



**Mwobobia & 2 others v Thurania (Environment and Land Appeal E019 of 2020) [2023] KEELC 632 (KLR) (8 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 632 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E019 OF 2020**

**CK YANO, J**

**FEBRUARY 8, 2023**

**BETWEEN**

**PATRICK MWOBOLIA ..... 1<sup>ST</sup> APPELLANT**

**JOTHAM MUTHOMI THURANIRA ..... 2<sup>ND</sup> APPELLANT**

**JOYCE WANJA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**RUTH MUGURE THURANIRA ..... RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. The appellants herein moved the trial court vide a plaint dated June 6, 2018 and which was amended on September 9, 2019 in which they sued the respondent and their late father M’ithuranira M’rimbere (Deceased) who was the 1<sup>st</sup> defendant claiming for judgment as follows;
  - i. An order for cancellation of subdivisions land parcel No Nkuene/Uruku/2276, 2277, 2278 and 2279 and have them reverted to the land parcel Nkuene/Uruku/452 in the name of the 1<sup>st</sup> defendant.
  - ii. An order of permanent injunction restraining the defendants from interfering with the plaintiff’s occupation and interest within land parcels No Nkuene/Uruku/2276, 2277, 2278 and 2279 the resultant sub divisions of land parcel Nkuene/UrukI/452.
  - iii. Costs of this suit and interests.
  - iv. Any other relief this Honourable court may deem fit to grant.
2. It was pleaded that the deceased, who was the father to the 1<sup>st</sup> and 2<sup>nd</sup> appellants and the respondent herein and father in law of the 3<sup>rd</sup> appellant, was the original owner of land parcel LR No Nkuene/



Uruku/751 and Nkuene/Uruku/452 which are family land and were registered in the name of the deceased as a trustee for himself, the appellants, the respondent and other family members. That the deceased in compliance with the implied customary trust, registered land parcel LR No Nkuene/Uruku/751 in the name of the respondent on July 18, 2005 and was left with land parcel LR No Nkuene/Uruku/452 intended for the appellants.

3. The appellants pleaded that in breach of the trust, the deceased and the respondent proceeded and subdivided land parcel LR No Nkuene/Uruku/452 into four portions, namely Nkuene/Uruku/2276, 2277, 2278 and 2279 and had subdivision No 2278 registered to the respondent who had earlier been given the whole of land Parcel LR No Nkuene/Uruku/751. The appellants listed particulars of breach of trust and accused the respondent of manipulating the deceased to subdivide the original parcel of land and causing subdivision of LR No 2278 registered in her name, thus ending up with two parcels of family land and leaving the appellants with no land.
4. The respondent filed a defence and counterclaim dated September 27, 2019 wherein she denied the averments in the amended plaint. The respondent averred that she was the registered owner of land parcels LR No Nkuene/Uruku/2278 and LR No Nkuene/Uruku/751 having been bequeathed the same by her deceased father.
5. In the counterclaim, the respondent prayed for orders that the appellants be ordered to vacate from land parcel Nos Nkuene/Uruku/451 and 452 and for the appellants to be stopped from unlawfully using the said parcels of land. The respondent also wanted the appellants to pay the costs of the suit and of the counterclaim.
6. During the pendency of the suit, the late M'thuranira M'rimbere passed on and the plaint was amended to have his name removed as a party in the suit.
7. The suit in the lower court was set down for hearing and the trial court delivered its judgment on December 7, 2020, whereby the court dismissed the appellants suit and allowed the respondent's counterclaim and ordered the appellants to vacate from the suit parcels LR No Nkuene/Uruku/452 and Nkuene/Uruku/227 within 30 days from that date failure to which they would be evicted. The court further granted the respondent an order of permanent injunction against the appellants as well as costs of the suit and the counter claim.
8. The appellants were aggrieved by the said judgment and filed the appeal herein. In the memorandum of appeal dated December 23, 2020, the appellants have set forth the following ten (10) grounds of appeal-;
  - i. That the learned trial magistrate erred in law and in facts by failing to find that the appellants had proved their claim of breach of trust against the respondent on a balance of probabilities.
  - ii. That the learned trial magistrate erred in law and in fact by failing to find that the respondent had admitted that the subject matter land is family and trust land.
  - iii. That the learned trial magistrate erred in law and in fact by failing to find that the appellants' and the respondent father, M'thuranira M'rimbere, ( deceased) had in his lifetime settled each of his children on their portions of land prior to the impugned subdivision of land parcel No Nkuene/Uruku/452 and subsequent transfer of land parcel No Nkuene/Uruku/2278 to the respondent.
  - iv. That the learned Trial Magistrate erred in law and in fact by failing to find that the respondent took advantage of M'thuranira M'rimbere ill health and advanced age as at the time of carrying out the sub division of land parcel NoLR Nkuene/Uruku/452 and had the land sub-divided in



a skewed manner so as to dispossess the appellants where they have lived, utilized and developed all their adult lives.

- v. That the learned trial magistrate erred in law by failing to find that M'thuranira M'rimbere (deceased) had intended that land parcel Number Nkuene/Uruku/452 benefits the appellants as the respondent had already benefited from land parcel number Nkuene/Uruku/751 which was also family land and the appellants had not benefited from any family land.
  - vi. That the learned trial magistrate erred in law and in fact by disregarding cogent evidence by the appellants that M'thuranira M'rimbere had been entrusted with the family land and the same was registered in his name as a trustee for himself, the appellants and respondent.
  - vii. That the learned trial magistrate erred in law by finding that the appellants ought to be evicted from the suit parcel of land yet they have nowhere else to go and the same will only render them homeless and destitute and the respondent will have the whole family land on her own.
  - viii. That the learned trial magistrate erred in law by finding that the claim for customary trust could not proceed for failure to substitute the 1<sup>st</sup> defendant, M'thuranira M'rimbere
  - ix. That the learned trial magistrate erred in law and fact in failing to consider and or disregarding the appellants' submissions on record.
  - x. That the learned magistrate's decision is against the weight of evidence before the court.
9. The appeal was canvassed by way of written submissions. The appellants filed their submissions dated September 14, 2022 through the firm of Gichunge Muthuri & Co. Advocates while the respondent filed hers dated October 26, 2022 on October 31, 2022 through the firm of B.K Kariuki & Co. Advocates.

### **The Appellants' Submissions**

10. The appellants gave brief facts of the case and submitted that it is not in dispute that land parcel LR No Nkuene/Uruku/452 was the parent suit land and that one of the resultant subdivisions LR No Nkuene/Uruku/2278 is registered in the names of the respondent, that the other subdivisions LR Nos Nkuene/Uruku/2276, 2277 and 2279 are still registered in the name of their late father and that the respondent is the registered owner of land parcel LR No Nkuene/Uruku/751.
11. On whether the suit land was held in trust by their deceased father, the late M'thuranira M'rimbere the appellants relied on the case of *Isack Kieba M'Inanga vs Isaaya Theuri M'Lintari & another* Supreme Court of Kenya No 10 of 2015 and submitted that they have proved their requirements therein in which the supreme Court held that:

“ ... 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 Vs 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-;

- a. The land in question was before registration, family, clan or group land,
- b. The claimant belongs to such family, clan or group,



- c. 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,
  - d. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances, and,
  - e. The claim is directed against the registered proprietor who is a member of the family, clan or group.”
12. The appellants further relied on the case of *Mbui Mukangu vs Gerald Mutwiri Mbui* CA No 281 of 2000 wherein the court stated “that for one to establish a claim in customary trust, one had to prove that they are in actual physical possession or occupation of the parcel of land” and submitted that they have been in occupation and use of LR No Nkuene/Uruku/452, and the resultant subdivisions land parcel LR Nos Nkuene/Uruku/2276, 2277, 2278 and 2278 and have permanent abodes thereon. That the respondent has never been in occupation or use of land parcel subdivision LR No Nkuene/Uruku/2278 as she is the registered owner of land parcel LR No Nkuene/Uruku/751 which she utilizes solely.
13. The appellants further submitted that with no evidence proving that the respondent had bought the resultant sub-division LR No Nkuene/Uruku/2278 from their late father, the respondent manipulated the deceased to transfer the land to her due to greed and selfishness. It is therefore the appellants’ submissions that the respondent was in breach of trust and they relied on the case of *Juletabi African Adventure Limited & another vs Christopher Michael Lockley* (2017) eKLR in which it was held that “it is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence.”
14. The appellants submitted that the evidence brought before the trial court had proven that the land parcel LR No Nkuene/Uruku/452 is trust land to be subdivided equally amongst the appellants to the exclusion of the respondent who already had family land parcel LR No Nkuene/Uruku/751 gifted and transferred to her and urged the court to allow the appeal, set aside the judgment of trial court and allow their claim as prayed.

### **The Respondent’s Submissions**

15. The respondent also gave brief facts of the case and submitted that trust is a question of fact which must be proved by whoever is claiming a right under customary trust. It is the respondent’s submission that the appellants did not establish the existence of a trust over parcel LR No Nkuene Uruku/452. The respondent counsel relied on the case of *Felista Muthoni Nyaga vs Peter Kayo Mugo* [2016] eKLR, *Susan Gacheri Mugambi Vs Maureen Florence Kagwiria & 2 others* [2016] eKLR, and *Alice Wairimu Macharia vs Kirigo Philip Macharia* [2019] eKLR
16. The respondent submitted that the appellants did not tender any evidence to prove that indeed the deceased was holding the land in question in trust for them. That the appellants produced green cards for the two parcels of land which clearly showed that the deceased M’thuranira M’rimbere was the first registered owner of the two parcels of land and that the appellants claim to have been in actual possession or occupation of the suit land is not enough evidence to prove the existence of trust. It is the respondent’s submissions that the appellants did not discharge the burden of proof as reiterated by the Supreme Court in *Isack M’Inanga Kiebia Vs Isaaya Theuri M’Lintari & another* [2018] eKLR
17. The respondent submitted that the deceased was the absolute and indefeasible owner of the suit land and as a registered owner, he was free to deal with his property as he wished, including transferring the same to the respondent or any other person. The respondent argued that the uncontroverted evidence



on record is that the deceased subdivided land parcel LR No Nkuene/Uruku/452 into four (4) resultant subdivisions known as Nkuene/Uruku/276, 2277, 2278 and 2279 and that the subdivision was done in consideration of each of the appellants' occupation and developments. That the deceased only transferred parcel No Nkuene/Uruku/2278 to the respondent being the portion that he had constructed his homestead and was utilizing to cater for his needs and that the other three subdivisions No 2276, 2277, and 2279 which are occupied by the appellants remained in the name of the deceased. The respondent submits that the appellants ganged up against her after the demise of their father and expelled her from land parcel No Nkuene/Uruku/2278 and proceeded to take possession of her tea bushes and have been using the same forcefully.

18. Regarding the issue whether the respondent was in breach of trust, the respondent submitted that the appellants did not adduce any evidence to prove that the deceased did not have mental capacity to make his own decisions or that the respondent unduly influenced the deceased to transfer the said parcels of land to her. Also that the appellants did not produce any medical evidence to support their assertions as to the senility of the deceased's mind.
19. The respondent pointed out that the suit was instituted while the deceased was still alive but after his demise, the appellants sought leave to amend the plaint so as to substitute the deceased, but proceeded to strike out his name in their amended plaint leaving the respondent as the only defendant. The respondent submits that the claim on the existence of customary trust against the deceased abated by operation of the law at the lapse of one year after the death of the deceased under Rule 4(3) (sic) of the *Civil Procedure Rules*.
20. The respondent submits that she was not the original registered owner of the land which the appellants are claiming trust neither was she the personal representative of the deceased nor trustee of the suit land and as such the claim on existence of customary trust could not continue against her. The respondent further submits that she couldn't be held liable for breach of trust which did not exist and that any claim of breach of trust would only have been maintained as against the deceased.
21. The respondent therefore prays for dismissal of the appeal with costs and that the judgment appealed against be upheld in terms that the appellants be ordered to vacate the respondent's parcel of land No Nkuene/Uruku/2278.

### **Analysis and determination**

22. I have considered the record of appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-asses and re-analyze the evidence on record to determine whether the conclusions reached by the learned magistrate were justified on the basis of the evidence and the law. In *Selle and another vs Associated Motors Boat co. Ltd & others* (1968) EA 123, this principle was enunciated thus:

“...this court must consider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence...”

23. It was also held in *Mwangi vs Wambugu* (1984) KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such findings is based on no evidence or on a



misapprehension of the evidence or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

24. The issue for determination in this appeal as I can deduce from the grounds of appeal are;
- i. Whether the suit land was held by the deceased in trust.
  - ii. Whether the respondent was in breach of the said trust.

#### **Whether the suit land was held by deceased in trust**

25. From the material on record, it is not in dispute that the appellants initially sued the deceased and the respondent. After the demise of the deceased who was named as the 1<sup>st</sup> defendant, the appellants sought leave of the court to amend the plaint so as to substitute the deceased and which leave was granted. However, and as clearly observed by the trial court, the appellants never substituted the said deceased but only struck out his name. This left only the respondent herein as the defendant in the case.

26. Order 24 rule 4(1) of the [Civil Procedure Rules](#) provides as follows-;

“Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit” Rule 4 (3) provides that “where within one year no application is made under sub rule (1) the suit shall abate as against the deceased defendant”

27. In this case, the record indicates that the trial court was notified of the demise of the 1<sup>st</sup> defendant who is now deceased on July 12, 2019. Therefore, as correctly found by the trial court, the claim against the said defendant lapsed as at July 12, 2020. It is also trite law that a claim cannot proceed in court against a deceased person without the substitution of such deceased with his estate. The claim of existence of customary law trust against the deceased is a claim which could not survive or continue against the respondent herein since she was not the registered proprietor of the land in which trust was being claimed against the deceased. Therefore in my view and as correctly found by the trial court the failure to substitute the deceased meant that the claim against him on holding the suit land in trust, abated at the lapse of one year after the demise of the deceased. Further, because the respondent was not a trustee on behalf of the deceased nor a personal representative of the estate of the deceased, the claim based on trust could not be sustained against her. It is therefore my finding that the conclusion reached by the learned trial magistrate on this issue were justified on the basis of the evidence and the law and I find no basis to interfere with it.

#### **Whether the respondent was in breach of trust**

28. In this case, it is not in dispute that the original parcel of land was in the name of the deceased. The appellants alleged that the respondent took advantage of the deceased's old age and senility to manipulate him to subdivide land parcel No Nkuene/Uruku/452 and have subdivision No Nkuene/Uruku/2278 registered in her name. I have carefully perused the material on record. The appellants did not adduce any evidence to prove that the deceased did not have the mental capacity to make his own decisions or that the respondent unduly influenced the deceased to transfer the land to her. There was no medical documents to support the appellants' assertions as to the senility of the deceased. As the registered owner of the parcels of land in my view the deceased had indefeasible title and right to subdivide the land and transfer part thereof to any person including the respondent, whether for a



consideration or even as a gift. In this case, the deceased made an inter vivos gift to the respondent and since trust had not been proved, the appellants submissions on breach of trust against the respondent cannot stand. In my view, the appellants did not discharge their burden to prove the existence of customary law trust as outlined by the Supreme Court in *Isack M'Inanga Kieba vs Isaaya Theuri M'Lintari & another* (supra). The burden of proving that the suit parcels of land were ancestral or family land and that the deceased was registered as proprietor thereof in trust squarely lay on the appellants. However, from the evidence on record, the appellants in my view, failed to discharge that burden of proof.

29. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am satisfied that the learned trial magistrate was justified in arriving at the decision he made. The findings and holding of the trial magistrate were well founded and I find no basis to interfere with it.

30. In the result, I find no merit in the appellants' appeal and the same is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MERU THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2023**

**In presence of**

**Court assistant –Kibagendi**

Gichunge for appellants

Ms Mbubuya for respondent

**C.K YANO**

**ELC JUDGE**

