



REPUBLIC OF KENYA



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**Murithi & 6 others v Mwithimbu (Environment and Land Appeal
E082 of 2022) [2024] KEELC 3801 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3801 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E082 OF 2022**

CK NZILI, J

MAY 8, 2024

BETWEEN

SUSAN KATHAMBI MURITHI 1ST APPELLANT
TISILLA KARAMBU GICHOHI 2ND APPELLANT
SAMMY MWIRIGI 3RD APPELLANT
GATWIRI NANCY MURITHI 4TH APPELLANT
FAITH KAGWIRIA 5TH APPELLANT
PHILLIS KAROKI 6TH APPELLANT
LYDIA KENDI 7TH APPELLANT

AND

JUSTUS MURITHI MWITHIMBU RESPONDENT

*(An appeal from the judgment of Senior Resident Magistrate at Meru
(L.N Juma) in Meru ELC case No. E153 of 2021 delivered on 13.12.2022)*

JUDGMENT

1. The appellants, as the plaintiffs at the lower court, had sued their father for breach of customary trust over L.R No. Kibirichia/Ntumburi/406 by subdividing the same and threatening to dispose of it or evict them in favour of a second house, that they established upon the death of their mother. The appellants sought a declaration that the suit land was ancestral or family land held in trust for them and an order stopping any subdivisions, sale, transfer or dealing with it to their disadvantage.
2. The respondent filed a statement of defendant and counterclaim dated 2.2.2022, denying the alleged customary family or ancestral claim over the suit land registered under his name. he averred that he was legally married to the second wife with no desire to dispose of the land as alleged or at all. Further,



the respondent averred that he single-handedly acquired the suit land out of his means as a former police officer after he left his ancestral or family land, namely L.R No. Abothuguchi/Githongo/131, registered in the name of his brother. The respondent averred that his son, though old enough, was lazy and unwilling to look for their land.

3. By way of a counterclaim, the respondent averred that despite the and being his acquisition, he had subdivided it and gifted each of the appellants a share who then became greedy and unwilling to let his wife acquire her share. He counterclaimed for an eviction of the appellants from his land and a permanent injunction stopping them from accessing or interfering with it.
4. At the trial, Sammy Mwirigi testified as PW 1 and adopted his witness statement dated 23.12.2021 as his evidence in chief. He told the court that his father, the respondent, was 90 years old and acquired the suit land from his grandparents as ancestral or family land. PW 1 told the court this father, as a police officer used to work away from home and that it was their late mother who helped in acquiring the land. He said all of them had lived on the land since the 1960s where, with the permission of their parents, have all built permanent homes therein.
5. PW 1 further, said the dispute arose after their mother passed on on 30.12.2017, after which the father married a young lady who had taken advantage of the respondent's advanced age and wanted to sell the land and relocate elsewhere.
6. PW 1 said his father turned violent and has been threatening to evict them from the land. He said that the appellants lodged a caution over the title register, but the land registrar threatened to lift it in the absence of a court order. PW 1 relied on a copy of an official search bundle of photographs and letters dated 24.8.2021, 7.9.2021, 25.3.2019, 24.8.2021 and 7.12.2021 as P. Exh No's. 1-6, respectively.
7. In cross-examination, PW 1 told the court the land belonged to the Olyaga Clan, though he has not listed the clan officials as some of his witnesses, for he considered their evidence as unnecessary to the suit. PW 1 also acknowledged that he was not present during the adjudication stage, nor were his uncles and aunties privy to or claimants for the land. PW 1 denied that the ancestral land was situated in the Githongo area since he has all along lived on the Ntumburi land. He said his late mother told him initially they lived in the Kibirichia area until the late Jackson Angaine evicted them to move to the current land, which his late mother, as a wife of a police officer, was allocated to her but was registered under the respondent's name. While admitting that a meeting took place at the chief office, PW 1 denied that the respondent was involved then in the alleged subdivision of the land. He denied that he was opposed to her stepmother acquiring a share of his late mother's land.
8. Justus Murithi Mwithimbu testified as DW 1 and adopted his witness statement dated 2.2.2022 as his evidence in chief. He told the court that his ancestral home is situated in Gikuure village bearing L.R No. Abothuguchi/Githongo/131 as per the green card, where he was born in a family of 8 children. Since it was too small for the said children, DW 1 told the court that in 1960, he was working as a police officer and through the assistance of Jackson Angaine, the then minister for land, he successfully applied for and was allocated government land in Ntumburi area now the suit land. He said he paid for the requisite fees and was eventually registered as the owner after balloting.
9. D.W. 1 said all his brothers except Rimberia Mwithimbu left the ancestral land and decided to look for alternative land. He said the appellant should look for their parcels of land even though he had gifted them some shares out of his land following a meeting at the chief's office. Also, DW 1 said that while subdividing the land, the appellants rushed to court and obtained inhibition orders hence stalling the process. Additionally, DW 1 termed the appellants as lazy, greedy and selfish, for they did not wish to respect his wish to share the land in favour of his second wife.



10. DW 1 told the court that if the appellants were not satisfied with his offer, then they should vacate his land. He urged the court to grant him eviction and injunctive orders. In support of his defence and counterclaim, the respondent produced a copy of the green card for L.R Kibirichia/Ntumburi/406, Abothuguchi/Githongo/131, minutes for the family at the chief's office, and a mutation form dated 18.6.2021 as D. Exh No's. 1-5.
11. In cross-examination, DW 1 told the court he acquired the suit land between 1960 – 1961 and stayed therein with his first wife and the children, who have also established permanent homestead for their own families therein. DW 1 confirmed that following the chief's meeting, he willingly agreed to share the land with his children, with each getting one acre of the land for the girls while the boys were entitled to two acres each.
12. Solomon Mwirichia Mwithimbu, Japheth Nteere Mutungi and Rosa Gacheri testified as DW 2 – 4, respectively and adopted witness statements dated 2.2.2022 as their evidence in chief. All were in agreement that the suit land was acquired solely by the respondent and was different from his ancestral/family or clan land in the Githongo area. In particular, D.W. 2, a brother of the respondent, was emphatic that the ancestral land was solely left for Rimberia M'Ithimbu.
13. With the close of the defence case, the trial court delivered its judgment and found no merits in the suit, triggering this appeal. The appellants have listed eight grounds of appeal. In summary, the appellants fault the trial court for:
 - i. Failing to find that they had proved the claim for trust based on long occupation.
 - ii. For misapplying the law and principles on customary trust.
 - iii. For holding that the appellants were forcefully attempting to get inheritance from the respondent when they had not made any claim for transfer of the land in their favour.
 - iv. For failing to appreciate that the appellant wanted the family land preserved while still in the land of the respondent.
 - v. For failing to appreciate the respondent's advanced age and his capacity to make sound decisions.
 - vi. For failing to appreciate the appellant's documents and evidence in support of their case.
14. With leave of court the appellants relied on written submissions dated 22.2.2024. On whether the appellants proved customary trust. It was submitted Sections 25(1) & 28 of the *Land Registration Act* provide their claim as an overriding rights as held in *Kiebia M'Inanga vs Isaaya Theuri M'Lintari* (2018) eKLR and *Kanyi vs Muthiora* (1984) KLR 712. In this, it was submitted that the elements governing customary trust were not given the manner in which they were brought up on the suit land and were allowed to put up permanent buildings.
15. The appellants submitted under Sections 107-109 of the *Evidence Act* that the respondents failed to prove that L.R No. Abothuguchi/Githongo/131 was ancestral land.
16. An appellate court of the first instance is to relook at the entire record of appeal with a fresh perspective and come up with independent findings as to facts and the law while taking into consideration that the trial court had the benefit of seeing and hearing the witnesses first hand. See *Selle vs Associated Motor Boat Co. Ltd* (1968) E.A 123. In *Kiruga vs Kiruga* and another (1988) KLR 348, the court said an appellate court cannot substitute its factual findings with that of a trial court unless there was no evidence to support the finding or unless the judge can be said to be plainly wrong.



17. In this appeal, the appellants claimed that as children of the respondent, they were entitled to the suit land, that the respondent had breached the customary or family trust, and therefore, there was a need for the court to step in and declare the land as ancestral or family and to stop any adverse dealings with it by the respondent.
18. The respondent pleaded that the suit land was not family or ancestral and that the appellants were greedy and ungrateful since even though he solely acquired the land, he had gifted the children some shares, which were disputed and interfered with his rights to share it out with his 2nd wife. The respondent had also counterclaimed for eviction and stoppage of the appellants from interfering with his rights to the suit land.
19. It is trite law that parties are bound by their pleadings, and issues flow from those pleadings. The record of appeal filed by the appellants does not contain any reply to the defence and defence to the counterclaim by the respondent dated 2.2.2022. See *Doge vs Kenya Cannery Ltd* (1985) eKLR. Order 2 Rule (6) of the Civil Procedure Rules prohibits parties from departing from their pleadings. See *IEBC & another vs Muitnda Mule & others* (2014) eKLR.
20. Additionally, a party may not raise new issues that were not raised in the primary suit on appeal without leave of court. See *Mohammed Abdi Mohamad vs Ahmed Abdullahi Mohamed & others* (2018) eKLR. The appellants herein failed to challenge the defence and the counterclaim by the respondent before the trial court. A counterclaim is a cross-suit. The respondent had pleaded that the suit land was not ancestral land, unlike L.R No. Abothughuchi/Githongo/131.
21. The issues contained in grounds numbers 4, 6 & 7 of the memorandum of appeal were not pleaded by the appellants as an answer to the respondent's statement of defence and counterclaim meant that the failure to defend the counterclaim by the appellants. The evidence led by the respondent substantiated the contents of his statement of defence, and the counterclaim remained unchallenged. In *Daniel Toroitich Moi vs Mwangi Stephen Murithi & another* (2014) eKLR, the court said that even where a defendant has not denied the claim by filing a defence, formal proof of proceedings is conducted. Therefore, the trial court must examine the evidence tendered by a claimant to prove his or her claim. In this appeal, the respondent defended the claim based on customary trust and counterclaimed for the suit land.
22. A party seeking customary trust, as held in *Kiebia M'Inanga vs Isaac Theuri* (supra), has to prove that the land before registration was family, clan or group land, that he belongs to such family, clan or group, the relationship is not remote or tenuous; that he could have been entitled to be registered as the owner but for some intervening circumstances and that the claim is directed against a registered proprietor who is a member of the clan, family or group.
23. In this appeal, it is not in dispute that the appellants are the children of the respondent who have been occupying and developing the suit land as a result of their relationship with the respondent. The appellants had averred and testified that the respondent had breached the customary trust and was threatening to dispose of and evict them from the land they have known as home for over 60 years.
24. The onus was on the appellants to lead evidence that the suit land before registration was a family, clan or group land. A copy of the search produced as P. Exh No. (1) showed that the land became registered under the respondent's name on 30.7.1991. Apart from the letters written to the land registrar to register a caution, no evidence was led over the history of the suit land by the appellants to sustain their assertion that the respondent's rights were subject to ancestral clan or family overriding rights.



25. Evidence led by the respondent, his witnesses and documents was consistent that the respondent solely acquired the suit land after he left the ancestral /family land, namely L.R No. Abothuguchi/Githongo/131, which was acquired on 3.4.1963 by his brothers Rimberia and Mwithimbu.
26. The appellants did not challenge D. Exh No's 1 – 6, which showed the history of the suit land and how the respondent magnanimously sought to gift the appellants some share of his land as per a mutation form dated 14.6.2021. The evidence by the respondent on the circumstances in which the appellants came to occupy his land was not challenged. DW 1 testified that the appellants were licensees to his land. The respondent, as an absolute owner of the land has all the rights to deal with his land the way it pleases him.
27. A parent has no legal duty to share his land with his children. The appellants had purely pleaded customary trust. They did not plead either a resultant or constructive trust. No material was brought to show that the respondent had breached any customary trust. If anything, the mutation form is clear that the respondent was willing to regularize the appellants' occupation of his land. The appellants did not tender evidence of an impending eviction, transfer or disposal. The mutation form and the minutes at the chief's office are clear on the intention of the respondent in subdividing the land in favour of himself and his children. There is nothing to show that in undertaking the subdivision, the respondent owed or promised the appellants anything, but he has now breached such a promise. There is no evidence that the respondent is unjustly dealing with his land to the detriment of the appellants. See *Twalib Hatayan Twalib Hatayan & another vs Said Saggar Ahmed AL Heidy & others* (2015) eKLR.
28. The onus was on the appellants to lead evidence showing that there was an intention of trust in the registration of the land in the first instance. See *Peter Ndungu Njenga vs Sophia Watiri Adungu* (2000) eKLR. The intention of the parties to create a trust must be clearly determined before a trust is implied. The appellants did not plead constructive trust and proprietary estoppel. The two cannot be raised at the appellate stage without leave of court and evidence in support thereof. It may be true that the appellants may be beneficial owners of the land. However, that right has not accrued and cannot be enforced against the respondent, or he can be compelled during his lifetime to do so.
29. In *Jane Wanjiru Kiarie & another vs Maria Wanjiku & another* (2008), eKLR daughters had sued their father and stepmother in similar circumstances as in the instance case. A statement of defence and counterclaim had been filed seeking an eviction based on no colour of right to occupy the land or seek resettlement. Construction had occurred on the land with the consent of the stepmother and father. Disposal of the land during the occupation had occurred out of an alleged influence of the older man by the stepmother, yet a beneficial interest was in existence. The marriage to a young wife was alleged to have occurred so as to defeat the children's rights and render them destitute. Elders had also met to reach an amicable settlement. The trial court termed the suit as raising issues of social and economic justice and whether children have a beneficial interest in their parent's parcel of land on occupation. The court held it would be unconscionable and against the letter and spirit of the law that guarantees the fundamental right to life to evict the daughters in occupation and perpetuate an injustice likely to contribute to the increase of poverty. The court further held that the children had a legitimate expectation that they had a beneficial interest in the family land.
30. In this appeal, there is evidence of a valid agreement at the chiefs office followed by a valid mutation form signed by the respondent to gift the appellants a share of his land. The justice of this matter would demand that the intentions of the parties and especially the respondent be upheld and or enforced. It would be unconscionable for the respondent to renege on his promise to confirm and resettle the appellants on his land.



- 31. My view is that the respondent, in essence, admitted the appellant's claim in his statement of defence. I would, in the circumstances, guided by Article 159 of *the Constitution* encourage alternative dispute resolution, allow the appeal and order that the parties proceed to actualize the agreement signed before the area chief and follow up through the mutation form.
- 32. The appellants shall meet the cost of the subdivisions and transfers. In the event the respondent defaults to sign the transfers within two months from the date hereof, the Deputy Registrar of the court shall execute them. There will be no orders as to costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU*
ON THIS 8TH DAY OF MAY, 2024**

HON. C K NZILI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In presence of

C.A Kananu

Mugo for applicant

Gatwiri for Kimathi for respondent

