



**Libuku v Libuku (Environment and Land Appeal E037 of 2022)
[2024] KEELC 4126 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4126 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E037 OF 2022**

DO OHUNGO, J

MAY 8, 2024

BETWEEN

JAPHETH OKWIRI LIBUKU APPELLANT

AND

GEORGE AURA LIBUKU RESPONDENT

(Being an Appeal from the Judgment and Decree of the Senior Principal Magistrate's Court at Butere (Hon. B Ojoo, Senior Principal Magistrate) delivered on 16th August 2022 in Butere MCELC No. E017 of 2021)

JUDGMENT

1. Litigation leading to this appeal started in the Subordinate Court on 27th May 2021 when the appellant filed a plaint dated 29th April 2021 against the respondent. The appellant averred in the plaint that the respondent was the registered proprietor of land parcel number Kisa/Wambulisho/421 (the suit property) which was entrusted to the respondent to share equally with the appellant. The appellant further averred that the respondent refused to relinquish the appellant's share. He therefore prayed for judgment against the respondent for a declaration that the respondent held the suit property in trust for him, an order directing the respondent to transfer half of the suit property to him, costs of the suit and any other relief that the Subordinate Court deemed fit to grant.
2. The respondent filed a statement of defence dated 12th July 2021 in which he denied the appellant's allegations of trust and urged the Subordinate Court to strike out or dismiss the suit with costs.
3. Upon hearing the matter, the Subordinate Court (Hon. B Ojoo, Senior Principal Magistrate) delivered judgment on 16th August 2022 wherein she found no merit in the case and dismissed it with an order that each party bears own costs.



4. Dissatisfied with that outcome, the appellant filed this appeal on 31st August 2022 through Memorandum of Appeal dated 30th August 2022. He prayed that the judgment be set aside and that his case in the Subordinate Court be allowed. The grounds of appeal are as listed on the face of the Memorandum of Appeal.
5. The appeal was canvassed through written submissions. The appellant collapsed the grounds of appeal into two issues for determination: whether the suit property is ancestral land and whether the suit property is subject to customary trust in his favour. He further argued that the suit property was family land which devolved to the respondent from the parties' father who caused it to be registered in the respondent's name, and that it is therefore family or ancestral land. That the parties' father gave his parcels of land to his first born sons to hold for the benefit of other sons in line with the concept of intergenerational equity. The appellant relied on the case of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, and further argued that a son of Peter Libuku Saya (deceased) from his fourth wife, his relationship with the said family was not so remote as to make his claim idle or adventurous.
6. The appellant also argued that he could have been registered as an owner of the suit property had he been born prior to the process of land adjudication when their father caused the registration of all his parcels of land in the names of his first born sons. That their father's intention in dealing with his properties as he did leave no doubt that trust was created between the title holders and their younger siblings. The appellant also argued that all the first born sons of Peter Libuku Saya (deceased) shared their land with their younger siblings save for the respondent who conceded to never exclusively occupying the suit property. That having occupied a portion of the suit property since the year 2007, he had established customary law rights against the respondent. The appellant therefore urged this court to allow his appeal.
7. On the other hand, the respondent argued that the appellant did not present sufficient evidence to prove that there was customary trust in his favour as regards the suit property. That the Learned Magistrate did not therefore err in finding that customary trust was not established. The respondent further argued that the appellant failed to demonstrate that their father had any intention that the respondent holds the suit property in trust for the appellant. Relying on the case of *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR, the respondent argued that a trust can never be implied by the court unless there was a clear intention to create a trust. In conclusion, the respondent contended that the appeal is bereft of merit and urged the court to dismiss it with costs.
8. This being a first appeal, this court's mandate is as stated by the Court of Appeal in *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority vs Kustron (Kenya) Limited* 2000 2 EA 212.

9. I have considered the grounds of appeal, the pleadings, the evidence, and the submissions. The issues that arise for determination are whether trust was established and whether the reliefs sought ought to have issued.
10. The appellant's case as pleaded in his plaint was that the parties' father had the suit property registered in the name of the respondent with a view to the respondent sharing it equally with the appellant. In



other words, he contended that the respondent held a portion of the suit property in trust for him under customary trust.

11. The basic tenets of trust were outlined by the Court of Appeal in *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggat Ahmed Al-Heidy & Others* [2015] eKLR as follows:

... according to the *Black's Law Dictionary*, 9th Edition; a trust is defined as

“1. 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...” ...

Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. *Halsbury's Laws of England* vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. ...”

12. Pursuant to Section 28 (b) of the *Land Registration Act*, all registered land is subject to overriding interests including customary trusts, unless the contrary is expressed in the register.
13. Whether trust exists is a question of fact which must be proven through evidence. The key considerations in regard to customary trust are the nature of the holding of the land and intention of the parties. In *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, the Supreme Court stated 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 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.

14. From the material on record, it is apparent that the deceased had four wives and four parcels of land, each of which he had registered in the names of the respective first born sons of the different wives, to hold in trust for their younger siblings. Thus, the deceased's intention was that each house was allocated



a specific parcel which was to be shared within that house. The appellant is from the fourth house but is claiming the suit property which was reserved for the third house. Even though the appellant is basing his claim on what he says were the intentions of the deceased during his lifetime, the deceased's actions do not show any intention to create trust in favour of the appellant in respect of the suit property since he reserved the suit property for the third house.

15. Although the appellant is in occupation of a portion of the suit property, he only entered the portion in the year 2007, long after the deceased had passed away in the year 1982. He was not settled on the suit property by the deceased. In fact, he was born in 1978, long after the respondent became registered proprietor. I agree with the Learned Magistrate that the appellant did not establish customary trust and that he did not prove his case. In those circumstances, he was not entitled to the reliefs that he sought.
16. I find no merit in this appeal, and I therefore dismiss it. In view of the close family relationship between the parties, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 8TH DAY OF MAY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Appellant

Ms Anono holding brief for Ms Malanda for the Respondent

Court Assistant: M Nguyayi

