



REPUBLIC OF KENYA



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**Mbogori v Nkanata & 3 others (Environment and Land Appeal
E055 of 2021) [2022] KEELC 15242 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15242 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E055 OF 2021**

CK YANO, J

DECEMBER 7, 2022

BETWEEN

DAVID KIBANGA MBOGORI APPELLANT

AND

SUSSY RUGURU NKANATA 1ST RESPONDENT

JANE KANANU KIRIMI 2ND RESPONDENT

WINFRED KANARIO KIRIMI 3RD RESPONDENT

SILAS KIRIMI NKANATA 4TH RESPONDENT

*((Being appeal against the judgment delivered on 26th March 2021 by Hon.
S. Ndegwa SPM in the ELC court at Githongo vide ELC case no. 42 OF 2017))*

JUDGMENT

A. Introduction

1. The appellant David Kibanga Mbogori filed this appeal against the judgment of Honourable S Ndegwa SPM delivered on March 26, 2021 in Githongo ELC case No 42 of 2017 and set out the following grounds.
 1. That the learned trial magistrate erred in both law and facts by failing to adhere to the provisions of Section 6 and 7 of the *Land Control Act* among other laws and therefore her finding was wrong on principals of the law.
 2. That the learned trial magistrate erred in both law and facts by failing to appreciate the appellant's pleadings, submission and authorities.



3. The learned trial magistrate erred in both law and facts by failing to properly interpret the sale of Land Agreement and understand its very clear terms which showed the appellant had followed due diligence in purchasing the land from the 4th respondent legally.
4. That the learned trial magistrate erred in law and facts by ignoring that the appellant had legally purchased the suit property in the sum of Kshs 750,000/= vide sale agreement dated July 6, 2011 and August 1, 2011 respectively.
5. That the learned trial magistrate erred in law and facts by ignoring the fact that the suit property had been sold to the appellant by the 4th respondent legally and a title passed to the appellant upon execution of a contract of the sale and consent order vide Meru ELC case 327 of 2007 was issued to that effect the facts which are not in dispute as the appellant had offered clear the 4th respondent loan and debts to save the entire land from being auctioned.
6. That the learned trial magistrate erred in both law and facts by failing to appreciate that there was no fraud proved against the appellant on acquiring the land from the 4th respondent and thereafter holding that the appellant was not an innocent purchaser for value without notice yet there was no glaring evidence of fraud proved by the respondent against the appellant.
7. That the learned trial magistrate erred in both law and facts by failing to appreciate and to acknowledge that the entire land was saved by the appellant from being auctioned when the appellant enjoined in Meru CMC Case No 327 of 2007 so as to save the entire land from the jaws of the Auctioneers and indeed the Honourable court directed that the 4th respondent do transfer the said land to the appellant.
8. That the learned magistrate erred in both law and facts by failing to find that all the transactions in respect of the sale of the suit land were done pursuant to the provisions of law and was perfectly legal and the appellant had done due diligence and confirmed that the 4th respondent was the rightful owner of the suit property.
9. That the learned magistrate erred in both law and facts in ignoring the fact that the appellant is holding a valid title to the suit property in occupation of the suit land and has done a lot of development on the suit land since 2010 to date by planting over 4000 mature tea bushes.
10. That the learned trial magistrate erred in both law and facts by finding that the sale and transfer of the suit property to the appellant was null and void and directing the same to be cancelled or deleted from the register of titles.
11. That the learned trial magistrate erred in both law and fact by failing to make consequential findings and orders regarding the appellant's indebtedness and the appellant's right to monies paid in the impugned sale which saved the entire land from being auctioned.
12. That the learned trial magistrate erred in both law and facts in ignoring the fact that the Executive Officer of this honourable court had visited the land in question on October 17, 2012 and made the report and indeed confirmed that the respondents were not in occupation as they alleged and there was no residential houses or toilets as to the time the suit land was visited.
13. That the learned trial magistrate erred in both law and facts by failing to find and appreciate that land parcel Number Nkuene/Uruku/954 registered under one Murithi Nkanata brother to the 4th respondent and which resulted into two equal portions to wit 1866 and 1867 in which 1866 was given to the 4th respondents as a gift by his brother and in which resulted



to subdivisions of two portions 1979 and 1980 and in which 1980 was transferred to the appellant herein was not an ancestral land in absence of any evidence tendered or adduced by the respondents and thus the learned trial magistrate misdirected herself thereof.

14. That the learned trial magistrate erred in both law and fact when she entered judgment in favour of the 1st, 2nd and 3rd respondent whereas their evidence was not clear and shrouded in ambiguity and the 1st, 2nd and 3rd respondent had therefore not proved their case on a balance of probabilities as expected of them.
 15. That the learned trial magistrate erred in both law and in fact when she found that the 1st, 2nd and 3rd respondent have proved their case on balance of probabilities and disregarding the appellant's evidence, submissions and the authorities that the appellant had settled loans and debts secured by the 4th respondent so as to save the entire land from auction.
 16. That the learned trial magistrate erred in both law and in fact by finding that the appellant be evicted out of the suit land which he has been in occupation since 2010 and which he has done and/or puts a lot of development.
 17. That the learned trial magistrate erred in both law and in fact and misdirected herself when she directed that the appellant title number 1980 be amalgamated with title number 1979 for Jane Kinanu in a matter which has not been determined as the same is pending before the same court for hearing and determination.
 18. That the learned trial magistrate erred in both law and fact by failing to find that no attempt was made to trace land parcel Number Nkuene/Uruku /954 as an ancestral land, originally registered under the name of one Murithi Nkanata brother to the 4th respondent and which resulted into two equal portions to wit parcel number 1866 and 1867 back to one Nkanata Matiri the alleged father of the 4th respondent and alleged father in law of the respondent in which indeed reveal that the land was previously registered in the name of one Murithi Nkanata who then transferred the same to the 4th respondent not in transmission/success but as the land was transferred as gift to the 4th respondent on April 13, 2007 and title deed issued on April 23, 2007.
 19. That the learned magistrate erred in law and fact by awarding costs on wrong principles of law.
 20. That ultimately, the appellant sought to have the appeal herein allowed with costs against the respondents, the judgment and decree of the trial court be set aside and its defence be allowed with costs to the appellant and or in the alternative the respondents be ordered to refund the sum of Kshs 3,000,000 to the appellant together with interest at bank rates and in the further alternative a finding to be made as to the indebtedness to the 4th respondent.
2. The appellant prays for the appeal to be allowed by setting aside the whole judgment and decree of the subordinate court and to dismiss the respondents suit with costs as well as costs and interest of both the lower court case and this appeal to be awarded to the appellant

B. Background of the Appeal

3. The respondents herein are all related. The 2nd and 3rd respondents are children to the 1st respondent while the 4th respondent is a former husband to the 1st respondent.
4. The 1st, 2nd and 3rd respondents herein filed suit in the lower court against the 4th respondent and the appellant seeking for a declaration that LR Nkuene/Uruku/1980 is ancestral/family/trust land and that their rights and occupation of the same has arisen due to their considerable long time possession



and development thereon and an order be issued that the suit land should be transferred to them, an order that the 4th respondent and the appellant dealing with LR No Nkuene/Uruku/1866 and the appellant's acquisition of LR No Nkuene/Uruku/1980 was fraudulent and the registration should be cancelled, an order directing the District Land Registrar, Meru Central District to cancel the registration of LR No Nkuene/Uruku/1980 registered in the name of the appellant and the appellant to sign the transfer forms and have the same registered in the names of the 1st, 2nd and 3rd respondents jointly and in default, the Executive Officer of the court do sign all the requisite transfer documents, and order of permanent injunction as well as costs and interest.

5. In the plaint, the 1st, 2nd and 3rd respondents averred that Nkananta M'Matiri (now deceased) was the owner of parcel of land LR No Nkuene/Uruku/954 and that the same is ancestral family land (Mburugo) as the same was acquired by their clan. It was stated that LR No Nkuene/Uruku/1980 is a resultant subdivision from LR No Nkuene/Uruku/1866 which was a subdivision from original parcel LR No Nkuene/Uruku/954 and the same was inherited by the 4th respondent from his father, Nkanata M'Matiri.
6. It was averred that in the year 2011, the 4th respondent and the appellant caused the land LR No Nkuene/Uruku/1866 to be subdivided into two parcels LR No Nkuene/Uruku/1979 and LR No Nkuene/Uruku/1980 and the latter parcel was secretly transferred by the 4th respondent to the appellant. The 1st, 2nd and 3rd respondents contended that the 4th respondent held the suit land in trust for himself and the 1st, 2nd and 3rd respondents and therefore breached the trust by secretly and without prior notice and knowledge of the 1st, 2nd and 3rd respondents or any other member of the family subdivided the land and in further breach of trust transferring LR No Nkuene/Uruku/1980 to the appellant thereby depriving them their ancestral land. The particulars of trust and the breach thereof as well as the particulars of fraud on the part of the 4th respondent and the appellant were itemized in the plaint.
7. The 4th respondent and the appellant filed a joint statement of defence wherein they essentially denied the averments by the 1st, 2nd and 3rd respondent. They averred that the 4th respondent and the 1st respondent separated since the year 2007 after the 1st respondent deserted the matrimonial home. The 4th respondents and the appellant denied that LR No Nkuene Uruku/1866 is ancestral land and the 4th respondent averred that he was registered as absolute owner of the land after the same was gifted to him by one Murithi Nkanata and as such he had the right to deal with the same under Section 28 of the Registered Land Act Cap 300 (now repealed) and further that the sub-division and subsequent transfer was not done secretly but legally and openly and was done to save the entire land from the risk of being sold by public auction pursuant to decree in Meru CMCC No 327 of 2007 Virginia Gatumwa Kirimi vs Silas Kirimi Nkanata.
8. The 4th respondent and the appellant denied that the subdivision and subsequent transfer in favour of the appellant was done in breach of any trust. It was further denied that the 1st, 2nd and 3rd respondents are in occupation of the suit land and further denied the existence of any developments belonging to the 1st, 2nd and 3rd respondents on the suit land. The appellant contended that he had been in occupation and use of one acre of the suit land LR No Nkuene/Uruku/1866 as a lessee from the August 1, 2010 long before the subdivision and transfer and that the 1st, 2nd and 3rd respondents' assertion that they are in occupation of the same are not correct. The appellant further averred that he has been plucking tea on LR No Nkuene/Uruku/1980 which is registered in his name after the same was transferred to him by the 4th respondent. They thus prayed that the suit be dismissed with costs.
9. The matter proceeded to full hearing and wherein the 1st, 2nd and 3rd respondents herein called five witnesses in support of their case while the appellant called two witnesses in support of his case. The



4th respondent did not adduce any evidence in support of his defense in the joint statement of defence. Directions were also taken that parties file written submissions which were duly complied with.

10. After considering the pleadings, the evidence tendered and the submissions of the parties, the learned trial magistrate found that the 1st, 2nd and 3rd respondents herein had on a balance of probabilities proved their case against the 4th respondent and the appellant and entered judgment in favour of the 1st, 2nd and 3rd respondents in the following terms:
 - a. That a declaration be and is hereby issued that LR Nkuene/Uruku/1980 is ancestral family land (trust land) and the plaintiffs' right and occupation of the same has arisen due to their considerable long time possession and developments thereon.
 - b. That an order be and is hereby issued that the defendants dealing with the LR Nkuene/Uruku/1866 and the 2nd defendant's acquisition of LR Nkuene/Uruku/1980 and his acquisition of the same was fraudulent and the registration should be cancelled.
 - c. That an order be and is hereby issued directing the District Land Registrar Meru Central district to cancel entry number in the land register for LR Nkuene /Uruku/1866 closing the said title and the new title being LR Nkuene/Uruku/1979 and LR Nkuene/Uruku/1980 be cancelled/revoked.
 - d. That an order be and is hereby issued that the register of LR Nkuene/Uruku/1866 be amended to the extent that the 1st defendant to be indicated as holding the said land in trust for the plaintiffs.
 - e. That an order of permanent injunction be and is hereby issued restraining the 2nd defendant, his agents, servants assigns, employees or successors in title from entering or any other way interfering with the suit land.
 - f. That the defendants are condemned to pay the costs of the suit with interest at the court's rate from the date of this judgment.
11. The appellant was dissatisfied with the said decision and filed the present appeal. The appeal was canvassed by way of written submissions.

C. The Appellant's Submissions

12. In his submissions dated August 10, 2022 through the firm of Mbaabu M'Inoti & Co advocates the appellant submitted inter alia, that the trial court failed to analyse and or isolate all the salient issues for determination as contained in the pleadings, failed to make a finding of fact on collusion and connivance by the respondents against the appellants, failed to make a finding of fact that the appellant had proved his claim to the required standards especially his documentary evidence regarding Meru CMCC No 327/2007 and the monies owed to Yetu Sacco and its implications on the suit, failed to make findings that the appellant was in actual possession and occupation of the property, failed to find that the sale and transfer by the 4th respondent to the appellant was not fraudulent, illegal and unprocedural in anyway as all the respondents were aware of the transfer and sale agreement to send (sic) debts, and that the trial court erred when it attached weight to the respondent's evidence despite lack of such evidence to rebut or controvert own evidence.
13. The appellant submitted that the learned trial magistrate ignored the appellant's evidence that he was in possession of the suit property, and relied on extraneous finding and fabrications by the respondents. Counsel for the appellant relied on the case of *Macharia Mwangi Maina & 87 others Vs Davidson Mwangi Kagiri [2014] eKLR*.



14. It was further submitted that the purchaser is entitled to the land by land sale agreement and constructive trust, and that in the instant case, there was common intention between the appellant and the respondents in relation to the suit property. The appellant's counsel contended that the main contention ought to be whether the 4th respondent sold the suit land secretly or fraudulently without the awareness of the 1st, 2nd, and 3rd respondents. It is the appellant's submissions that he validly purchased the suit property at a consideration of Kshs 750,000/= and that there was a valid sale of land agreement between the appellant and the 4th respondent for the interest of all the respondents of saving the entire land from auction.
15. The appellant's counsel submitted that there were two valid land sale agreements pertaining the suit property done and witnessed by an advocate, and that the 4th respondent in the statement of defence admits that he transferred the appellant a portion of his own title in land parcel No Nkuene/Uruku/1866 which portion was registered under LR No Nkuene/Uruku/1980 in the name of the appellant. Counsel for the appellant relied on the case of *Katende Vs Haridar & Company Limited (2008) 2 EA 173*.
16. The appellant submitted that in this case, money was paid for the interest of saving the respondents property in a controlled transaction and that the respondents cannot have their cake and eat it. That the suit land LR No Nkuene/Uruku/1980 was a gift to the 4th respondent from his late father and that if indeed the suit land was held in trust, a part of it was sold to save the entire property from being auctioned with the blessing of all the respondents who knew the appellant very well as he had leased part of the land.
17. Regarding the grounds that the trial magistrate erred in law and fact and misdirected himself that the appellant's title No 1980 be amalgamated with title No 1979 for Jane Kananu, a matter still pending before court for hearing and conclusion the appellant's counsel invited the court to find that the respondents instituted the suit on their own and not as representatives of the estate of the 4th respondent's father. Counsel cited Section 28 (2) (b) of the *Land Registration Act* where the issue of trust is provided for in that any party can claim the overriding interest of customary land trust. It is the appellant's submissions that the respondent did not prove that the suit land was held in trust for them by the 4th respondent. That the respondents lied to the Honourable court for claiming that they lived on the land and have developed it, and referred to a report by the Executive Officer who visited the suit land and confirmed that the respondent were not in occupation. The appellant submitted that he is in occupation of the suit land and would suffer irreparable loss if the appeal is found not merited. The appellant submitted that the respondents did not tender any evidence in support of their case, and urged the court to find that the respondents are in collusion to deny the appellant his rightful use of the land that he purchased from them. The appellant urged the court to allow the appeal as prayed.

D.The 1st, 2nd, and 3rd Respondents' Submissions.

18. The 1st, 2nd and 3rd respondents filed their submissions dated October 5, 2022 through the firm of Kiogora Ariithi & Associates Advocates in which it is submitted that in his submissions, the appellant has attempted to sneak in the issue of constructive trust which is a completely new issue that was not pleaded in the lower court. That it is also imperative to note that the appellant herein was the 2nd defendant at the trial court with the 4th respondent being the 1st defendant, and that they did not file any counterclaim. Learned counsel for the 1st, 2nd and 3rd respondents submits that in this appeal, the appellant purports to associate the 1st, 2nd and 3rd respondents with the acts of the 4th respondent and that that is a desperate move to shift liability to the 1st, 2nd and 3rd respondents who were not party to the agreement for sale of the suit land between the appellant and the 4th respondent. That the appellant



cannot turn back now and associate the 1st, 2nd and 3rd respondents with the acts of the 4th respondent when all along he has been one entity with him against the 1st, 2nd and 3rd respondents. That this appeal is thus improperly framed before this honourable court.

19. Counsel for the 1st, 2nd and 3rd submitted that the main issues for determination in this matter is whether the suit land Nkuene/Uruku/1980 was trust land and if so whether the 4th respondent was in breach of such trust for transferring the land to the appellant. That the question as to whether the appellant and the 4th respondent obtained consent from the Land Control Board or not has no probative value in the matter. That if anything, the fact that the appellant obtained the consent does not in itself legalize the transaction between the appellant and the 4th respondent.
20. It is the 1st, 2nd and 3rd respondents submissions that the trial court had due regard to the appellant's pleadings and submissions before arriving at its judgment. That the 4th respondent entered appearance and filed defence but did not testify in court in support of his defence, therefore his averments amounted to nothing but mere statements while the appellant did not produce in court any evidence to controvert the 1st, 2nd and 3rd respondents' averments that the suit land was trust land.
21. It is the 1st, 2nd and 3rd respondents' submissions that the appellant did not exercise due diligence prior to entering into the sale agreement with the respondent, adding that had he done so, he would have realized that the 1st, 2nd and 3rd respondents had interest in the land. They further submit that they were not party to the sale agreement between the appellant and the 4th respondent and did not sanction it, adding that if any money is owed to the appellant, the same is due and owing from the 4th respondent. While not disputing that the suit land was sold to the appellant by the 4th respondent, the 1st, 2nd and 3rd respondents submit that the land was family land which the 4th respondent was holding in trust on behalf of the 1st, 2nd and 3rd respondents who did not consent to the said sale. That by dint of Section 28 of the *Land Registration Act, 2012* such trust is an overriding interest which needed not be noted on the register and it is this ground that the learned trial magistrate revoked the agreement between the appellant and the 4th respondent. That the assertion by the appellant that he saved the land from being auctioned is without any basis.
22. The 1st, 2nd and 3rd respondents submitted that the appellant did not tender any evidence to prove that he was an innocent purchaser. It is further submitted that due diligence is not only limited to noted encumbrances but also other subsisting encumbrances which are not noted in the register such as a trust. That the appellant ought to have investigated the root of the title to the suit land prior to entering into the sale agreement with the 4th respondent. It is the 1st, 2nd and 3rd respondents' submissions that the trial court did not err in finding the transfer of the suit property to be null and void on the basis of the subsisting trust which was found to have existed on the suit land.
23. The 1st, 2nd and 3rd respondents quoted the doctrine of privity of contract and submitted that they were not party to the sale of land agreement between the appellant and the 4th respondent and as such are not liable on the indebtedness to the appellant. The 1st, 2nd and 3rd respondents faulted the appellant for plucking some part of the Executive Officer's report and pointed out that the said report as a whole indicated that the parties herein had developed the suit land proportionately. Further, that the trial court having found that the appellant did not hold a valid title over the suit land, it matters not whether he had developed the same. They submitted that the trial court's finding that suit land LR NO NKUENE/URUKU/1980 is ancestral trust land was well founded on the evidence tendered by the 1st, 2nd and 3rd respondents. The court was urged to disregard the issue of a loan that was allegedly settled by the appellant for the benefit of the 4th respondent in a bid to save the suit land from being auctioned by being baseless and irrelevant in the determination of the legal issues in this matter. It is further submitted that the appellant's occupation since the inception of the suit has been illegal having



not received the blessing of the 1st, 2nd and 3rd respondents prior to obtaining the suit land. That as a matter of fact and law, an illegal act does not give rise to a valid course of action. That ground 17 of the appeal has already been determined in favour of the 1st respondent in Githongo SPMC ELC No 21 of 2012.

24. It is the 1st, 2nd and 3rd respondents' submissions that Murithi Nkanata testified at the lower court in support of the 1st, 2nd and 3rd respondents and averred that he transferred the suit land to the 4th respondent to hold in trust for the benefit of the said respondents. That the 4th respondent did not have a good title to pass to the appellant herein.
25. In the support of their submissions, the advocate for the 1st, 2nd and 3rd respondents relied on the case of *Margaret Nkirote and 2 others Vs Mutwiri Mutungi Meru HCCC ELC NO 104 of 2009*, *M'Kiugu MMwirichia & Moses Marangu Kiara Vs Esther Nthira M'Ikiugu & 2 Others CA No 95 of 2009 KLR*, *Isack M'Inanga Kiebia & Isaya Theuri M'Lintari & another [2018] eKLR* and *Justus Maina Muruku Vs Jane Waitihira Mwangi [2018] eKLR* and urged the court to find that the appellant's appeal does not raise any cogent issues at law.

E. Analysis and Determination

26. I have considered the record of appeal, the grounds of appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusion reached by the learned magistrate were justified on the basis of the evidence presented and the law. This was put more appropriately in *Selle Vs Associated Motor Boat Co (1968) EA 123* though it was in relation to an appeal to the Court of Appeal from the High Court thus:

' An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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 allowance in this appeal. In particular this court is not bound necessary to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hamed Saif Vs Ali Mohamed Shalon (1955) 22 EA CA 270*)'

27. It was also held in *Mwangi Vs 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 no evidence or on a misrepresentation of the evidence, or where the court has clearly failed on material point to take account of particular circumstances or probabilities material to an estimate of the evidence.
28. Having perused the pleadings and the material on record, the case before the trial court was that land parcel LR Nkuene/Uruku/1980 is resultant sub-division of LR Nkuene/Uruku/1866 which was a sub division from original parcel LR Nkuene/Uruku/954. It is also not in dispute that land parcel LR Nkuene/Uruku/1980 is registered in the name of the appellant pursuant to a sale agreement between the appellant and the 4th respondent herein. The issue for determination in this appeal as I can deduce from the grounds of appeal are -:
 - i. Whether the trial magistrate rightly held that the existence of a trust had been proved.



- ii. Whether the trial magistrate rightly found that the 1st, 2nd and 3rd respondents herein had proved their case on a balance of probabilities and allowed the suit.
 - iii. Whether the decision of the learned trial magistrate was against the weight of the evidence and the law.
29. I have considered the evidence before the subordinate court and the submissions of counsel, and am in complete agreement with the trial court that the material facts in this case are not in dispute. I also concur with the learned magistrate's finding that the 4th respondent did not attend court so as to substantiate his averments in the joint statement of defence. As such, his averments in the defence amounted to mere statements.
30. In this case, the 1st, 2nd and 3rd respondents contended that the land was ancestral and having been registered in the names of the 4th respondent to hold in trust for them. I have perused the evidence adduced. It is clear that all the witnesses who testified stated that the land was family land. The green card for LR Nkuene/Uruku/1866 that was produced as an exhibit indicates that the said land is a sub-division of LR Nkuene/Uruku/954 and was registered in the names of one Muriithi Nkanata on January 18, 2007 and was later transferred to the 4th respondent as a gift. The said Muriithi Nkanata who testified as Pw 3 stated that he transferred the said land to the 4th respondent who is his brother to hold the same in trust for his other brothers. He stated that he was not informed when the land was sold. All the witnesses who gave evidence on behalf of the 1st, 2nd and 3rd respondents testified to the effect that the land was family land and was sold and transferred in favour of the appellant without the consent of the family members. The 4th respondent who sold the suit land to the appellant did not attend court and therefore the averments made in the joint statement of defence was no substantiated. The evidence tendered by the 1st, 2nd and 3rd respondents was not controverted and stands unchallenged as there was no evidence which was tendered by the 4th respondent.
31. The appellant submitted that the land was to be sold by public auction to offset decretal amounts in Meru CMCC No 327 of 2007 and monies owed to Yetu Sacco. The appellant argued that the respondents rushed to him since he had leased part of the property that was to be auctioned and that is when he entered into an agreement to purchase the suit land to offset the debts and save the rest of the land. The appellant, however, admits that the suit land is family land belonging to the respondents. His argument is that he saved the entire land from being auctioned.
32. In the case of [*Juletabi African Adventure Limited and another Vs Christopher Michael Lockley \(2017\) EKLK*](#) 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'
33. 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 Kiebia Vs Isaya Theuri M'Intari & another* [2018] EKLK. The burden of proving that the suit parcel herein was ancestral land and that the 4th respondent was registered as proprietor of the land in trust squarely lay on the 1st, 2nd and 3rd respondents. In this case, the evidence on record in my view was sufficient to confirm that the suit parcel LR Nkuene/Uruku/1980 was ancestral land, the same having been a subdivision of parcel LR Nkuene/Uruku/1866 and which was a sub-division of the original parcel LR Nkuene/Uruku/954 which belonged to the 4th respondent's father. The 2nd



and 3rd respondents are children to the 1st respondent while the 4th respondent is said to be the former husband to the 1st respondent.

34. From the evidence on record, it is clear to me that the suit land was ancestral land and was therefore held in trust by the 4th respondent for the benefit of the other family members, including the 1st, 2nd and 3rd respondent. From the evidence on record, it is clear that the appellant was a neighbor to the respondents and as rightly found by the learned trial magistrate, the appellant ought to have known that the suit land was ancestral land and ought to have involved the other family members and not the 4th respondent alone before purchasing the land. Moreover, it was not necessary for the 1st, 2nd and 3rd respondents' interest in the suit property to be noted in the register and the absence of any reference to a trust in the instrument of acquisition of the land did not affect the enforceability of the trust. In proviso to Section 28 of RLA (repealed) the case of Isack M'Inanga Kiebia (supra) the Supreme Court stated

' 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 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.'

35. Being guided by the above Supreme Court decision, it is my view that the appellant's submissions that the respondents did not prove that they were in occupation of the suit land cannot hold. This court is satisfied that the element of a customary trust in favour of the 1st, 2nd and 3rd respondents pertaining to the suit land existed, and the trial court rightly found so. I therefore find no reason to interfere with the learned magistrate's conclusion.

36. In this case, I find that the learned trial magistrate decided the case on the weight of the evidence brought before him and rightly arrived at the decision he made. The finding and holding of the learned Magistrate were well founded and I find no basis to interfere with it.

37. In the result, I find that there is no merit in this appeal and the same is hereby dismissed with costs to the 1st, 2nd and 3rd respondents.

38. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF DECEMBER, 2022.

In presence of

Court assistant – Kibagendi

Ms Kinjanyui holding brief for Mbaabu M'Inoti for appellant

No appearance for Kiogora Arithi for respondents

C.K YANO

JUDGE

