



REPUBLIC OF KENYA



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**M'Karichia v Nkarichia (Environment and Land Appeal E017 of 2022)
[2023] KEELC 426 (KLR) (1 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 426 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E017 OF 2022**

CK NZILI, J

FEBRUARY 1, 2023

BETWEEN

STANLEY KAUNGA M'KARICHIA APPELLANT

AND

THIAINE NKARICHIA RESPONDENT

*(Being an appeal from the Judgment/Decree of the Hon. P.M Wechuli
(SRM) in Tigania PM ELC Case No. 191 of 2015 dated 13th January, 2022)*

JUDGMENT

1. By a memorandum of appeal dated March 25, 2022, the appellant who was the defendant in the trial court has complained about the judgment delivered on January 13, 2022 on the grounds that; the trial court erred in finding that there was in existence a customary trust in favour of the respondent; failed to recognize his proprietary rights over the suit land; shifted the burden of proof on him; determined unpleaded issues and lastly, made a decision that was bad in law and facts.
2. This being a first appeal the court is mandated to rehearse, rehear and or re-evaluate the pleadings, evidence tendered and the law in order to come up with its own independent findings as to fact and law while giving allowance to the fact that the trial court saw and heard the witnesses first hand. See *Abok James Odera T/A J Odera & Associates v John Patrick Machira T/A Machira & Co Advocates* (2013) ekLR, *Selle & another v Associated Motor Boat Company Limited* (1968) EA 123 and *Peters v Sunday Post Limited* (1958) EA 424.
3. The claim by the respondent at the primary court came by way of a plaint dated June 7, 2012. The respondent had sued his elder brother, the two being sons of the late William Nkarichia said to have passed on in 1970. He averred that their mother, one Sarah Kangai Nkarichia, gathered the family land prior to the adjudication process where her late husband had settled her before his demise but directed



the respondent as her elder son to go and register in her name but instead registered it under his name as LR No Kianjai/Thau/283 and acquired a title deed in 1979.

4. It was averred that the appellant held the suit land in trust for himself and other family members including the respondent until some resultant sub-divisions namely LR No's Kianjai/Thau/881 & 882 were affected. The respondent averred that the whole family of the respondent and his mother continued living on the suit land and had affected several developments thereon including coffee plants, rearing of cattle, four semi-permanent houses, toilet, assorted natural trees and fruit trees. The respondent averred that at a family meeting held on January 27, 2001, the appellant was directed to subdivide and transfer the land but declined which was contrary to the existing Ameru customary trust.
5. Therefore, the respondent prayed for a declaration of the customary trust over the original parcel and its resultant subdivisions; an order compelling the appellant to sub-divide and transfer half share of the suit land and a permanent injunction/inhibition restraining the appellant from in any way whatsoever dealing with the suit parcels. The plaint was accompanied by a list of witnesses, witness statements and documents dated June 7, 2012, supplementary list of witnesses dated July 13, 2017 and a further list of witnesses and witnesses' statements dated March 21, 2020.
6. Through a defence dated July 4, 2012, the appellant denied the claim stating that Thau area was a new settlement area and stated that the suit land was never gathered by either their mother or the respondent, hence it could not possibly be a family land or capable of creating the alleged customary trust. Further, the appellant in the alternative pleaded that he acquired the land as "Ngwato" since the area was not settled but had just been set aside as a settlement area by the county council of Meru, previously a grazing area with no habitation by anyone.
7. The appellants averred that upon acquisition of the land he put all the necessary fence marks and looked for the respondent's mother to stay there in guard after she was kicked out of her matrimonial home and was uncomfortably living in other people's homes. The appellant went on to plead that he had agreed with his deceased brother and the respondent to exchange the suitland with some other family parcels of land at Uringu which the deceased obliged but the respondent out of greed, failed to honour the promise despite the resultant subdivisions of LR No 283 to enable the respondent to transfer half of the suit land to his brother's deceased widow. The defence was accompanied by a list of witnesses, witness statements and a list of documents dated July 9, 2012.
8. In a reply to defence dated July 11, 2012, the respondent averred that the suit land belonged to their deceased father which was never a "Ngwato" or "Kuwata" allegedly acquired or exclusively belonging to the appellant.
9. At the hearing the respondent testified as PW 1 and adopted his witness statement dated June 7, 2012 as his evidence in chief. He stated that his late father who had five wives passed on in 1970 but had gathered the said land in 1947 at Mituntu area which became their family Mburago land until he built a house for his mother in 1968. The respondent told the court that the demarcation process started a year after his father had passed on and their mother gave the appellant the gathering book to go and register the land under the deceased father's name but instead of putting his mother's name, the appellant put his own name, which was discovered after the title deed came out in 1979.
10. The respondent continued to state that he together with their mother and her family have lived on the suit land for over 44 years including his later brother Nathan Mutuma and have made permanent developments therein. The respondent testified that the subdivisions were done without his knowledge and that in 2001 the family met, deliberated and agreed on the subdivisions but the appellant later on refused to implement the decision. PW1 averred that the appellant merely proposed to give 2 ½ acres of the land to his deceased brother's widow and to remain with the balance yet the appellant lives in



- another family land at Malibi. He produced the copies of register for the suit parcels as P Exh No 1, chief's letter dated April 24, 2012 as P Exh No (2), an affidavit dated June 6, 2000 by the mother as P Exh No (3), family meeting minutes dated January 27, 2001 as P Exh No (4), copies of a caution as P Exh No (5) and a demand letter dated May 22, 2012 as P Exh No (6) respectively.
11. In cross examination PW 1 said that his late father used to stay with his family on the suit land while the appellant as the elder brother was living elsewhere. PW1 testified that though the land was registered in the appellant's name, he had to share the same as directed by the clan elders. PW 2 was Nathan Meme M'Imathiu. He adopted his witness statement dated March 12, 2022 as his evidence in chief and confirmed that the respondent was the one in occupation of the land which was gathered by their late father. PW 3 adopted his witness statement dated December 4, 2020 associating his evidence with that of PW 2.
 12. Lucy Kinyangi, the senior chief Thau location, was PW 4. She confirmed that the respondent and his witnesses were her subjects unlike the appellant who hailed from Uringu side. PW4 confirmed that the respondent's late mother and brothers were buried on the suit land which was occupied by the respondent and his sister in law. PW 4 confirmed the family meeting was attended by chief M'Thiringi, her predecessor, who wrote the minutes. She said that she knew the land as belonging to the parties' parents now deceased and was ancestral land.
 13. The appellant testifying as DW 1 adopted his witness statement dated June 25, 2012 as his evidence in chief. His evidence was that their late father passed on in 1970. He claimed to have acquired the land as "Ngwato" in 1961, took vacant possession and brought his step mother, the mother of the respondent to guard the land, following which during the gathering in 1975, the land was recorded under his name. Later on, he said that he acquired a title deed in 1990. DW1 admitted that the respondent had been living on the land alongside his children and wife since 1965. DW 1 acknowledged entering into an agreement dated September 24, 2011 with his deceased brother's wife to exchange the land with LR No 1742/ Uringu/Adjudication section which was objected to by the respondent.
 14. The appellant stated that the respondent had his own land LR 1845/4090 Uringu/Adjudication section and another portion of land in Rei area hence the suit land was not the only ancestral land. DW1 confirmed that LR No 283 had been closed for subdivisions in LR 881 and 882 measuring 2.60 acres and 1.85 acres respectively. DW 1 produced the formal location plan as D Exh No (1), family meeting on September 26, 1995 minutes as D Exh No (2), title deed for LR No 283 as D Exh No (3), proceedings and decision of the adjudication committee as D Exh No (4), fees payment as D Exh No (5), his affidavit as D Exh No (6), exchange agreement as D Exh No (7), report of the land dispute as D Exh No (8), family minutes for January 27, 2001 as D Exh No (9) and copies of register for LR No 283 as D Exh No (10).
 15. In cross examination, DW 1 admitted that the respondent's late mother used to stay in the disputed land since 1965 and had a permanent homestead therein alongside the respondent and his sister in law. He also said that six of his relatives were buried therein. DW 1 also admitted that the appellant was not living on the suit land and that after a family meeting it was agreed he shares the family land.
 16. DW 2 a brother of the two parties adopted his witness statement dated June 23, 2012. He acknowledged the developments and occupation by the respondent on the suit land DW 3 was Thurania Stanley Kaume. He admitted that the suit land was occupied by the respondent, his sister in law and previously by their late mother before she passed on. Achiata Franklin DW4, was the last defence witness. His testimony was that that the people of Kaunga were the ones occupying the suitland together with the respondent and his sister in law. DW 4 also confirmed that more than 5 family members were buried on the suit land. The trial court in a considered judgement made a finding



- that the respondent had proved the existence of a customary trust and proceeded to declare him as entitled to half share of the suit land. Out of this judgment, the court has been urged to find the appeal merits.
17. In order to canvass the appeal, parties were directed and opted to file written submissions dated November 30, 2022 and December 17, 2022 respectively. The appellant submitted that under grounds no's 1, 2 & 3 of the appeal, his title deed was covered by sections 24(1) & 26 of the Land Registration Act which he acquired registration under "Ngwato" hence was an absolute owner and subject to no overriding interests such as trust. Reliance was placed on Simon Njage Njoka v Simon Gatimu Kanyi (2007) eKLR.
 18. As regards the alleged trust, the appellant submitted the respondent failed to meet the requirements of trust as laid down in NWK v JKM & another (2013) eKLR, Moses K Wachira v Joseph Muirbti Kanyita & 3 others (2016) eKLR, Isack M'Inanga Kiebia v Isaya Theuri M'Lintari & another (2015) eKLR.
 19. On the other hand, the respondent submitted that the plaintiff inferred a customary trust by indicating the relationship of the parties. Further, the respondent submitted that his evidence which was not controverted that the appellant held the land in trust for the family.
 20. Regarding the proprietary rights of the appellant, the respondent submitted that the trial court took all that into consideration to an extent of directing half a share to be transferred to him and the balance to remain with the appellant hence there was no dispossession.
 21. On the aspect of ground No 3 of the appeal, the respondent submitted that the particulars of trust and its breach were pleaded at paragraph 12 of the plaint hence the finding by the trial court was anchored on cogent pleadings and evidence. As to whether the trial court relied on extraneous issues, the respondent submitted that none of them have been pointed out in this appeal and so the court should ignore such wild allegations without prove.
 22. The court has gone through the pleadings, evidence tendered, written submissions, the judgment and the law. The issues for the court's determination are:
 - i. If the respondent pleaded a trust and specified its nature and particulars.
 - ii. If the respondent proved the existence of a trust over the suit properties.
 - iii. If the respondent was entitled to the payers sought.
 - iv. If the trial court considered the facts, evidence and the law and arrived at a correct decision.
 23. The manner of pleading for and against a trust is governed by order 2 rules 3, 4, 9, 10 & 11 of the Civil Procedure Rules. Order 2 rule 10 (1) of the Civil Procedure Rules directs that the particulars of breach of trust be specifically pleaded while order 2 rule 4 (2) of the Civil Procedure Rules requires a defendant to an action for the recovery of land to plead specifically every ground of defence which he relies on and a plea that he is in possession of the land by himself or his tenants shall not be sufficient.
 24. In the case of Heartbeat Ltd v Ng'ambwa Heartbeat Community Children's Home and Rescue Center (2018) eKLR the court cited with approval Twalib Hatayan & another v Said Saggah Ahmed Al-Heidy & others (2015) eKLR that a trust is a right enforceable in equity to the beneficial enjoyment of property to which another holds legal title (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).
 25. The court held that under the Trustee Act, a trust and trustee extend to implied and constructive trust and a case where the trustee has a beneficial interest in the trust property. Further, the court held that



- there are also trusts created by the operation of law among them resulting trusts and constructive trust, the latter being imposed by a court when a person who is already a trustee takes advantage of his position for his own benefit in which case, a proof of the intention of parties is immaterial, for the trust will nonetheless be imposed by the law for the benefit of the settler so as to guard against unjust enrichment.
26. On the legality of a customary trust in the case of *Gladys Njeri Mubura v Lispa Wagaturi Muthiguro* (2019) eKLR the court held that a customary trust was a concept through which land may be acquired in Kenya and was anchored in article 60(1) (a) of the *Constitution* as an intergenerational and intra-generational equity with its statutory underpinnings in sections 24 and 25, 26, 27 & 28 of the *Land Registration Act*.
 27. In this suit, the respondent at paragraphs 5, 6, 8, 9, 10, 11 and 12, 13, 14 of the plaint dated December 7, 2012, laid bare the history of the suit land prior to and from the inception of the gathering, demarcation, registration and to present occupation including the particulars of the same, the occupants, the developments and the meetings undertaken relating to the sharing of the same among family members. In his testimony, the respondent indicated that the common thread pointed at a customary trust created on the title and which is actualized by the continuous possession and occupation by the family to the exclusion of the appellant.
 28. On the other hand, the appellant in his defence dated 4.7.2012 made denials to the alleged trust. At paragraphs 9, 10 & 11 – 15 of the defence, the appellant raised the issue of being the absolute owner of the land to the exclusion of any overriding interests. In response to the defence, the respondent filed a reply to defence dated July 11, 2012 and insisted that the suit land was ancestral or family land acquired by their late father and not a “Ngwato or “Kuwata” as alleged in the defence. Each of the parties thereafter filed written statements and list of documents for and against their respective claims as well as list of issues dated August 9, 2014.
 29. Consequently, my finding is that the respondent in line with order 2 of the *Civil Procedure Rules* pleaded a customary trust whereas the appellant did not state in his defence whether he was in occupation on the land or not. Therefore, the claim under ground No 4 of the appeal fails since the issues considered by the trial court flew from the pleadings and from the parties listed set of issues in line with of the order 15 *Civil Procedure Rules*.
 30. Coming to the 1st ground of the appeal the appellant pleaded that he was an absolute owner of the land with no overriding rights in favour of the respondent. In the case of *Kanyi v Muthiora* (1984) KLR 712 the court held that the registration of land in the name of the appellant under the *Registered Land Act* (cap 300) did not extinguish the respondent’s rights under Kikuyu customary law and neither did it relieve the appellant’s of their duties or obligations under section 28 thereof as trustee. Further, in *Gathiba v Gathiba* Nairobi HCCC 1642/84 the court held that the registration of land did not extinguish customary land rights which are trusts recognizable under sections 28 and 126 (1) of the *Registered Land Act (repealed)*. The court held that the concept of trust was inherent among Africans where a person holding a piece of land in a fiduciary capacity under any of the customary law could have the piece registered in his name.
 31. In *Mbui Mukangu v Gerald Mbui* (2004) eKLR the court held that customary trust was a concept of intergenerational equity where the land was held by one generation for the benefit of a succeeding generation and that the key elements in establishing customary trust were on possession and occupation.
 32. On the manner to found a claim of trust the *locus classicus* of *Isack M’Inanga Kiebia v Isaya Theuri M’Lintari & another* (2018) eKLR gave the parameters as; the land before registration was family, clan



- or group; the claimant belongs to such family, clan or group; the relationship with the family, clan or group is not so remote or tenuous to make the claim adventurous; the claimant could have been entitled to registration but for some intervening circumstances and lastly that the claim is directed against the registered proprietor who is a member of the family clan or group.
33. To prove the customary trust, the respondent herein narrated how his late father gathered the land, settled his mother thereon, passed on before the area was demarcated and thereafter how his mother directed the appellant to attend the demarcation process, who instead put the land under his name and eventually acquired the title deed in 1990. The respondent testified that his family including her late mother, late brother's family have continued to occupy and possess the land where they have made various developments for over 40 years including interring bodies of at least 5 members of their family.
 34. The respondent testified that efforts have been made to discuss the sharing of the land among the possessors and occupiers including a clan decision but the appellant has reneged and or declined to subdivide the land. The respondent produced P Exh No's 1-6, in support of his claim.
 35. On the other hand, while admitting the respondent was his step brother and in occupation of the suit premises alongside his sister in law and their families, the appellant testified that the suit land was his "Ngwato" and that the respondent's late mother and by extension, her children came to the land in 1965 out of his invitation and were only there under his sole discretion with no customary rights over the land. The appellant in support of his defence produced D Exh No's 1-9 among them family meetings minutes for September 26, 1995, title deed, land adjudication committee decision, his affidavit, exchange agreement, report of the land dispute and another family meeting minutes for January 27, 2001 as well as copies of register for the new subdivisions.
 36. Looking at the evidence tendered by both sides, what is evidently clear is that there is no dispute over ingredients numbers 2, 3, 4, & 5 of the parameters in *Kiebia v M'Lintari case* (supra). The respondent's pleadings and evidence therefore had satisfied the said parameters to found customary trust.
 37. What the court has to decide is whether the land was family, clan or group land prior to registration. The copy of records produced for LR No Kianjai/Thau/283 indicated that the register was opened on February 2, 1979 and a title deed issued to the appellant on February 2, 1990. The respondent pleaded that their late father William Nkarichia passed on in October 1970 and was living in Mituntu area where the suit land is situated following his gathering of the land in 1947. Sarah Kangai Nkarichia the mother to the respondent wrote a witness statement which is appearing at page 19 of the record of appeal.
 38. PW 2 – 4 corroborated the respondent's evidence. The history of the land was also captured in the family minutes which all the parties herein have produced as exhibits. The appellant in his witness statement at page 38 of the record of appeal stated that he gathered the land in 1961 long before his late father passed on. He admitted that he settled his step mother Sarah on the land in 1964 to take care of the land and in 1975, the land was adjudicated into his name. Therefore, at the time the adjudication and registration occurred in 1977, already the respondent and his relatives were in occupation of the land.
 39. In the affidavit sworn on September 15, 1993 the appellant admitted that his late father passed on October 10, 1970 and was buried at home. In the agreement dated September 24, 2011 the appellant also admitted that there was another family land in Uringu area where the respondent's sister in law, said to be in occupation of LR No 283 was entitled to which he was willing to exchange with, so that she could continue living in the suit land.



40. This issue formed part of the deliberations in the family meetings held on September 26, 1995 and January 27, 2001.
41. The appellant admitted in his testimony that the respondent has been in occupation and possession of the suit land together with his mother, late brother and their families since 1964. There is no evidence that the respondent has had any other residence except in the suit land. The appellant admitted in cross examination that there were several burial sites of the respondent's deceased family members and other permanent developments on the land.
42. The respondent invoked the Meru customary law that the appellant as the eldest son was registered as the owner in trust for his own behalf and that of the family. This state of affairs is what the Court of Appeal in *Henry Mwangi v Charles Mwangi* CA 245 of 2004, echoed as epitomized with the eldest son inheriting land as a Muramata to hold in trust for himself and other heirs under Kikuyu customary law.
43. Customary law is to be proved through evidence. The appellant admitted that the respondent and his family members settled on the land in 1964 and to date have extensively developed the same without any notice to vacate or an order of eviction from him. The appellant did not express any intention to the respondent to take over the land and relocate them. He has allowed them to occupy and develop the land as if it was theirs since 1964. In *Mbui v Mukangu* (supra) the court said that to prove customary trust one has to prove that he was in actual physical possession or occupation of the land.
44. In the case of *Omollo v Oduor* (civil appeal) 46 of 2017 (2022) KECA 371 (KLB) (February 18, 2022) (judgment) the court was dealing with a case where the father of the parties had died prior to the registration of the suit land but during the lifetime of the two brothers. The court held that evidence must be led to prove the existence of a trust, or otherwise with each case being determined on its own merits and depending on the quality of the evidence presented before the court.
45. In this appeal, the evidence of the respondent was consistent on the existence of a customary trust going by the admission of the some of its elements by the appellant.
46. In *Esther Nyamweru Warubiu & another George Kangethe Warubiu* (2019) eKLR, the court gave weight to the evidence of family negotiations to try and amicably resolve the issue prior to coming to court and the element of family households. The court also cited with approval *Peter Gitonga v Francis Maingi M'Rintari & another v M'Ikiara* (2007) eKLR that customary trust can be created under customary law save that the circumstances surrounding registration must be looked at to determine the purpose of the registration.
47. In this appeal, there is no dispute that the deceased William M'Nkarichia had five wives. The respondent's mother was settled by the appellant on this land prior to registration at the request of elders.
48. The appellant admitted that he settled her and erected a house for her. He not only allowed her to live there but also alongside her house, the respondent and his sister in law included. There can be no doubt in my mind that the evidence obtaining herein points out that there was an intention to create a customary trust otherwise the appellant would not have waited for over 50 years down the line to claim that he was the absolute owner.
49. In the circumstances, I return a verdict that the trial court considered all the pleadings, the evidence tendered and the law and reached the correct decision. The said decision is hereby confirmed. This appeal lacks merits and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT



THIS 1st DAY OF FEBRUARY, 2023

In presence of:

C/A: Kananu

Mwendwa for appellant

Mukaburu for respondent

HON. C.K. NZILI

ELC JUDGE

