a case where the claimant, a brother was in actual possession of the suit land and despite initial willingness to transfer the land, the respondent had changed his mind. The court held that the claimant was entitled to be transferred the land since it was held in trust for him.
 48. In this suit the defendant admitted in his evidence that at one stage, he had agreed to give the plaintiff one acre out of the eight acres of the suit land who unfortunately eventually declined to vacate the suit land despite the offer.
 49. The court finds no justification given why the defendant would have been willing to cede part of his land to the plaintiff if at all the land exclusively belonged to him. The only inference is that the land was all along family land.
 50. Looking at the evidence in totality, my irresistible conclusion is that the land was at all material times family land. This is also the reason that the defendant had all along allowed his late mother and all his siblings including the plaintiff to live and occupy the land since registration in 1965.
 51. As at the time the defendant acquired the title deed in 1985, the same was subject to the occupation and possessory rights of not only his late mother but also the plaintiff. It does not matter whether the plaintiff's other siblings are claiming the land or not. The plaintiff does not claim the land on their behalf. None of the other siblings have sought to be joined into this suit.



52. In the premises, I find the plaintiff has proved customary trust and proceed to grant the prayers sought namely:

1. A declaration be and is hereby issued that the defendant holds half share of LR No.Kiirua/Naari/302 in trust for the plaintiff.
2. The land shall be subdivided into two equal shares in favour of the two parties.
3. The defendant to sign the subdivision, land control board and land transfer forms in favour of the plaintiff within two months from the date hereof in default the Deputy Registrar to effect the forms
4. Permanent injunction do issue restraining the defendant from interfering with the plaintiff's quiet possession of the aforesaid half share out of LR No. Kiirua/Naari/302.

Cost to the plaintiff.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 16TH DAY OF NOVEMBER, 2022

In presence of:

C/A: Kananu

Ashaba for plaintiff

Miss Rimita for Munene Kirimi for defendant

HON. C.K. NZILI

ELC JUDGE

