



Kimene (Being Sued on Behalf of the Estate of Isaac Kimene Nabea alias Isaac Gituma Nabea) v Murithi (Environment and Land Appeal E021 of 2023) [2024] KEELC 3799 (KLR) (8 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3799 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E021 OF 2023**

**CK NZILI, J
MAY 8, 2024**

BETWEEN

PATRICK KIMENE (BEING SUED ON BEHALF OF THE ESTATE OF ISAAC KIMENE NABEA ALIAS ISAAC GITUMA NABEA) APPELLANT

AND

STEPHEN MURITHI ALIAS M'INOTI KIAUTHA RESPONDENT

(Being an appeal from the judgment of Hon. Evans A. Mbicha – PM delivered on 1.3.2023 in Meru CM ELC No. 264 of 2018)

JUDGMENT

1. The appellant, as the defendant at the lower court, had been sued by the respondent as the plaintiff, a blood brother, for breach of trust over L.R No. Nyaki/Kithoka/3xx and sought the rectification of the register to replace his name with that of the respondent. All these facts were contained in a plaint dated 20.11.2018.
2. The appellant denied the claim by a statement of defense dated 24.12.2018. He denied the alleged trust or breach thereof. He stated that before the registration of the suit land under his name in 1983, he was still using the land. He termed the claim as statute-barred and filed without issuing him any demand notice.
3. Further, the appellant filed a notice of preliminary objection dated 5.2.2020 that the suit offended Section 7 of the *Limitation of Actions Act*, the court lacked jurisdiction to hear it, and it was frivolous, vexatious, and an abuse of the court process. By a ruling dated 9.9.2020, the preliminary objection was dismissed, paving the way for the hearing.
4. Stephen Murithi alias M'Inoti M'Ithowobia testified as PW 1. He told the court that Isaac Kimene, then deceased and replaced by Patrick Kimene, was his late brother. PW 1 said that he bought the suit



- land between 1957 and 1960 from M'Ringera and registered it in the name of his late brother since he was like his child then and in school. He said he allowed both his mother and sister to utilize the land by planting yams alongside his 200 tea trees.
5. PW 1 urged the court to return the land to him since both the seller and his brother had passed on. All these facts were contained in his written statement dated 4.12.2018, which he adopted as his evidence in chief. PW 1 relied on a copy of the green card as P. Exh No. (1).
 6. In cross-examination, PW 1 told the court he had no documents to prove that the purchase from M'Mwongera since the agreement was oral but was confident that he registered the land under his late brother's name, whom he was educated at the time.
 7. PW 1 said that he caused the registration in 1967, and between 1967 – 2018, no one complained against his ownership of the land or its use of the farm produce. Similarly, PW 1 said the land was under the use of his children and not the appellant. He added that he registered the land that way as per Kimeru culture. He said the dispute arose after he demanded the land to be transferred to him, which his brother declined to do, leading to this case.
 8. Benson M'Ibutu testified as PW 2 and adopted his witness statement dated 4.12.2018 as his evidence in chief. PW 2 told the court the suit land belonged to the respondent since he witnessed the purchase from M'Inoti M'Mwongera. In cross-examination, PW 2 told the court the land was bought at Kshs.300/= in 1960, while it was undemarcated. He said that the agreement was oral, though he had witnessed the seller acknowledge receipt of Kshs.300/=, which was much money then. PW 2 said the land was under the use of the respondent's mother for a long time.
 9. Patrick Kithinji Kimene testified as DW 1 and adopted his witness statement dated 16.9.2022 as his evidence in chief. He said that the land belonged to his late father as per a green card he produced as D. Exh No. (1) DW 1 said that the land has all along been under the use of his father and family and not the respondent or his children.
 10. In cross-examination, DW 1 said that he was born in 1975 and found his parents utilizing the land as part of the inheritance from his late grandfather, who had initially bought the land DW1 said that the respondent was living approximately 10 kilometers from the suit land on a piece of land he also inherited from his late grandfather.
 11. DW 1 said his father had bought the land from one of his uncles. DW 1 said that the suit land did not form part of the properties included in succession because his late father and the respondent were involved at the High Court. DW 1 said the name Gituma was inserted into the green card by his late father following a change of name in 1983. The trial court delivered its judgment on 1.3.2023 in favor of the respondent.
 12. The appellant faults the judgment on the following grounds:
 - i. For finding that the land was held in trust for the respondent and his siblings despite overwhelming evidence to the contrary.
 - ii. For failing to find that the respondent was bound by his pleadings yet allowing him to depart from his pleadings in giving evidence.
 - iii. For allowing a prayer that was not backed by any evidence.
 - iv. For allowing the suit yet it had not been proved to the required standards.
 - v. For failing to find the respondent evidence and that of his witnesses unreliable.



- vi. For being openly biased in favor of the respondent in his analysis of the evidence on record.
 - vii. For failing to analyze or evaluate the evidence, hence coming to the wrong conclusions.
 - viii. For going against the law and the weight of the evidence.
13. In support of this appeal and following directions, the appellant relied on written submissions dated 2.2.2024 and isolated three issues for the court's determination.
 14. The appellant relying on *Galaxy Paints Co. Ltd v Falcon Guards Ltd* [2000] 2 E. A 385 and *John Kamunya & another v John Ngunyi Muchiri & others* [2015] eKLR, submitted that parties are bound by their pleadings, and a court cannot only pronounce judgment on issues arising from the pleadings or as framed by the parties.
 15. To this end, the appellant submitted that the plaint dated 20.11.2018 in paragraph 4 captured the claims. In contrast, his statement dated 4.12.2018 mentioned that the appellant bought the land during the adjudication stage from M'Mwongera and registered it to his son Dedan Gituma and Isaack Kimene Nabea, to hold in trust and was not in possession. The appellant submitted that at the trial, the respondent had talked of a purchase in 1957 – 1960, while in cross-examination, he talked of registering the names in 1967.
 16. The appellant submitted the evidence of PW 1 and PW 2 was at variance with the pleadings as to the date of purchase, registration, names of the registered owners and occupation, making him conclude that the respondent did not prove his claim by producing any certificate of finality, adjudication record, sale agreement, records of the seller or otherwise to show that he was the original owner of the land. It was submitted that the respondent produced no evidence that he registered the land in the names of Dedan Gatuma Stephen and Isaac Kimene Nabea to hold in trust for him.
 17. The appellant submitted that trust as an overriding interest under Sections 25 and 28 of the [Land Registration Act](#), though not noted in the register of a title, must be proved to the required standard by leading evidence as held in *Isaack Kiebia M'Inanga v Isaya M'Lintari & another* Supreme Court of Kenya No. 10 of 2015 and in *Njenga Chogera v Maria Wanjiru Kimani & others* [2005] eKLR as cited with approval in *Muthuita v Muthuita* [1982 – 88] eKLR and lastly, in *Juletabi African Adventure Ltd & another v Christopher Michael Lockley* [2017] eKLR.
 18. The appellant submitted that the respondent did not explain why he did not register the land in his name or why he had to wait for 46 years to lodge the claim. The appellant submitted that the respondent was not claiming the land customary or family and that all he pleaded in his pleadings was that he was the original owner. In the absence of any pleadings on trust or evidence thereof, the appellant submitted the claim was not proved to the required standard.
 19. The appellant submitted that the trial court granted the respondent a relief that was not backed by any evidence going by pages 5 and 37 of the record of appeal. Relying on Sections 107 and 108 of the [Evidence Act](#), the appellant submitted that the burden was on he who alleges. In this appeal, the trial court shifted the burden to him when it held that he had failed to prove that the land was a result of inheritance, which issue, in any event, was not pleaded or evidence tendered in its support. To that extent, the appellant submitted that the trial court dwelt with issues that did not arise out of the pleadings or evidence.
 20. The respondent relied on written submissions dated 12.2.2024. It was submitted that the duty of an appellate court as held in *Selle & another v Associated Motor Co. Ltd & others* [1968] E. A as quoted in *Alice Wanjiru Ruhui v Messaic Assembly of Yahweh* [2021] eKLR, is to re-evaluate and re-examine the evidence on record and arrive at its conclusions bearing in mind that it did not see or hear the witnesses.



21. The respondent submitted that the burden under Sections 107 and 108 of the *Evidence Act* was on him, which he did to prove that the land was held by the appellant in trust by calling two key witnesses. Reliance was placed on *Ngugi v Kamau and another* [2022] KEELC 2261 (KLR) (23rd June 2022) Judgment) and *Peter Ndungu Njenga vs Sophia Watiri Ndungu* [2000] eKLR and *Juletabi African Adventure Ltd & another v Christopher Michael Lockley* (supra).
22. The respondent submitted that since he was working, he caused his son and brother to be registered as the owners in trust for him, and was not corroborated by his two witnesses, which evidence was challenged by the appellant.
23. On the burden of proof, the respondent, citing *Halsbury's Laws of England* 4th Edition Vol. 17 paragraphs 13 & 14, submitted that the legal burden rests typically upon the party desiring the court to take action and once discharged, the opposing party has a corresponding duty of adducing evidence in rebuttal. The respondent submitted that both the legal and evidential burden vested on him initially the evidential burden may shift in the course of trial depending on the evidence adduced.
24. The respondent submitted that the appellant was unable to discharge his evidential burden in rebutting his evidence given through his two key witnesses, save for the copy of the green card, which he failed to explain its root cause. Reliance was placed on *Nelly Chelimo Matelong v Grace Matelong* [2019] eKLR and *Munyu Maina v Hiram Gathiha Maina Civil Appeal No. 239 of 2009*, that where the root of a title was under challenge, it was not enough to dangle the instrument of the title without going beyond it to prove legality on how it was acquired in a legal, formal and free of any encumbrances.
25. An appellate court of the first instance has to re-evaluate, re-appraise, and re-hear the record of the court below, come up with independent findings on both facts and the law, but alive to the fact that the trial court had the benefit of seeing and hearing the witness first hand.
26. Having carefully studied the pleadings, documents, evidence tendered ground of appeals and the written submissions, the issues for my determination are:
 - i. If the respondent pleaded and particularized, the trust claimed against the appellant.
 - ii. If the respondent proved the trust against the appellant.
 - iii. If the appellant pleaded the manner that he acquired the suit land.
 - iv. If the appellant pleaded use, justification and occupation of the suit land to the exclusion of the respondent.
 - v. If the respondent had pleaded, proved and was justified to the reliefs the trial court granted him.
 - vi. If the appeal has merits.
27. It is trite law that parties are bound by their pleadings, and issues flow from there. In *Galaxy paints Co. Ltd v Falcon Guard Ltd* (supra), the court said issues flow from pleadings, and unless pleadings are amended, a court may only pronounce judgment on issues arising from the pleadings or as the parties have framed for the court's determination. The court cited *Fernandes vs Peoples Newspaper Ltd* [1972] E. A 63 that a civil case is decided on issues arising out of the pleadings.
28. Turning to the pleadings herein those undisputed ones are the plaint and the statement of defense dated 20.11.2018 and 24.12.2018, respectively. In the plaint, the respondent pleaded that the two were brothers. In paragraphs 4 & 5, the respondents averred that in 1967, he caused his land L.R No. Nyaki/Kithoka/3xx to be transferred to his late brother and his late son Stephen Dedan Gituma to hold it in trust for him, which land he had bought during the adjudication process and registered in his brother's



- name. He averred that he was in possession of the land. He sought a replacement of the name of his brother with his name and for the rectification of the register to reflect the proposed change. A witness statement and a copy of the green card for L.R No accompanied the plaint. Nyaki/Kithoka/3xx.
29. The appellant denied the alleged transfer to hold in trust, for he was registered as the proprietor in 1983, though before the registration, he was still using and occupying the land. He denied the alleged trust. The appellant termed the suit as statute-barred and promised to raise a preliminary objection which he did dated 5.2.2020.
 30. In support of his pleadings, the respondent adopted his witness statement dated 4.12.2018 as his evidence in chief. He said that he bought the land from M'Mwongera, as witnessed by Benson M'Ibutu and M'Ikinyua. PW 1 said that on the land registration, he did so under the names of his son Dedan Gituma and the appellant as a young brother to hold in trust. PW1 said that he established that his brother had fraudulently removed the name of his son from the title, leaving his name only. He said that his son was a minor, at the time while his brother was in school. PW 1 said that after buying the land, he put his mother in occupation since he was working away from home. He said that after his mother and sister (deceased), stopped working on the land, he continued working therein, though since he was old, his brother was the one on the land.
 31. On his part, the initial defendant did not file a witness statement accompanying the statement of defense. He passed on 24.1.2019, and by an application dated 17.12.2019, the appellant was allowed to replace him pursuant to letters of grant intestate dated 31.10.2019 in Meru H.C Succession Cause No. 18 of 2019, issued to Michelle Kendi Kimene and Patrick Kithinji Kimene, as the legal representatives.
 32. From the court record, it appears the appellant registered the land contrary to the doctrine of *lis pendens* under the legal representative's names and acquired a title deed dated 2.9.2020 now surrendered before this court.
 33. The appellant, in his testimony, adopted a witness statement dated 19.9.2022 as his evidence in chief, stating that his late father was the recorded owner at the adjudication stage and during the times of his parents, his grandfather, who became a registered owner in 1983 following which he was issued with a title deed.
 34. DW 1 said that his late father extensively developed the land till he died on 24.1.2019. He denied that the respondent bought the land from M'Mwongera as alleged or got it registered in the names of his son and brother for lack of documents to that effect. DW 1 said that his late grandfather initially occupied the land. The appellant denied that the land initially belonged to M'Mwongera or his uncle since no records to that effect were availed. The appellant relied on a copy of the green card.
 35. The law of trusts was expounded by the court in *Twalib Hatayan Twalib Hatayan & another v Said Sagar Ahmed Al-Heidy and others* [2015] eKLR. The court held thus:

“According to the Blacks Law Dictionary 9th Edition as, trust is defined as the right enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary). Under the *Trustee Act*” the expressions trust and trustee extend to implied and constructive trust and cases where the trustee has a beneficial interest in the trust property.....”.



36. The court went on the cite thus:

“In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories: Constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired the property by wrongdoing.

It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. Constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit. As earlier stated, with constructive trusts, proof of parties' intention is immaterial, for the trust will nonetheless be imposed by the law for the benefit of the settlor. The imposition of a constructive trust is thus meant to guard against unjust enrichment....A resulting trust is a remedy imposed by equity where the property is transferred under circumstances that suggest that the transferor did not intend to confer a beneficial interest upon the transferee.... This trust may arise upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favor of the person who advances the purchase money whether or not the property is registered in his name or that of another is immaterial.”

37. In this appeal, the respondent, in his claim, did not plead customary trust or allude to any facts in his testimony that the trust he had pleaded and wanted the trial court to enforce was based on customary, family and or ancestral land.
38. In paragraph 4 of the plaint dated 20.11.2018, the respondent begun with the events of how he bought the land during the adjudication stage and caused it to be transferred or registered in the name of his late son Dedan Gituma Isaac Kimene Nabea alias Isaac Gituma Nabea, to hold in trust for him and themselves.
39. In the witness statement accompanying the plaint, which he adopted as his evidence in chief, the respondent said that his late brother fraudulently removed the names of his son from the title. He pleaded that the acquisition, transfer, and registration occurred while his son was a minor and his young brother was in school. The respondent went on to state that he took possession of the land and allowed his mother and sister to work on it since he was always away from home, and likewise, by extension, his young brother currently was working on the land, for he had grown old to be able to continue utilizing the land.
40. In *Karugi & another v Kabiya & another* [1987] KLR 347, the court observed that the burden was on a plaintiff to prove his cause remained the same throughout the case. The court said the plaintiff must adduce evidence which, in the absence of a rebuttal evidence by the defendant, convinces the court that, on a balance of probabilities, he has proved his claim. In *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [2014] eKLR, the court said a constructive trust is based on common intention, which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted up on by the claimant. The court said constructive trust was an equitable concept that acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention.
41. In *Peter Kyalo Mutinda v Elizabeth Katete Mutinda* [2018] eKLR, the court cited *John Gitiba & another vs. Jackson Rioba Buruna Kisumu Civil Appeal No. 89 of 2003*, that constructive trust will



arise whenever one party has so conducted himself that it would be inequitable to allow him to deny the other party a beneficial interest in the property acquired. The court said it would be so if there were a common intention that both parties should have a beneficial interest and where the claimant has acted to the detriment of the other. The court held that the relevant intention would reasonably be inferred by that party's word or conduct, notwithstanding that he did to consciously, formulate that interest or even acted with some different intention that he did not communicate.

42. In this appeal, the appellant did not plead in his defence on the events between 1967 to 1982. Other than saying that even before 1983, he was using or occupying the land, he did not state under what capacity and who was the registered owner before 1983, if not the appellant. The respondent, as indicated above filed his plaint accompanied by a list of documents and witness statements. The copy of records on entry number one shows who was the first registered owner.
43. The witness statements were filed on 16.1.2019 during the lifetime of the late Isaac Kimene Nabea. The agreed issues and case summary were filed on 11.12.2018, raising the history of the land before 1983. The issue of the respondent's son and the initial plaintiff as the first owners of the land was disclosed by the respondent at the earliest opportunity. How the appellant's father failed, omitted, ignored, and or overlooked to respond to the said facts in his statement of defense remains unclear.
44. The appellant, in his cross-examination, said that he was born in 1975. Therefore, he could not have been privy to the events of 1957 – 1960 and between 1967 – 1975 unless he had obtained the history from his late father and or obtained documentation on how the land was acquired before it was registered under his name in 1983.
45. Asked about the entries, DW 1 told the trial court that his late father had a change of names, and that was why new names were inserted in the title register. The appellant did not tender the copy of the register showing entries before 1983 and the change of the names.
46. Trust is a matter of fact to be proved by way of evidence. Section 33 (a) of the [Evidence Act](#) provides that a statement, written or oral, of admissible facts made by a person who is dead or cannot be found, are admissible if they were made by such person in the ordinary course of business or in a document signed by that person or where made or relates to the existence of any relationship or relates to a transaction. The appellant failed to produce rebuttal evidence to the presumption of a trust on the circumstances relating to the acquisition of the suit land, against the version given by the respondent.
47. The appellant failed to call any witnesses to support his evidence on the manner his late father acquired the land as an inheritance from his grandfather. None of the appellant's siblings, including the co-legal representatives and or uncles, were called to sustain his version that his late father was the one who acquired or solely inherited the land from his grandfather.
48. In *Ayoub v Standard Bank of S.A* [1963] E. A 619, the court said it could not imply a trust save in order to give effect to the intention of the parties. Section 98 of the [Evidence Act](#) provides that upon proof of the terms of a document, evidence of oral agreement or statement is inadmissible to contradict, vary, add, or subtract the terms of the document. The respondent in this appeal called PW 2 and PW 3 to confirm the circumstances under which he bought the land and took vacant possession.
49. In *Arvind Shah & others vs Mombasa Bricks & Tiles Ltd & another* S.C Petition E020 of 2022, the court said a constructive trust would automatically arise where a person already a trustee takes advantage of his position for his own benefit as held in *Twalib Hatayan & another v Said Sagar Ahmed Al-Heidy & others* (supra). The court cited Section 25 (2) of the [Land Registration Act](#) that nothing in this provision shall be taken to relieve a proprietor from any duty or obligation to which the person is subject as a trustee.



50. The initial plaintiff in this suit raised a fundamental issue that he was the one who transferred and registered the land to the appellant's father and his son Dedan Gituma, only for the deceased to unjustly and fraudulently remove the name of his son from the title deed. That evidence was not challenged by the appellant at the trial court.
51. In cross-examination the appellant admitted that he was aware that the name Gituma was inserted in the green card by Stephen. He said that his father actually did a conversion of the name and filed the same in 1983. The appellant admitted that as of 1967, the respondent's son was five years old, though not an agemate of his late father. Interests include trust. The court in *Arvind Shah vs Momba Tiles Ltd* (supra) observed that trust is an equitable remedy, which is an intervention against unconscionable conduct and is imposed whenever justice and good conscience require it, including importing it into a land sale agreement to defeat a registered title that is in the hands of a wrongdoer to prevent him from benefitting unjustly from the wrongful conduct. The court went on to say that a party wronged by another who has benefitted as a result of wrongdoing can be remedied through constructive trust. The court further said constructive trust is imposed to address situations where it would be unjust for one party to retain ownership of property under inequitable circumstances in favor of the victims of the wrong, who is then given a right to the property since courts in Kenya are vehicles for redressing wrongs by adjudicating dispute and administering justice in accordance with *the constitution's* ethics, values and principles.
52. Concerning the preceding binding case law, I think the appellant failed to rebut the presumption of trust in the manner that the respondent acquired the land for value in 1967 and registered it in the name of his son then a minor.
53. In my view, the facts here and the evidence point to the appellant's father as occupying the position of a trustee, who abused his position and removed the respondent's late son's name from the title to the land in 1983, under unclear circumstances. Trust abhors misuse of the law and steps in to correct those out to enrich themselves unjustly.
54. In my view, I am unable to find how the trial court deviated from the pleadings and issues arising therefrom. The respondent had filed a list of five issues dated 4.12.2018. The appellant filed none. The appellant instead raised a preliminary objection under Section 7 of the *Limitation of Actions Act*, yet limitation of time does not apply in trusts as per section 41 thereof.
55. It is also the appellant who misapprehended the nature of trust pleaded in the plaint, as if it was customary trust based on ancestral land. It is the appellant, also in his written witness statement dated 19.9.2022, who introduced the issue of his late father inheriting the land from his grandfather. In paragraph 5 of the witness statement, which the appellant adopted as his evidence in chief, he was aware of the history of the land acquisition and registration by the respondent prior to 1983.
56. The respondent, in his final written submissions dated 11.10.2022 before the trial court, relied on *Nelly Chelimovs Grace Matelong* (supra), *Peter Gitonga v Francis Maingi M'Ikiara* [2007] eKLR, on court's consideration surrounding the registration of title to determine whether a trust was envisaged. The appellant, on the other hand, relied on written submissions dated 3.11.2022. On page 2, the appellant relied on the ingredients to found a customary trust as per *Isaack Kiebia M'Inanga vs. Isaya Theuri M'Lintari* (supra), which, in my view, demonstrates an apparent misapprehension of the pleadings, issues raised, evidence tendered and the law applicable.
57. In my considered view, the trial court looked at the pleadings, issues raised, evidence tendered, written submissions and the law. Evidence of a likelihood of bias has not been demonstrated in this appeal. The manner in which the trial court deviated from the pleadings and evidence tendered has not been



clarified, and errors of facts and law have not been substantiated in this appeal. Fabrication of the respondent's evidence was not substantiated.

58. On the contrary, it is the appellant who misconstrued the facts, issues, evidence, and the law applicable to the issues as derived from the cause of action that the respondent and his late father pleaded. The upshot is that I find the appeal both incompetent and lacking merits. The same is dismissed with costs.

Orders according.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 8TH DAY OF MAY, 2024

In presence of

C.A Kananu

Respondent

Igweta for the appellant

Gatwiri for Kiara for the respondent

HON. C K NZILI

JUDGE

