Kithunga & another v Ngumu (Environment and Land Appeal E001 of 2023) [2025] KEELC 3504 (KLR) (5 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3504 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT AND LAND APPEAL E001 OF 2023

EO OBAGA, J

MAY 5, 2025

BETWEEN

KIOKO KITHUNGA .... 1ST APPELLANT

STELLAMARIS NDUNGE KIOKO .... 2ND APPELLANT

AND

KITHUNGA MUE NGUMU .... RESPONDENT

(Being an appeal from the judgment of Hon. M. Mutua, SRM delivered on 4th August, 2023 in Makueni MCELC No. 38 of 2022)

JUDGMENT

Background and introduction

1. The 1st Appellant is a son to the Respondent. The 2nd Appellant is wife to the 1st Appellant and daughter-in-law to the Respondent. On 29th November, 2022, the Respondent filed a suit against the Appellants in which he sought the following reliefs;

    a. An order of vacant possession of all that parcel of land known as Title No. Kathonzweni/Thavu/941 within a period of seven (7) days in default of which an order of eviction to issue.

    b. An order of permanent injunction do issue restraining the Defendants, their agents, servants, heirs or proxies from entering, trespassing and or otherwise interfering with the Plaintiff's quiet possession of the suit property.

    c. Costs of the suit and interest.

2. The Appellants filed a joint defence and raised a counterclaim in which they sought the following reliefs:

1. A declaration that Defendants have legal and/or equitable rights over land parcel No. Kathonzweni/Thavu/941.

2. In the alternative a declaration that the Defendants are entitled to and be settled on their ancestral land.

3. General damages.

4. Costs and interest at court rates.

3. The case was fully heard and in a judgment delivered on 4th August, 2023, the trial magistrate found in favour of the Respondent and allowed the claim as per the prayers in the plaint.

4. Aggrieved by the judgment of the trial court, the Appellants preferred an appeal to this court in which they raised the following grounds:

   1. That the learned trial magistrate erred in law and fact in delivering a fatally defective judgment and dismissing the Appellants counterclaim while there existed a customary trust relationship between the Appellants herein and the Respondent.

   2. That the learned trial magistrate erred in law and facts in issuing eviction orders against the Appellants herein without granting them the opportunity to cross-examine the Respondent herein over the issue of customary trust contrary to rules of natural justice and fairness.

   3. That the learned trial magistrate erred in law and facts in failing to appreciate the fact that the Appellants herein are lay persons who did not under the strict rules of procedure and as such failed to consider that land is an emotive issue therefore he ought have accorded the Appellants herein fair hearing.

   4. That the learned trial magistrate erred in law and facts in finding that the Respondent proved his case when the weight of evidence strongly pointed to the fact that this suit parcel of land constitutes a customary trust and the fact that the Appellants herein are son and daughter in law of the Respondent, have nowhere else to go as they have been residing on this suit parcel of land for the past thirty (30) years and as such the eviction orders as issued are unfair and unjustified.

   5. That the learned trial magistrate erred in law and facts in failing to consider the Appellants counterclaim, the weight of evidence in support thereof and the applicable principles of law.

   6. That the learned trial magistrate erred in law and fact by proceedings on wrong principles of law as to arrive at an erroneous determination of the suit, a determination not supported by law and evidence.

   7. That the learned trial magistrate erred in law and facts in failing to pronounce himself on the real substantive issue at hand in that the suit property constitutes a customary trust and the fact that there exists a legitimate expectation of use and proprietary rights over it by the Appellants herein.

5. The court directed that the appeal be disposed of by way of written submissions. The Appellants filed their submissions dated 17th January, 2025. The Respondent did not file any submissions.

Appellants Submissions

6. The Appellants submitted that the trial magistrate erred in ignoring to apply the principle of proprietary estoppel in favour of them. They adopted the definition of proprietary estoppel as defined in Halsbury's Laws of England 4th Edition volume 16(2) paragraph 108 thus:

> "Proprietary estoppel usually arises when the representation consists of a promise of an interest in land although its principles have been used in the context of commercial relationships not involving such promise. The traditional formulation was based on the principle that, where the owner of land (A) knowingly allowed his rights to be infringed by another (B) who expended money on the land in the mistaken belief that it belonged to B, a could not afterwards be allowed to assert his own title to the land...................."

7. They also relied on the case of Kivindu & another –vs- Musau & 4 others 2023 KECA 1015 (KLR) where the court of Appeal listed the following factors to consider in determining whether proprietary estoppel is applicable:

   a. Whether equity in favour of B arises out of the conduct and relationship of the parties.

   b. What is the extent of the equity, if one is established; and

   c. What is the relief appropriate to satisfy the equity.

8. Further reliance was placed on the case of Thorner –vs- Major and others (2009) UKL 18 (2009) 1 WLR 776 where it was held as follows:

> "............most scholars agree that the doctrine is based on three main elements although they express them in different terms; a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance."

9. The Appellants submitted that the Respondent had been staying with them within his compound in LR. No. Kathonzweni/Thavu/941 (suit property) until sometime in 2019 when he asked them to build their house outside the compound but within the suit property. They therefore submit that the Respondent is estopped from reneging on that fact by giving excuses to kick them out of the suit property.

10. The Appellants further submitted that the trial magistrate failed to find that there was a customary trust over the suit property. They submitted that though the ancestral land was at Kola where the 1st Appellant was born in 1967, the Respondent sold the ancestral land at Kola and moved to Kathonzweni where he purchased the suit property using the proceeds of the sale of ancestral land.

11. The Appellants submitted that the trial magistrate ignored the fact that the Appellants had stayed on the suit property for over 30 years. During this long stay, there were no issues raised by either the Respondent or his wife. The 2nd Appellant took care of her mother in-law when she was ailing until she passed on. When she passed on, they continued staying with the Respondent until the time he started raising petty complaints and asked them to move out of his compound and build their house outside his compound.

12. It was further submitted that the trial magistrate ignored the fact that the Appellants had legitimate expectation over the suit property. They relied on the case of J. P. Bansal –vs- State of Rajastan & another Appeal (Civil) 5982 OF 2001 where it was held as follows:

> " The basic principles in this branch relating to 'legitimate expectation' were enunciated by Lord Diplock in Council of Civil Service Unions and others v Minister for the Civil Service (1985 ac 374(408-409)(commonly known as CCSU case). It was observed in that case that for a legitimate expectation to arise, the decision of the administrative authority must affect the person by depriving him of some benefit or advantage which either:
>
> i. He had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or
>
> ii. He has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn…."

13. The Appellants submitted that the trial magistrate did not accord them a fair hearing. They contend that they were lay persons who were acting in person and were not given opportunity to cross examine the Respondent and his witness or present their defence in a proper manner.

Analysis and Determination

14. I have carefully gone through the proceedings before the trial court, the grounds in the memorandum of appeal, the submissions and the authorities relied on. This is a first appellate court and my duty is to evaluate the evidence afresh and reach my own conclusion. In the case of Pil Kenya Limited Vs Oppong (2009) KLR 442 the duty of a first appellate court was stated as follows:

> " It is the duty of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanor and giving allowance for that."

15. The following are the issues which emerge for determination;

    a. Whether the suit property was ancestral land and if so whether there was prove of customary trust.

    b. Whether the Appellants had legitimate expectation over the suit property.

    c. Whether the Appellants were given a fair hearing during the hearing.

    d. Did the Respondent prove his claim to the required standard.

    e. Did the Appellants prove their counterclaim.

    f. Which order should be made on costs.

a. Whether the suit property was ancestral land and if so whether there was prove of customary trust

16. The evidence on record shows that the suit property is registered in the name of the Respondent. The Respondent was issued with title on 19th June, 1998. The 1st Appellant's own evidence contained in

his written statement is that their ancestral home was at Kola in Machakos. When his father moved to Kathonzweni, the 1st Appellant came and he was given a house which was furnished to live in. He lived in this house with his first wife until they differed with her. He then went to live at Kathonzweni where he found the 2nd Appellant who was working as a bar maid at Kathonzweni. The two stayed together at Kathonzweni until 2008 when he took her home.

17. While being accommodated by the Respondent there arose differences particularly with the Respondent and the 2nd Appellant. The Respondent called clan members from Kola who deliberated on the issue and it was resolved that the Appellants were to vacate the suit property by 21st August, 2022 failing which a suit was to be filed against the two.

18. It is therefore clear that the suit property is not ancestral land and the issue of customary trust cannot arise. Customary trust is a matter of evidence which has to be proved. The Appellants have tried to claim in their submissions that the Respondent sold the ancestral land at Kola and came to purchase the land at Kathonzweni. There was no such evidence adduced during the trial in the lower court.

19. The evidence on record from the 2nd Appellant was that the Respondent was staying alone on the suit property when they joined him. When her mother-in-law was ailing that is when she joined the Respondent. This means that she was staying elsewhere perhaps at the ancestral land. The suit land having not been ancestral land, there is no way the Appellants can lay claim to it based customary trust. For one to successfully lead evidence on customary trust, he has to prove that the land is ancestral land, that during land adjudication and consolidation, one member of the family was designated to hold it on behalf of the family and that the registered person was registered so to hold it on behalf of the other family members.

b. Whether the Appellants had legitimate expectation over the suit property

20. The Appellants had been given a portion of the suit property to live there on temporary basis until they found their own land. There is evidence on record that when the 1st Appellant married the 2nd Appellant, they were initially staying at Kathonzweni. When the 2nd Appellant was taken for introduction to the parents at the suit property, the Respondent gave the Appellants a place to reside. When there arose differences between the Respondent and the 2nd Appellant, the two were asked to move outside the Respondent's compound.

21. The Respondent called a clan meeting where the issue of the differences between the 2nd Appellant and the Respondent were deliberated. The clan members resolved that the Appellants move out of the Respondent's land. The 1st Appellant who had been invited to the clan meeting did not attend. It is only the 2nd Appellant who attended. She alleged during that meeting that the Respondent had wanted to sleep with her.

22. The Appellants had been made aware from the beginning that their stay on the suit property was temporary. The temporary stay was cut short when there arose irreconcilable differences between the 2nd Appellant and the Respondent. The Appellants were given opportunity to explain why their stay should not be cut short. This opportunity came when the clan elders from Kola came and after the meeting which was boycotted by the 1st Appellant, it was decided that the Appellants vacate the suit property.

23. The principle of legitimate expectation cannot therefore be invoked to aid the Appellants. The Appellants stated that during the clan members meeting they were given a portion of the suit property. There were minutes of the clan meeting, which were produced but they were in Kamba language and

there was no translation. However, the verdict of the clan members was made in English and it was resolved that the Appellants move out of the suit property.

24. During the hearing, the 1st Appellant kept on pleading to the court to be shown the ancestral land. This was a clear confirmation that he knew that the suit property at Kathonzweni was not ancestral land. In his own statement, he stated that the ancestral land was at Kola in Machakos. He did not say whether the ancestral land had been sold.

c. Whether the Appellants were given a fair hearing at the trial court

25. The Appellants submitted that they were not given a fair hearing during the hearing. They state that they were not given opportunity to cross examine the Respondent and his witnesses. They also state that they were not given opportunity to present their defence well. They state that as they were unrepresented, the rules should have been bent a bit to accommodate them as land is an emotive issue.

26. I have gone through the record of proceedings in the lower court. Both the Appellants and the Respondent appeared in person. The record shows that the Appellants were given opportunity to cross examine the Respondent and his witnesses which they did. They were given opportunity to give their defence which they did. They told the court that they did not have any witnesses to call. The Appellants had recorded comprehensive witness statements which they adopted as their evidence in chief. They cannot therefore be heard to say that they were not afforded a fair hearing.

27. The rules of Civil Procedure should not have been bent to accommodate them. This was an adversarial system of litigation and the trial magistrate was not expected to guide them on what to do and in any case there is nothing on record which shows that the Appellants ran into any procedural problems which would have required the court's intervention.

d. Did the Respondent prove his claim

28. The Respondent adduced evidence to show that he was the registered owner of the suit property. He gave evidence on how he had given his son a place to build as he looked for his own land. He also gave evidence of how the difference between him and the 2nd Appellant came by. He had to call clan members who resolved that the Appellants had to move out of the suit property.

29. The Respondent had sought for vacant possession and he gave reasons why. He also gave evidence which showed that he needed protection by way of injunction. His properties were disappearing. The 2nd Appellant had shown him disrespect by alleging that he had wanted to sleep with her. The items which the Appellants were using after moving from Kathonzweni where they were staying belonged to the Respondent and he had every reason to demand them back. The trial magistrate considered all these evidence and found that the Respondent had proved his case on a balance of probabilities. He allowed it. There is no basis of faulting the conclusion which he arrived at.

e. Did the Appellants prove their counterclaim

30. The Appellants had sought for a declaration that they had legal and or equitable right to the suit property or in the alternative, they were entitled to be settled on the ancestral land. As I have stated hereinabove, the Appellants were claiming customary trust over the land. There was no evidence adduced which would have made the trial magistrate to find that there was customary trust. In his own witness statement, the 1st Appellant had stated that ancestral land was at Kola in Machakos but they moved to Kathonzweni. There was no evidence that the Kola ancestral land was sold to purchase the Kathonzweni property.

31. There was no evidence adduced on the status of the Kola ancestral land. There was no way the trial magistrate will have either granted the Appellants' claim on customary trust or a declaration that they were entitled to be settled on ancestral land. The ancestral land at Kola was not subject of the suit before the lower court. The only mistake the trial magistrate made was his failure to specifically address his mind to the counterclaim by the Appellant and make a specific finding that the same had be dismissed.

Disposition

32. From the above analysis, I find that there is no basis upon which this court can fault the verdict by the trail magistrate. I therefore uphold the decision of the trial magistrate on the Respondent's case save that the order on costs is hereby set aside and replaced with an order that each party to bear their own costs. This is because the parties herein are related. This is a case between a father and son and daughter in-law. The Appellants' counterclaim before the lower court is dismissed with no order as to costs. Each party shall bear their own costs of the appeal.

HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 5TH DAY OF MAY, 2025.

In the presence of:

Mr. Muthiani for Appellants

Respondent in person

Court assistant – Steve Musyoki