



M'imathiu & another v M'uthaka & 5 others (Environment and Land Appeal E018 of 2023) [2024] KEELC 3250 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEELC 3250 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E018 OF 2023
CK YANO, J
FEBRUARY 8, 2024**

BETWEEN

**J. KABERIA M'IMATHIU 1ST APPELLANT
JULIUS MWAA M'ANAMPIU 2ND APPELLANT**

AND

**JOSHUA M'UTHAKA 1ST RESPONDENT
JACOB MUGAMBI M'UTHAKA 2ND RESPONDENT
GEOFFREY GICHUNGE M'UTHAKA 3RD RESPONDENT
JOSEPH KINYUA M'UTHAKA 4TH RESPONDENT
ZAKAYO KABERIA M'UTHAKA 5TH RESPONDENT
DANIEL KIRIMI M'UTHAKA 6TH RESPONDENT**

JUDGMENT

Introduction

1. The Respondents herein were the plaintiffs in the lower court Maua Civil Case No. 240 of 2014 wherein they sued the appellants seeking nullification of sale, subdivision and transfer of parcel Nos. Ithima/Antuambui/6581 and 6582. The respondents pleaded that they are the sons of Stephen Muthaka Uthaka (Deceased) who was the 3rd defendant in the said case but died during the pendency of the lower court case.
2. The respondents pleaded that the deceased was the registered owner of original parcel No. Ithima/Antuambui/1445 which was family land and who held in trust for the respondents who lived and settled thereon with their families.



3. The respondents averred that on 29th November, 1999, a mutation was registered against the said original land whereby 3 new numbers emerged i.e Ithima/Antuambui/6581, 6582 and 6583. It was the respondents contention that the said subdivision and subsequent transfer of land Parcel No. Ithima/Antuambui/6581 to the 2nd appellant herein and land parcel Ithima/Antuambui/6582 to the 1st appellant were fraudulent.
4. The respondents enumerated the particulars of fraud against the appellants and the deceased as subdividing the land secretly without involving the respondents as beneficiaries and without coming to the actual ground, attending the Land Control Board secretly without involving any member of the family particularly the respondents, subdividing and transferring the land to the appellants herein when a caution was still in force in the register of the land and failing to recognize the interests of the respondents as to their rights to the land. The respondents contended that the sub-division and subsequent transfer of the suit parcels were irregular and should be reversed.
5. The respondents pleaded that the deceased who held the original parcel in trust for the respondents had breached the said trust by disposing the family land secretly, failing to cater for the interests of the respondents in regard to the suit property and failing to take into account the developments of the respondents in the land.
6. The 1st and 2nd appellants herein entered appearance and filed a joint statement of defence wherein they averred that they bought the two parcels Ithima/Antuambui/6581 and 6582 from the deceased. They denied the existence of trust and fraud. They further filed a counterclaim. The basis of the counterclaim was that they were purchasers of the said two parcels. That the respondents had occupied part of their land and were threatening to forcefully enter the remaining portion of the land. The appellants sought for general damages for trespass and an order that the respondents vacate from the said parcels of land.
7. The deceased also entered appearance and filed his defence wherein he averred that the appellants herein were bona fide purchasers of the suit land. He also denied the existence of any trust and the allegations of fraud. The deceased passed on during the pendency of the case and no substitution was made. Thereafter, the matter proceeded for hearing.
8. Geoffrey Gichunge, the 3rd respondent herein testified on behalf of the respondents and the respondents closed their case. The appellants herein also testified and called two witnesses.
9. After considering the evidence adduced, the learned trial magistrate found that land parcel No. Ithima/Antuambui/1448 was registered in the name of the deceased to hold the same on his own behalf and on behalf of his family members, and that the sub-division and transfers were irregularly carried out as there was a caution which had been lodged by the 3rd respondent herein.
10. The appellants were dissatisfied with the decision and filed this appeal on the following grounds:-
 1. That the Learned Trial Magistrate erred in Law and fact in that he failed to find that the appellants entered into agreements with the respondents' father for the sale of land and they lawfully bought the parcel of land LR. Nos. Ithima/Antuambui/6581 and 6582 hence there was no evidence to impeach their title deeds.
 2. That the Learned Trial Magistrate erred in Law and fact in that he failed to find that respondents' father had given the respondents parcels of land hence their father had the legal right to deal with his other portions of land during his lifetime.



3. The Learned Trial Magistrate erred in law and fact in that he failed to find that the respondent's father being the owner of the original parcel of land there was no evidence that had acquired the land from his father.
4. That the learned Trial Magistrate erred in Law and fact that he failed to find the respondents did not prove fraud on the part of the appellants having bought the land from the respondents' father.
5. That the learned Trial Magistrate erred in law and fact in that he failed to find that the respondents' father did not commit any fraud when he sold part of the land to the appellants.
6. That the Learned Trial Magistrate erred in law and fact in that he failed to find that the respondents did not prove their case on trust to the required standard.
7. That the Learned Trial Magistrate erred in law and fact in that he failed to find that the Mandatory consent of the Land Control Board was obtained and hence the transfer of the resultant subdivisions of land to the appellants was lawful but he shifted the burden of proof to the appellants.
8. The Learned Trial Magistrate erred in Law and fact in that he failed to consider the appellants counterclaim before court.
9. That the Learned Magistrate erred in Law and fact that he failed to consider the appellants submissions and the Judicial authorities thereof and thereby arrived at the wrong decision.
10. That the decision of the Trial Magistrate is against the weight of evidence and is bad in Law.
11. The appellants prayed that the Honourable court do allow the appeal herein and the Judgment/decree in Maua CMCC. No. 240 of 2014 be set aside and Judgment be entered for the appellants as prayed in the counterclaim.
12. The Appeal was canvassed by way of written submissions. The appellants filed their submissions dated 14th November, 2023 through the firm of Kiogora Arithi & Associates while the respondents filed their dated 28th November, 2023 through the firm of Ms. Ayub Anampiu & Co. Advocates.

Appellants' Submissions

13. The appellants gave a brief facts of the case and proceeded to submit on grounds 1, 2, and 3 of the Appeal together. It is the appellants submission that they bought the parcel of land LR. Nos. Ithima/Anyuambui/6581 and 6582 from the respondents' father and that the two parcels of land are inter alia some of the resultant of subdivision from the mother title LR. No. Ithima/Antuambu/1445.
14. The appellants further submitted that to date the parcels of land LR. Ithima/Antuambui/6583 is still registered in the names of the respondents' late father. That the appellants filed a counterclaim in the lower court and demonstrated how they bought the suit lands after due diligence and that they are innocent bonafide purchasers for value without notice.
15. The appellants submitted that they bought the suit properties vide the agreements dated 5th June, 1997 and 13th December, 1998 and that the respondents' father in his defence also averred to the same.
16. Learned counsel for the appellants submitted that there is no law requiring a parent to subdivide his land and share it with children during his lifetime and relied in the case of Muriuki Versus Richard Muriuki CA No. 190 of 1996.



17. The Appellants counsel also submitted that the respondents did not prove the Customary Law trust as required by the law and that there is no cogent evidence to show that the respondents' father inherited the land from his father. They relied on the case of *Jemaki Tanui Versus Juliana Jeptekerny & 5 Others* ELC. NO. 44 of 2013, *Paul Kirinya Versus Delfina Kathiri* (2019) eKLR and *Mumbi Waititu Versus Mukuru Ndata & 4 Others* (2007)eKLR.
18. The appellants counsel submitted that the respondents proceeded in this matter on the basis that their father had no entitlement to the land yet he was actual owner and had left part of his land in his name. The Appellants counsel relied on the case of *Bridget Riara Eustus & 6 Others Versus Eustus Kirimi M'Aburi* ELC Case No. 8 of 2019.
19. On grounds 4, 5, 6 and 7 of the Appeal, learned counsel for the appellants submitted that the respondents did not prove fraud as required by law. They pointed out that the 1st and 2nd appellants filed their defence and counterclaim dated 31st August, 2000 in which they clearly stipulated how they obtained the suit lands to wit lands Ithima/Antuambui/6581 and 6582 from the respondents deceased father and therefore they are innocent purchasers for value without any notice of defect. That the appellants further contended that they had conducted due diligence before purchasing the suit lands and that the deceased had every right to sell the suit land to them as he was the sole registered proprietor by then and the suit lands were not encumbered in any way. That the appellants further contended that having bought the suit lands vide the said agreements for sale of land dated 5th June, 1997 and 13th December, 1998 respectively for parcels of Land Ithima/Antuambu/6581 and 6582 and having processed and obtained title deeds, they are innocent purchasers thereof. The appellants pointed out that the deceased filed his separate statement of defence dated 31st August, 2000 in which he averred that he sold the suit lands to the appellants and that the same did not form part of their ancestral trust land as the respondents had some other land where they resided.
20. It is the appellants submission that while the respondents pleaded fraud, they did not particularly prove the same and that the burden of proof squarely lay upon them to prove the same. The appellants counsel cited Section 109 of the *Evidence Act*, which lays the burden of proof as to any particular fact to the person who wishes the court to believe in its existence. It is the appellants submissions that the respondents did not prove the particulars of fraud and argued that they merely left the court for the particulars of fraud to be inferred from the facts in the matter.
21. The appellants submitted that the respondent's allegation that the suit lands were subdivided when there was a caution subsisting on the same was contradicted by the letter from the Land Registrar dated 18th April 2000 which the respondents rendered as P. Exh. 4 and which clearly indicated that by the time the caution documents were lodged at the lands registry, the mother parcel Ithima/Antuambui/1445 had already been subdivided, hence reason the caution was finally registered under parcel No. Ithima/Antumbui/6583 which was still registered under the names of the deceased.
22. The Appellants further submitted that the respondents' allegations that the appellants attended the land Control Board meeting secretly is without basis. The appellants argued that the suit lands were not matrimonial property that would have required marital consent before sale. Secondly, that it was incumbent upon the respondents to produce before the court Land Control Board Minutes for the suit lands to show who was in attendance when the consent for transfer was issued. That it could not be left to the appellants to prove the same when it was the respondent who alleged. It is the submission of the appellants that the respondents' allegation that the appellants failed to produce Land Control Board application and the consent was an attempt to shift the burden of proof to the appellants when in fact this was an allegation upon which the case was based on.



23. The appellants counsel submitted that the respondents did not prove their case based on fraud to the required standards and relied on the case of *Vijay Morjaria Versus Nansigh Madhasingh Darbar & Another* (200) eKLR and the case of *Moses Paranai Versus Peris Wanjiku Mukuru* (Suing as legal representatives of the estate of *Sospeter Mururu Mbeere Versus Stephen Njoroge Macharia* (2020) eKLR).
24. On the issue of trust, the appellants counsel submitted that a party who desires a court to give a judgment in his favour as to the existence of a trust must lead concrete evidence to show its existence. That it cannot be left for the court to make an inference as to the existence of trust when one has not tendered any and or insufficient evidence as to suggest its existence. It was pointed out that the respondents produced a Green Card which indicated that the suit land was originally registered in the name of their father, but did not tender any concrete evidence in court to support their allegations that the suit land was ancestral trust land save for the said green card. It is the appellants submission that the suit lands having been registered solely in the name of the respondents' father it was personal property and he had the right to deal with the same in whatever way he deemed fit.
25. The appellants submitted that they are innocent purchasers for value and without notice of defect and that if the respondents had any remedy then the same lied elsewhere and not with the appellants. The appellants counsel urged the court to find, that the lower court did not consider the appellants' counter claim and allow the appeal as prayed.

Respondents Submissions.

26. The respondents counsel submitted that the Appeal lacks merit and ought to be dismissed. They identified two issues at the lower court which were, whether the suit land was held in trust for the respondents and whether the appellants acquired the suit land fraudulently.
27. The respondents submitted that they tendered very credible evidence proving that the original land parcel Ithima/Antuambui/1445 was fraudulently subdivided into two parcels namely Ithima/Antuambui/6581 and 6582 and that the same were illegally transferred to the 1st and 2nd appellants. The respondents counsel submitted that the respondents proved through evidence that the said transfers were fraudulent as no family members were involved and that the same was done when there was a caution registered on the Original LR. Ithima/AntumambuI/1445.
28. The respondents counsel submitted that the respondents were relying on customary trust to agitate for this claim and argued that they proved all the particulars of trust and particulars of breach of trust by the appellants.
29. It is the respondents' contention that the appellants had no supportive documents other than a title and submitted that the same had to be supported by proving documents.
30. The respondents submitted that the appellants did not produce application to the Land Control Board, Consent from the land Control Board and transfer Forms duly signed by the seller.
31. The respondents further submitted that the respondents called the area Chief (PW2) who clearly admitted that the suit land was family land and further stated that the Land Control Board was not existing at the time and so no land control board consent was given.
32. The respondents further submitted that the proceedings before the Lower Court were very clear that the Magistrate had no alternative but grant the orders sought.
33. Learned counsel for the respondents cited Section 28 of the *Land Registration Act* No. 3 of 2012 where Customary Trust has been recognized as one of the overriding interests which must not necessarily be



noted in the register, and relied on the case of Isaac M’Inanga Kiebia Versus Isaya Theuri & Another (2018)eKLR.

34. The respondents counsel pointed out that the respondents are sons of the 3rd defendant in the lower court. That the deceased was the registered owner of the land but held the same in trust for the respondents herein.
35. The respondents counsel urged the court to dismiss this appeal in its entirety with costs in this court and the court below.

Analysis And Determination

36. This court’s role on appeal was settled in case of *Selle & Another Versus Associated Motors Boat Co., Ltd* (1968)EA 123. This being a first appeal this court has the liberty to consider, evaluate and draw its own conclusion on both law and fact. In *Gitobu Imanyara & 2 Others Versus Attorney General* (2016) eKLR the Court of Appeal stated that:-

“A. 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 conclusion though it would always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”.

37. There are five issues that call for determination: -
 - i. Whether there was proof of fraud
 - ii. Whether Customary Trust was proved to the required standards
 - iii. Whether the 1st and 2nd appellants were innocent purchasers for value
 - iv. Whether the decision of the trial Magistrate is against the weight of evidence and the law.
 - v. Who bears the costs.
38. The respondents pleaded that they were all sons of Stephen Muthaka Uthaka (Deceased) and that their father was registered as the owner of parcel No. Ithima/Antuambui/1445 which is family land and was held by the deceased in trust for the respondents and other family members. It was pleaded that on 29th November 1999 a mutation was registered against the suit parcel whereby 3 new numbers emerged i.e Ithima/Antuambui/6581,6582 and 6583. That the said mutation was done fraudulently when the caution lodged by the deceased was still in force and registered in the district land registry Meru.
39. PW1 testified that Land Parcel No. Ithima/Antuambui/1445 belonged to their grandfather (Ntonyande) and it was later transferred to the deceased who was his father and the same was family land. He stated that they live on the land together with their families and cultivate and utilize the land.
40. It was PW1’s evidence that their father wanted to sell the land and they cautioned the said land at the Meru Land Registry so that it could not be transferred to anyone. PW1 testified that the land was subdivided and transferred fraudulently despite the said caution. PW1 produced the Green Card which was Marked P. Exhibit 1, before trial court and the same showed that the caution was placed on parcel 1445 on 1st February 2000. It was the evidence of PW1 that they later heard that the land had been sold and they wondered how the land could have been sold whereas they had not even seen a surveyor, and had not attended the Land Control Board.



41. From the record, it is evident that the respondents live on the land with their families. That confirms why the appellants in their counterclaim wanted vacant possession. In my view, the land was family land. The deceased sold the land to the appellants while there was a caution on it. It was the evidence of PW1 that they wrote a letter to the Land Registrar who in a response in a letter dated 18th April 2000 which was produced as Exhibit 3 explained how the land was subdivided in view of the caution as follows:-

“A caution had been registered on a temporary Green card as the Original went missing. That when the Original Green Card was traced the transaction subject of this matter had been carried out” .

42. I do find that it was clear that there was a caution which existed and was not removed before the impugned entries were made. By failing to peruse the original Green Card to establish the status of the land, the appellants in my view failed in due diligence. The subdivision and transfer and subsequent registration of the appellants as owners of the suit properties while a caution was in existence, made the transactions irregular, null and void.

43. On the issue as to whether there was fraud perpetrated by the 1st and 2nd Appellants and the deceased, I do find that transferring and registering the property in the names of Appellants when a caution existed was fraudulent.

44. It's trite Law that allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, but something more than a mere balance of probabilities is required. General accusations are not sufficient to prove fraud. In my view, the respondents proved the alleged fraud to the required standard and the findings of the Learned Magistrate cannot be faulted.

45. The respondents pleaded that the deceased was the registered owner of the Parcel No. Ithima/Antuambui/1445 and that the same was family land and therefore held the same in trust for the respondents. It was the respondents' case that the deceased who held the original land Parcel No. Ithima/Antuambui/1445 had breached the said trust.

46. The respondents itemized the particulars of breach as disposing the family land secretly, failing to cater for the interests of the respondents in regard to the suit property and failing to consider the development of the respondents in the land to inform the respondents of the sale of the suit land.

47. PW1 testified that he knew that Land parcel No. Ithima/Antuambui/1445 previously belonged to his grandfather Ntonyande and was later transferred to the deceased who is their father.

48. It was the evidence of PW1 that the suit parcel was family land and testified that they are living on the said land with their families and that they cultivate the land and utilize it.

49. Godfrey Kanampiu the appellants witness testified that he was present during subdivision of the suit land and confirmed that the land in issue was family land. There is also no dispute that the respondents are in actual occupation and use of the land.

50. Customary Trust was well explained by the Supreme Court in the case of Isack Kieba M'inanga Versus Isaac Theuri M'Lintari & Another (2018)eKLR; where it held as follows:-

“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 Versus 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 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.
51. In this case, the respondents pleaded customary trust in the suit land. Customary Trust is an encumbrance on land. These are non-registrable rights which run with the land. They are overriding. They subsist on the land. In the case of *Kanyi Versus Muthiora*(1984)eKLR 712, the Court stated that “ the registration of land in the name of the appellant under the Registered Land Act (Cap 300) did not extinguish the respondents rights under Kikuyu Customary Law and neither did it relieve the appellant of her duties or obligations under Section 28 as trustee..... The trustees referred to in Section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under Customary Law, if the Act had intended to exclude Customary law rights it would have clearly stated”.
52. The legal burden to prove the existence of the trust rests with the one who is asserting a right under Customary Trust. To discharge this burden, the person must proof that (a) The suit properties were ancestral clan land, (b) during adjudication and consolidation, one member of the family was designated to hold on behalf of the family (c) the registered persons were the designated family & members who were registered to hold the parcels of land on behalf of the family. In essence, one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.
53. In this case, I agree with the trial court that the Appellants did not rebut the fact that the suit land had been given to the deceased to hold in trust for himself and his family. Further no evidence was given to show that the deceased bought the land. In the result I find that customary trust was proved to the required standard.

Whether the 1st and 2nd Appellants were innocent purchasers for Value?

54. On the issue as to whether the 1st and 2nd Appellants were innocent purchasers for value without notice of any illegality, I do find that it was clear on the Green Card that a caution existed and the same was not removed before the entries were made. By failing to peruse the Green Card to establish the status of the land, the 1st and 2nd Appellants failed in due diligence and therefore they cannot be said to be innocent purchasers for value without notice. The caution was sufficient.

Whether the decision of the Trial Magistrate is against the weight of Evidence and the Law.

55. The evidence adduced demonstrate that the deceased sold land which he held under Customary trust and while a caution had been registered on the land. It was only proper for his children to be involved since it was customary land and further for the caution to be lifted before any transaction was done.



56. It is my view that based on the material on record, the Learned Magistrate was justified in arriving at the decision he made. The findings and holding by the Learned Magistrate were well founded and I find no basis to interfere with the same. The appellants counterclaim must fail.

57. In the result, I find no merit in the appellant's appeal and the same is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF FEBRUARY, 2024

HON. C. YANO

ELC – JUDGE

In the presence of :-

Court Assistant: Kiragu

Ms. Mukaburu for Appellants

Kithinji holding brief for Ayub Anampiu for Respondents

