



REPUBLIC OF KENYA



KENYA LAW
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**Wambua v Wambua (Environment & Land Case E008 of 2021)
[2025] KEELC 595 (KLR) (12 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 595 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E008 OF 2021
TW MURIGI, J
FEBRUARY 12, 2025**

BETWEEN

JOHN NZOMO WAMBUA PLAINTIFF

AND

JOSEPH TAITI WAMBUA DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit against the Defendants vide a Complaint dated 23rd March 2021 seeking the following orders:
 1. A declaration that all that land known as Makueni/Kako/269 was the property of the late Joel Wambua Nzioki and therefore ancestral land.
 2. An order declaring that land parcel number Makueni/Kako/269 is held and registered in the name of the Defendant to hold in trust for the Plaintiff and other beneficiaries.
 3. An order compelling the Land Registrar, Makueni to cancel the title deed for Makueni/Kako/269 in the name of the Defendant and issue a title deed in the name of Joel Wambua Nzioki.
 4. A declaration that the purported sale to John Kimatu Kilokwe and all other persons is null and void ab initio.
 5. Costs of this suit plus interest.
 6. Any other and/or further relief that this Honourable court deems fit to grant.
2. The Defendant filed a statement of defence and counter claim dated 13th April 2021 and amended on 25th February 2022 in which he denied the Plaintiff's claim. In his counter claim, the Defendant seeks the following orders:



1. A declaration that the Defendant is the registered owner of land parcel No. Makueni /Kako/ 269.
2. An order of permanent injunction restraining the Plaintiff from interfering, trespassing and or entering land parcel No. Makueni /Kako/ 269.
3. Costs of the suit.
4. Any other relief that the court may deem fit to grant.

The Plaintiff's Case

3. The Plaintiff, John Nzomo Wambua testified as PW1 and called three witnesses in support of his case. He adopted his witness statement dated 6th May 2022 as his evidence in chief. He also produced the documents in his list dated 06/05/2022 as exhibits 1- 4.
4. PW1 testified that the Defendant is his elder brother. He testified that their late father Joel Wambua Nzioki had settled his wife Beatrice Ndunge on the suit property while his second wife Beth Mbuli was settled in land parcel No. Makueni/Kako/371. He further testified that before he died, his father owned land parcel Nos. Makueni/Kako/269(the suit property herein) and Makueni/Kako/371 which he subdivided between him and his brother. He further testified that he is in occupation of land parcel No. Makueni/Kako/371 which he has substantially developed while the Defendant is in occupation of the suit property. It was his testimony that the Defendant was planning to disinherit him of his share of inheritance.
5. On cross examination, he testified that he has been residing in land parcel No. Makueni/Kako/371 since the year 1956 while the Defendant resides in the suit property.
6. He went on to state that after the land demarcation exercise was concluded in the year 1969, land parcel No. Makueni/Kako/371 was registered in his late father's name while the suit property was registered in the Defendant's name. He further stated that the suit property belongs to their father even though he has no documents to demonstrate as much.
7. It was his testimony that his late father did not challenge the Defendant's ownership over the suit property during his lifetime and added that he was buried in land parcel No. Makueni/Kako/371. Concluding his evidence, he testified that his claim is for ownership of land parcel No. Makueni/Kako/371 and not the suit property.
8. PW2 Mbete Mulatya adopted her witness statement dated 20/04/2022 as her evidence in chief. She told the court that she is a sister to both the Plaintiff and Defendant. She testified that their late father had two parcels of land located in different locations. That their late father acquired the suit property and that she used to reside and graze their cattle thereon together with her step mother before her mother moved in.
9. That later on, their father acquired the second parcel of land and relocated her mother because his two wives did not get along. That after Beatrice Ndunge moved out, their late father caused the suit property to be registered in the name of the Defendant because he had attained the age of majority. That when the Defendant returned home, their late father gave him the suit property as his share of inheritance. She asserted that land parcel No. Makueni/Kako/371 is the Plaintiff's share of inheritance and added that the Defendant has never utilized the same.
10. She further testified that their late father purchased the suit property and caused it to be registered in the Defendant's name because he could not be issued with title deeds for the two parcels of land.



11. On cross examination, she testified that the Plaintiff was a minor at the time when the suit property was registered. She confirmed that their father did not have problem with the Defendant being registered as the owner of the suit property and added that he was buried on land parcel No. Makueni/Kako/371.
12. PW3 Beatrice Ngelewa, testified that she is sister to both the Plaintiff and Defendant. She adopted her witness statement dated 20/04/2022 as her evidence in chief. She echoed the evidence of PW1 and PW2.
13. PW4 Andrew Musyoka Musau adopted his witness statement dated 06/05/2022 as his evidence in chief. He testified that he is a close neighbour to both the Plaintiff and Defendant. It was his testimony that the late Joel Wambua Nzioki informed him that the suit property belongs to Defendant while the land in Kako belongs to Plaintiff.
14. He further testified that when the late Joel Wambua Nzioki was purchasing the parcels of land, it was not permissible for one to acquire two parcels of land but one could register his children. He further testified that the late Joel Wambua subdivided his land between his two sons and caused the suit property to be registered in the Defendant's name while the Plaintiff was given the parcel of land in Kako where the late Joel Wambua was living at that time.

Defendant's Case

15. The Defendant Joseph Taiti Wambua testified as DW1 and called two witnesses in support of his case. He adopted his witness statement dated 14/03/2022 as his evidence in chief. He also produced the documents in his list dated 14/03/2022 as Exhibits 1 - 7.
16. He told the court that his late father had two wives namely Beth Mbuli and Beatrice Ndunge who never got along. It was his testimony that he is the registered proprietor of the suit property having been allocated the same by the government while land parcel No. Makueni/Kako/371 is registered in the name of their late father.
17. He went on to state that after the demise of their father, a meeting chaired by the Assistant Chief Kako Location was held on 11/9/1989 and on 10/9/1989 where it was agreed that land parcel No. Makueni/Kako/371 be subdivided between Beatrice Mbuli, Beatrice Ndunge and John Wambua in equal shares of 9 acres each. He testified that the Plaintiff was given 9 acres because he had repaid an outstanding loan advance to their late father.
18. That they purchased the share allocated to Beatrice Ndunge after she indicated that she had no interest and gave it to their mother. That later on they subdivided their mother's share where he got 9 acres while the Plaintiff got 18 acres. That later on, the Plaintiff complained to the clan claiming the entire land and on 27/9/2017, it was agreed that he should get 9 acres while the Plaintiff should get 18 acres out of land parcel No. Makueni/Kako/371.
19. That pursuant to the said meeting, land parcel No. Makueni/Kako/371 was subdivided on 27/03/2017 and the parties therein appended their signatures. It was his testimony that Beatrice Ndunge used to reside in the suit property but had since relocated to Ithanga while Beth Mbuli used to reside in their father's land. The Defendant stated that he is claiming a share of land parcel No. Makueni/Kako/371 because it belongs to their late father.
20. On cross examination, he testified that Beatrice Ndunge was residing on their father's land while Beth Mbuli was residing on the Plaintiff's land because they never used to get along. He insisted that he is entitled to a share of land parcel No. Makueni/Kako/ 371 because it belongs to their late father.



21. DW2 William Wambua Taiti adopted his witness statement dated 14/03/2022 as his evidence in chief. It was his testimony that the Defendant is his father and that he is the registered proprietor of the suit property. He further testified that his grandfather Joel Wambua Nzioki relocated his wife Beatrice Ndunge to the suit property while his other wife was taken to Makueni/Kako/371 because they did not not getting along.
22. On cross examination, he reiterated that the suit property belongs to his father while land parcel No. Makueni/Kako/371 belongs to his grandfather.
23. On re-examination, he testified that his grandfather never resided on the suit property.
24. DW3 Stephen Musyoka Muli, testified that he is the chairman of Mbaa Mulee Itiema in which the two families are members. It was his testimony that he presided over a dispute relating to land parcel No. Makueni/Kako/371 where it was agreed that the Plaintiff should get 18 acres while the Defendant should get 9 acres. He further testified that the land was subdivided and the parties therein appended their signatures. He further testified that the suit property belongs to the Defendant.
25. After the close of the hearing, parties agreed to file and exchange their written submissions.

The Plaintiff's Submissions

26. The Plaintiff filed his submissions dated 8th October 2024.
27. On his behalf, Counsel summarized the evidence presented by the witnesses and urged the court to find that the late Joel Wambua Nzioki settled his two wives on his two parcels of land. Counsel further submitted that the late Joel Wambua Nzioki caused the suit property to be registered in the Defendant's name while their late father was registered on land parcel No. Makueni/Kako/371.
28. Counsel submitted that the suit property is ancestral land. Counsel further submitted that the Defendant acted fraudulently in failing to disclose the interest of other family members in the suit property. Concluding his submissions, Counsel urged the court to grant the orders sought in the Plaintiff and dismiss the counterclaim with costs. To buttress his submissions, Counsel relied on the case of Isaac Kieba M'inanga vs Isaaya Theuri M'lintari & Another [2018] eKLR.

The Defendant's Submissions

29. The Defendant filed his submissions dated 25th October 2024. On his behalf, Counsel reiterated the evidence on record in support of his submissions. Counsel submitted that the Defendant is the first registered proprietor of the suit property. Counsel further submitted the suit property is not ancestral land and added that there was no reason why it could not have been registered in the name of Joel Wambua Nzioki. Counsel further submitted that the fact that Beatrice Ndunge settled on the suit property cannot be a basis for the Plaintiff's claim since she had already moved to another parcel of land.
30. In conclusion, Counsel urged the court to find that the Defendant has proved that he is the registered proprietor of the suit property and to dismiss the Plaintiff's suit with costs. To buttress his submissions, Counsel relied on the case of Wainaina vs Kiguru & Another 2021) [2022] KEELC 3261 (KLR)

Analysis and Determination

31. Having considered the pleadings, the evidence on record and the respective submissions, the only issue that arises for determination is whether the Plaintiff is entitled to the orders sought



32. It is the Plaintiff's case that the suit property belonged to their late father and is therefore ancestral land. In that regard, the Plaintiff sought a declaration that the suit property is held and registered in the name of the Defendant in trust for him and other family members.

33. The Defendant on the other contended that he is the registered proprietor of the suit property having acquired the same from the government. He denied the Plaintiff's allegation that the suit property is ancestral land.

34. The Black's Law Dictionary 9th Edition defines a trust as follows:

“The right enforceable solely in equity, the beneficial enjoyment to which another holds a legal title, a property interest held by one person (trustee) at the request of another (settler) for the benefit of a third party (beneficiary).”

35. A customary trust falls within the ambit of the proviso to Section 28(b) of the [Land Registration Act](#) which provides as follows:-

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.

36. It is clear from the above provision that the registration of a person as a proprietor of land does not automatically exclude any obligation to which such proprietor may be subject as a trustee. The overriding interests such as customary trust need not be noted on the register. These are non-registrable rights which run with the land.

37. The Supreme Court in the case of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, articulated the elements which a person must prove to demonstrate the existence of a trust as follows:-

“(52) Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered [Land Act](#). Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. 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.”

38. Customary trust is a matter of evidence and not inference. The burden of proof lies with the person who wishes the Court to make a finding as to the existence of such trust. It is an issue both of fact and law which requires serious demonstration through proper evidence.

39. Similarly, in the case of *Salesio M’itonga v M’ithara & 3 others* (2015) eKLR the Court of Appeal held that:-

“It is trite law that trust is a question of fact and has to be proved by evidence.”

40. Turning to this case, it is not in dispute that:-

1. The Plaintiff and Defendant are siblings.
2. The Defendant is the registered proprietor of the suit property

41. It is the Plaintiff’s case that the suit property is ancestral land belonging to their late father. The Plaintiff contended that their late father acquired the suit property and land parcel No. Makueni/Kako/371 where he settled his two wives because they did not get along. PW2, PW3 and PW4 testified that the suit property initially belonged to their late father and is ancestral land. PW2 testified that their late father caused the suit property to be registered in the name of the Defendant because he could not be registered in more than one parcel of land.

42. The Defendant denied the Plaintiff’s allegation and insisted that the suit property was allocated to him by the government. At paragraph 10 of the *Plaint*, the Plaintiff pleaded that the Defendant fraudulently failed to cause the trust to be entered in the register.

43. It is trite law that allegations of fraud must be specifically pleaded and proved. In the case of *Vijay Morjaria vs Nansing Madhusingh Darbar & Others* [2000] eKLR (Civil Appeal No 106 of 2000) Tunoi JA held as follows:-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is



also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

44. Similarly, in the case of *Kinyanjui Kamau Vs George Kamau* [2015] eKLR the Court of Appeal held that:-

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo Vs Ndolo* [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in *Criminal Cases*...”

45. Although the standard of proof is not beyond reasonable doubt it is higher than proof on a balance of probabilities.

46. In Civil cases, the standard of proof is on a balance of probabilities. Section 107 (1) and (2) of the [*Evidence Act*](#) provides that:-

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(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

47. It is clear from the above provisions that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe.

48. To prove fraud, the Plaintiff relied on the particulars of fraud set out in paragraph 10 of the *Plaint*.

49. Although the Plaintiff pleaded fraud on the part of the Defendant, he did not adduce any evidence to support his allegations. The Plaintiff did not adduce any evidence to show that the suit property is family land or that they ever resided or took possession of thereof. It is not in dispute that their late father did not claim or challenge the Defendant’s ownership of the suit property during his lifetime. It is also not in dispute that their late father is buried on land parcel No. Makueni/Kako/371. It is the Plaintiff’s case that their late father subdivided his land between him and the Defendant and gave each their inheritance.

50. It is trite that parties are bound by their own pleadings. The evidence on record shows that the Plaintiff’s claim is over parcel land parcel No. Makueni/Kako/371 and not the suit property. The Plaintiff is apprehensive that the Defendant will claim a portion of land parcel No. Makueni/Kako/371. PW2 and PW3 testified that their late father subdivided his land between the Plaintiff and the Defendant. From the evidence on record, it is clear that the Plaintiff is claiming ownership of land parcel No. Makueni/Kako/371 while the Defendant is claiming a portion of the same. In their pleadings, the parties herein are not claiming ownership of land parcel No. Makueni/Kako/371 and therefore this court cannot determine ownership of the same.



51. From the foregoing, I find that the Plaintiff has not adduced any cogent evidence to demonstrate that the suit property is ancestral land or that the Defendant holds the same in trust for him and other beneficiaries.
52. Having failed to demonstrate that the suit property is ancestral land, I find that the Plaintiff has not established that there exists a customary trust on the suit property between the parties herein.
53. The Plaintiff is seeking for the cancellation of the title of the suit property and for the same to be registered in the name of their late father.
54. Section 80 of the [Land Registration Act](#) gives the court power to order for rectification of the register. Section 80(1) provides as follows: -

Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

55. From the above provision, it is clear that the court may order the cancellation of a title if it is obtained by fraud or mistake. The Plaintiff did not adduce any evidence to show that the registration of the Defendant was obtained by fraud or mistake.
56. The Plaintiff also sought for a declaration that the purported sale to John Kimatu Kilokwe and all other persons is null and void ab initio. The Plaintiff did not lead any evidence to support his allegations.
57. The Defendant is seeking a declaration that he is the registered owner of the suit property.
58. It was his testimony that he is the registered proprietor of the suit property having been allocated the same by the government. In this regard the Defendant produced the title deed, green card and certificate of official search which shows that he is the registered proprietor thereof.
59. The Plaintiff on the other hand insisted that the suit property belongs to their late father notwithstanding the fact that he did not have any documents to prove as much.
60. Section 26(1) of the [Land Registration Act](#) provides for instances when a title to land can be challenged as follows:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except;

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party or;
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
61. It is clear from the above provisions that a title can only be revoked on the grounds of fraud or misrepresentation or where the title had been acquired illegally, unprocedurally or through a corrupt scheme.
 62. The Plaintiff did not adduce any evidence to show that the Defendant obtained the title through fraud or misrepresentation, illegally, unprocedurally or through a corrupt scheme to warrant the revocation



of the title for the suit property. From the foregoing, I find that the Defendant has demonstrated to the satisfaction of this court that he is the registered proprietor of the suit property.

63. The Defendant sought for a permanent injunction restraining the Plaintiff from interfering, trespassing or entering the suit property.

64. At paragraph 5 of the amended defence and counter claim, the Defendant averred that in the year 2018, the Plaintiff started interfering with the suit property and listed the particulars of trespass and encroachment on the part of the Plaintiff.

65. The law is very clear on the position of a holder of a title in respect of the land. Section 24 (a) of the [Land Registration Act](#) provides for the interest conferred by registration. It provides as follows:-

“Subject to this Act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or appurtenant thereto.”

66. Section 25 of the [Land Registration Act](#) provides for the rights of a proprietor. It provides as follows:-

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided by this Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject;...

67. Having found that the Defendant is the registered proprietor of the suit property I find that he is entitled to all the rights and privileges belonging or appurtenant thereto.

68. In the end, I find that the Plaintiff has not proved his case against the Defendant on a balance of probabilities as required by the law. I also find that the Defendant has proved his counterclaim against the Plaintiff to the required standard. Accordingly, I enter judgement for the Defendant against the Plaintiff in the following terms:-

1. A declaration be and is hereby issued that the Defendant is the registered owner of land parcel No. Makueni/Kako/269.
2. An order of permanent injunction be and is hereby issued restraining the Plaintiff from interfering, trespassing and or entering land parcel No. Makueni/Kako/269.

69. Since the parties are closely related, each party is directed to bear its own costs.

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HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 12TH DAY OF FEBRUARY, 2025.

In the Presence of

Ms. Kyalo for the Defendant

Ms. Kinuthia for the Plaintiff

