



REPUBLIC OF KENYA



**Kilonzi (Deceased) & another v Kilonzi (Now Deceased) & another (Environment & Land Case 7 of 1999) [2022] KEELC 15274 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15274 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 7 OF 1999  
CA OCHIENG, J  
DECEMBER 7, 2022**

**BETWEEN**

**MUSAU KILONZI (DECEASED) ..... 1<sup>ST</sup> PLAINTIFF**

**ONESMUS MUSYOKI (SUING AS THE LEGAL REPRESENTATIVE OF THE DECEASED) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**BERNARD MATENG'E KILONZI (NOW DECEASED) ..... 1<sup>ST</sup> DEFENDANT**

**MUTUNGA MAKIO KILONZI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Through a Plaint dated the January 6, 1999, the Plaintiff filed this suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants seeking the following orders:-
  - a) A declaration that land parcel No Wamunyu/Kwakala/149 is the Plaintiff's property and the Defendants have no interest on it whatsoever.
  - b) An order that caution registered by the Defendants on 1<sup>st</sup> September, 1998 against the Plaintiff's title to land parcel No Wamunyu/Kwakala/149 be removed.
  - c) Cost of the suit and interest thereon.
2. The Defendants filed their Statement of Defence on January 21, 1999 where they denied the averments in the Plaint except the descriptive and jurisdiction of the court. They averred that land parcel number Wamunyu/Kwakala/149 hereinafter referred to the 'suit land' was subdivided into four portions to the four sons of Kilonzi Munyambu (the Plaintiff included) and each of them was already working on their respective portions. They stated that the suit land was registered in the name of the Plaintiff to hold in trust on behalf of the four of them and that the said land is family property. They sought for the land to be sub-divided into the four portions as per the boundaries marked by the clan members.



3. The matter proceeded to a full hearing where the Plaintiff had one witness while the Defendant called two witnesses.

### **Evidence by the Plaintiff**

4. PW1, Onesmus Musyoki Musau testified that the suit land, Wamunyu/Kwakala/149 is registered in the name of Musau Kilonzi. Further that, Musau Kilonzi was his father. He further testified that upon his demise, this Honourable Court granted him Letters of Administration enabling him to take over this suit.
5. He confirmed that Wamunyu/Kwakala/149 was owned originally by his late grandmother, Kateke Kilonzi in whose name the land was surveyed on or about the year 1969. Further, upon her (Kateke Kilonzi's) demise, his late father, Musau Kilonzi petitioned for Letters of Administration Intestate in respect of his grandmother's (Kateke Kilonzi) Estate. His father (Musau Kilonzi) was issued with a Grant which was confirmed on September 30, 1994. He explained that, at the time of filing the Petition and throughout the proceedings herein, all family members were involved and/or consulted as regards the properties belonging to the Estate of Kateke Kilonzi. Further, there was no objection even to the extent that the 2<sup>nd</sup> Defendant agreed to be his father's surety in the said Petition. He argued that all concerned family members consented to having Wamunyu/Kwakala/149 registered in his father's (Musau Kilonzi) name. He insisted that no trust was created as the property was, subject to the express consent, registered in Musau Kilonzi's name.
6. It was his testimony that the Defendants herein had homes elsewhere. Further that the 1<sup>st</sup> Defendant lived on his own land parcel number Wamunyu/Kwakala/148 while the 2<sup>nd</sup> Defendant resided in Yatta.
7. He further testified that the Defendants on or about the year 1999 wrongfully moved into Wamunyu/Kwakala/149, fenced it off, cleared bushes, among other acts of destruction. Further, that his late father came to realise that preceding their unlawful entry and destruction of Wamunyu/Kwakala/149, the Defendants had further registered a caution, secretly and unlawfully claimed beneficial interest in the suit land.
8. He reiterated that the Defendants are not the lawful owners of the suit land and they are not beneficial owners nor hold any interest in the said land.
9. The Plaintiff produced the following documents as Exhibits: Title Deed for land parcel No Wamunyu/Kwakala/149 (the suit property); Grant of Letters of Administration and Certificate of Confirmation thereof issued to the Plaintiff vide Machakos High Court Succession Cause No 129 of 1991; Form P & A 57 and P & A 11 filed in Machakos High Court Succession Cause No 129 of 1991; An abstract of the register for land parcel No Wamunyu/Kwakala/149; Copy of Title Deed for Wamunyu/Kwakala/149; Copy of Letters of Administration of the Estate of Musau Kilonzi dated October 31, 2005; Copy of Guarantee by personal sureties in Machakos Succession Cause No 129 of 1991; Copy of Affidavit in justification of proposed sureties; Certificate of Confirmation of Grant for the Estate of Kateke Kilonzi alias Kateke Mbithuka dated September 30, 1994; Certified copy of the green-card for Wamunyu/Kwakala/149 and any other document with leave of the court.

### **The evidence by the Defendants**

10. Dw1, Mutunga Mwakio Kilonzi, reiterated the contents of his witness statement and stated that his late grandfather had three (3) recognized wives and one of them, Kateke Kilonzi, had no children of her own but adopted the children of the other wives. Further, that her land was subdivided into four, for the sons of Kilonzi. He confirmed that, after the demise of Kateke, the four sons agreed to nominate



the original Plaintiff, Musau Kilonzi (deceased) as the eldest son, to take out Letters of Administration Intestate. He averred that he accompanied Musau Kilonzi to Machakos to fill in the succession forms and the Grant was issued in 1996. He explained that the family intended to have a surveyor subdivide the land but the Plaintiff was reluctant, only to realise that he was already looking for a buyer to buy the entire suit land. He stated that upon this realization, together with his brother the 2<sup>nd</sup> Defendant, they registered a caution on the basis of beneficial interest. It was after the caution was registered that the original Plaintiff filed this suit.

11. DW2, Benson Muema Matenge stated that he is the son of Bernard Matenge (2<sup>nd</sup> Defendant). He testified that as a grandson of Kateke Kilonzi, he interacted with her closely and that she had adopted nearly all the sons of her co-wives. He confirmed that upon the demise of Kateke Kilonzi, the family had wanted to subdivide the land and nominated the original Plaintiff to take out Letters of Administration Intestate accompanied by Mutunga Makio as a surety. They later noted that the original Plaintiff wanted to sell the land and a caution was registered since the land belonged to the family and the same had been subdivided with each family living on their designated portion.

## Submissions

### Submissions by the Plaintiff

12. The Plaintiff in his submissions explained that the 1<sup>st</sup> Defendant was a step-brother to the original Plaintiff and was settled on the adjoining parcel of land being Wamunyu/Kwakala/148 while all other family members were settled on different parcels of land. He argued that the Defendants had confirmed in their testimony that none of them lived on the suit land. He further submitted that it was known by all family members that the Estate of the late Kateke Kilonzi was to be succeeded by the original Plaintiff without any objection to the issuance of a Grant. As for the existence of a trust over the suit land, he argued that the burden of proof lay squarely on the Defendants to prove the same but they had failed to do so. It was his contention that every family was settled on separate parcels of land, with one of the Defendants being on Wamunyu/Kwakala/148 which he owned solely and hence should not encroach on Wamunyu/Kwakala/149. As to the question on removal of the caveat over the suit land, he relied on Section 71 of the [Land Registration Act](#). He averred that this court could not interfere with the title as it did not have jurisdiction to do so and relied on Section 26 of the [Land Registration Act](#) as well as the following decisions: *Republic v Karisa Chengo & 2 Others* [2017] eKLR; *Kazungu Fondo Shutu & Another v Japhet Noti Charo & Another* [2021] eKLR; *Maria Ngangi Gwako v Charles Mwenzi Ngangi* [2014] eKLR; *Penmain Company Limited v Likoni Community Development & Others* [2021] eKLR; *Richard Nyamemba Auka & 2 Others v Josephine Motarohi & 2 Others* [2014] eKLR; *Isack M'Inanga Kieba v Isaaya Theuri M'Lintari & Another* [2018] eKLR and *Republic v Rosemary Wairimu Munene, Ex-parte Applicant v Ibururu Dairy Farmers Co-operative Society Ltd* [2014] eKLR.

### Submissions by the Defendants

13. The Defendants in their submissions stated that by dint of Section 79 of the [Law of Succession Act](#), the Plaintiff was only entitled under Section 39(e) as a step son to the deceased just like all the other step-sons and that he had no better right than any of the Defendants. On the issue of existence of a trust, they inferred that there was an implied trust. They submitted that the 2<sup>nd</sup> Defendant facilitated the petitioning for Letters of Administration Intestate with the intention that once the title was obtained, the same would be subdivided among the four sons of Kilonzi. On their right to place a caution on the suit land, they relied on provisions of Section 71 of the [Land Registration Act](#) and argued that they are persons who 'claim a right to obtain an interest in Land'. To buttress their averments, they relied



on the following decision: [Peter Ndung'u Njenga v Sophia Watiri Ndungu](#) [2001] Civil Appeal No 2 of 2000 eKLR.

### **Analysis and determination**

14. Upon consideration of the Plaintiff, Defence, Witnesses testimonies, Exhibits and rivalling submissions, the only issue for determination is whether the original Plaintiff, Musau Kilonzi held land parcel number Wamunyu/Kwakala/149 in trust for the four sons of Kilonzi.
15. It is not in dispute that the suit land was initially registered in the name of the late Kateke Kilonzi who was a step-mother to the original Plaintiff and one of the Defendants. It is also not in dispute that the suit land was transmitted to the original Plaintiff after he undertook Succession proceedings in respect to the Estate of Kateke Kilonzi. The Defendants insist that the suit land is family land and was only vested to the original Plaintiff to hold in trust on behalf of Kilonzi's four sons. Further, that there was a clan meeting where land was subdivided. They aver that the original Plaintiff as the eldest son simply took out Letters of Administration Intestate in respect to Kateke Kilonzi's Estate so as to subdivide suit land to four of Kateke's step sons, which fact the Plaintiff refutes.
16. PW1 argued that his late father who was the original Plaintiff, is the absolute owner of the suit land and did not hold it in trust for the Defendants. He has further sought for the removal of caution registered by the Defendants' in 1999 on suit land.
17. In this instance before I proceed to determine whether the original Plaintiff held the suit land in trust for the four sons of Kilonzi, it is important to interrogate the root of the title to the said suit land. It emerged in evidence that the suit land before adjudication belonged to Kilonzi who was father to the original Plaintiff and one of the Defendants herein. Further, he had several wives including Mulia, Kateke and Ndunge who were all allocated portions of his land before adjudication. During adjudication Kateke was registered as owner of the portion, she had been allocated by Kilonzi which is the suit land herein. However, Kateke the registered proprietor did not have any children of her own. The Plaintiff insists his father who was Ndunge's son, was raised by Kateke as an only child in accordance with Kamba customary law. From this analysis alone, I find that the suit land even though registered in the name of Kateke Kilonzi, was indeed ancestral land.
18. The Defendants were categorical that they have used the land over a period of time which brings me to the question as to whether the Defendants had obtained user rights over the suit land. PW1 in his testimony contended that his father who was the registered proprietor of the suit land sued the Defendants for having encroached thereon. He confirmed that his father and 2<sup>nd</sup> Defendant had one mother called Ndunge Kilonzi. Further, that Mulia Kilonzi who was mother to 1<sup>st</sup> Defendant was also his father's step mother. He confirmed that during Succession proceedings in respect to Kateke's Estate, the 2<sup>nd</sup> Defendant was a surety in the said proceedings and no one objected. He stated that the Defendants' registered a caution on the suit land in 1999 and his father filed the instant suit to have the said caution removed. PW1 contended that the Defendants were not on the land but only grazed thereon as well as cut down trees. He explained that the land that was given to Ndunge his grandmother, was subdivided between his father and 2<sup>nd</sup> Defendant. From this evidence that I have highlighted, I find that since the Defendants were indeed using the suit land, an element of user rights was actually created.
19. I note the title to the suit land was acquired during the regime of the Registered Land Act (now repealed). Further, during the said regime, the issue of customary trust was not recognized. However, the [Constitution 2010](#) as well as the [Land Registration Act](#) recognizes customary trust. The Supreme



Court in the case of *Isack Kieba M'Inanga v Isaaya Theuri M'Lintari & Another* [2018] eKLR outlined the elements of trust and stated thus:

“The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

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.
- (53) We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered Land Act, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in *Obiero v Opiyo* and *Esiroyo v Esiroyo*. Once it is concluded, that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests.
- (54) In the foregoing premises, it follows that we agree with the Court of Appeal's assertion that “to prove a trust in land; one need not be in actual physical possession and occupation of the land.” A customary trust falls within the ambit of the proviso to Section 28 of the Registered Land Act, while the rights of a person in possession or actual occupation, are overriding interests and fall within the ambit of Section 30(g) of the Registered Land Act.

Although the Respondents herein were not in possession or actual occupation of Parcel No Njia/Kiegoi Scheme 70, both the High Court and Court of Appeal were entitled to enquire into the circumstances of registration, to establish whether a trust was envisaged. Since the two superior courts were satisfied that indeed elements of a customary trust in favour of the Respondents pertaining to the parcel existed, we see no reason to interfere with their conclusions.” Emphasis mine

20. In relying on this decision and applying the elements of trust as highlighted therein to the circumstances at hand, I find that the suit land was indeed initially customary land as it belonged to Kilonzi who allocated it to his wife Kateke. Further, despite the fact that the original Plaintiff took out succession proceedings, as per Section 39 of the *Law of Succession Act*, he cannot be deemed to have superior rights as a beneficiary of Kateke's Estate over the rest of Kilonzi's sons who were also Kateke's stepsons. It emerged in evidence that the elders had even directed that the suit land to be subdivided



among Kilonzi's four son who were Kateke's stepsons, but the Plaintiff declined. To my mind, I opine that even though the Plaintiff claimed some of Kilonzi's son were not in possession of suit land, I find he was not candid as PW1 confirmed the Defendants had indeed encroached thereon. I hence find that an element of customary trust was indeed created herein which I cannot ignore. It is my considered view that the four sons of Kilonzi are all equally entitled to have a share of the suit land which belonged to Kateke Kilonzi as she was childless. In that regard, I hereby make a declaration that the four sons of Kilonzi being Musau Kilonzi, Makio Kilonzi, Bernard Matenge Kilonzo and Mbithi Kilonzo or their dependants if they are deceased, all have a right to equal share, possession and occupation of the suit land and the original Plaintiff (Musau Kilonzi-deceased) simply held the said land in trust for them.

21. It is against the foregoing that I find that the Plaintiff has not proved his case on a balance of probability and will proceed to dismiss it.
22. However, since this is a family matter, I direct each party to bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 7<sup>TH</sup> DAY OF DECEMBER, 2022**

**CHRISTINE OCHIENG**

**JUDGE**

