



**Muriuki v Mbobua & another (Environmental and Land Originating Summons
34 of 2020) [2023] KEELC 19927 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19927 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 34 OF 2020**

CK NZILI, J

SEPTEMBER 20, 2023

BETWEEN

GERALD MURIUKI PLAINTIFF

AND

BENSON MBOBUA 1ST DEFENDANT

NAFTALI MEEME SAMSON 2ND DEFENDANT

JUDGMENT

1. By an amended originating summons dated November 17, 2022, the plaintiff asks this court to make a finding that LR No. Ntima/Igoki/134 is now subdivided into LR No. Ntima/Igoki/7940 and 7941 registered under the name of the 1st defendant's father, late Viz M'Imanene M'Rimberia, was and continues to be held in trust for the plaintiff's deceased father and the family of M'Muchiri M'Ikabu. The plaintiff, therefore, prayed that the court declare the suit land as ancestral land, cancellation of the titles and substitution with registration under his names alongside the 1st defendant in equal shares, and a permanent injunction barring and restraining the defendant from harassing, evicting or otherwise interfering with the plaintiffs quiet and peaceful occupation of the suit land. The amended originating summons was supported by a verifying affidavit sworn on July 13, 2020 and a verifying affidavit sworn on November 17, 2022, witness statements dated July 13, 2019, list of documents dated July 13, 2020, and a reply to the 1st defendant's preliminary objection dated March 15, 2022.
2. The 1st defendant opposed the amended originating summons by a preliminary objection dated April 12, 2021, a replying affidavit by Benson Mbobua sworn on April 12, 2021, and a further list of documents dated March 2, 2022. The 1st defendant maintained that the suit was res-judicata since the issues were determined in Meru High Court Succession Cause No. 37 of 2000; it was misplaced, fatally and irredeemably incompetent; a legal nullity; an abuse of the court process; an afterthought; vexatious and befitting dismissal. The 2nd defendant was never traced or served with any summons to enter an



appearance despite the plaintiff seeking and obtaining leave to serve him through substituted service. Therefore, the plaintiff opted to proceed against the 1st defendant only.

3. At the trial, the plaintiff testified as PW 1 and called his wife, Agnes Makandi as PW 2. He adopted his witness statement dated 13.7.2019 as his evidence in chief and produced a green card for LR No. Ntima/Igoki/1740 and 1741 as P. Exh No. 3. His evidence was that the suit land initially belonged to his late grandfather, one M'Mberia who left it to him and has lived on it since childhood. PW1 said that the 1st defendant secretly filed the succession cause at Meru High Court and solely transmitted the suit land to himself. Further, PW 1 told the court that he has lived on the suit land since he was born, yet the 1st defendant has allegedly brought third parties to the land who were not family members.
4. In cross-examination, PW 1 told the court that the land that he was occupying LR No. Ntima/Igoki/1934. His evidence was that the late grandfather had two wives and that his late father had acquired LR No. 1934 while 1st defendant's late father, an uncle, acquired LR No. 1932, which were parts of the ancestral land.
5. The plaintiff testified that his justification to claim LR No. 134 was out of trust based on the chief's letter. He admitted that he unsuccessfully filed an objection in the succession cause to the suit land but however, clarified that LR No. 7941 was a subdivision of LR No. 134.
6. PW 2 testified that she married PW 1 in 1984 after which her father-in-law, the late Fredrick M'Mbijiwe narrated to her the history of the suit land.
7. The plaintiff's submissions are dated June 29, 2023 but filed on May 30, 2023. It beats logic how that is possible in the ordinary course of nature and time. Thus, the submissions were filed out of time contrary to the court's directions upon the close of the plaintiff's case. The court directed the filing of submissions by June 26, 2023.
8. Out of non-appearance and non-prosecution the 1st defendant's case was marked as closed on May 22, 2023. Parties were therefore directed to file written submissions by June 21, 2023.
9. The court has carefully gone through the pleadings and the evidence tendered. The single issue for determination is whether the plaintiff is entitled to LR No 134 and its resultant subdivision L.R No's Ntima/Igoki/7940 and 1791 on account of customary trust. P. Exh No. 3 indicates that LR No. Ntima/Igoki/134 was registered in the name of Imanene Rimberia on 8.1.1970. It was eventually registered under the name of the 1st defendant on 16.3.2011, out of Meru High Court Succession No. 37 of 2000. Entry No. 3 in P. Exh No. (3) indicates that the original title was closed for subdivision to LR No. 7940 – 7946 on September 26, 2011. P. Exh No's. 1 & 2 indicate that LR No. Ntima/Igoki/7940 and 7941 were registered under the names of the 1st and 2nd defendants on September 28, 2011. The title deed was issued on the said date.
10. In the amended originating summons dated November 17, 2022, the plaintiff raised the issue of customary trust between his late father and the father of the 1st defendant, on account of Kimeru customs and traditions. He termed the initial land as inherited from his deceased grandfather. The plaintiff alleged that Succession Cause No.37 of 2000 was fraudulently and secretly handled as a means to deny him ancestral rights to the suit land, which the 1st defendant has transferred to third parties among them the 2nd defendant. The plaintiff averred that he was threatened with an eviction and harassment unless the court intervened to preserve his ancestral and occupation rights.
11. On the other hand, the 1st defendant averred that the suit was res-judicata since the same issue was heard and determined by the probate court, which traced the family tree of the late M'Rimberia and established that the plaintiff's late father acquired LR No. Ntima/Igoki 1934, while the 1st defendant's



- late father received LR No. Ntima/Igoki/1932. Unfortunately, no evidence was tendered to support the 1st defendant's defense, replying affidavit and the preliminary objection. The three documents remain mere statements of facts. Pleadings, cannot amount to evidence. In *CMCC Aviation Ltd v Crusair Ltd* (1978) KLR 103, the court observed that until averments in pleadings were proved or disapproved or admitted, they remain mere words, whose truth can only be established through investigation by way of testimony and cross-examination. See also *Trust Bank Ltd v Paramount Universal Bank Ltd and another* Nairobi Milimani HCC No.1243 of 2001.
12. The plaintiff had the burden to prove customary trust on a balance of probabilities to be entitled to the reliefs sought. The parameters to establish and prove customary trust were set out in *Isack M'inanga Kiebia v Isaya Theuri M'lintari & another* [2014] eKLR. The court held that a customary trust, as long as it can be proved to subsist upon a first registration, depends on the case's merits and the quality of evidence tendered. The court cited with approval *James N. Kiarie v Geoffrey Kinuthia & another* (2012) eKLR, that what was essential was the nature of the holding of the land and the parties' intention, whether or not the parties were in possession or actual occupation of the land.
 13. The court laid out the parameters 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 claimant's relationship to such family, clan or group was not so remote or tenuous as to make his 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.
 - e. The claim was directed against the registered proprietor who was a family, clan or group member.
 14. In *Karinga Gacini & others v Ndege Kabibi Kimanga and another* (2021) eKLR, the court observed that in the absence of the presumption of trust being dislodged, the land in question was held in trust and for the benefit of all family members, including the respondents.
 15. In this suit, the plaintiff had the duty to trace the land before it was registered as LR No. Ntima (Igoki) 134 in 1970. There was no evidence tendered that the late M'Muchiri M'Ikabu had staked a claim on LR No. 134 during his lifetime. The plaintiff did not produce any letters of administration granting him the capacity to represent the estate of his late father and stake a claim over the suit land. Since the registration of the suit land in 1970, no evidence was tendered to show that the plaintiff or his late father had lodged a claim over the suit land before the succession cause was filed in 2000.
 16. Between the confirmation of the grant on July 27, 2006, the issuance of the title deed in favor of the 1st & 2nd defendants in 2011, and the filing of this suit on August 24, 2020, the plaintiff did not explain to this court why the inordinate delay in moving to court.
 17. Trust is a question of fact that must be proved by the claimant, as held in *Mathuita v Muthuita* (1982-1988) 1KLR 42. It cannot be presumed except in cases of absolute necessity as held in *Peter Ndugu Njenga v Sophia Watiri Ndungu* (2000) eKLR and *Juletabi African Adventure Ltd & another v Christopher Michael Lockley* (2017) eKLR.
 18. The intention of the parties to create a trust must also be determined before a trust can be implied. Evidence must be led that points to the root of the land. The onus was on the plaintiff to prove the intention to create a trust on how the land was first registered, whether it was a clan or family land,



and how it passed down till it became registered in the names of the 1st and 2nd defendants. In my considered view, the evidence by the plaintiff was disjointed, shaky, misleading, and did not point out to any intention to find a trust. The ingredients set in Kiebia case supra were not established. Additionally, the parties were also before the probate court on the very same issues now before this court. A party who has lost before a court of competent court should not be allowed to have a second bite of the cherry by filing a fresh suit on the same subject matter hoping to get a different outcome. This is what the court in *Maina Kiai v IEBC & another* (2016) eKLR, termed as an abuse of the court process.

19. The upshot is that I find the suit incompetent, an abuse of the court process and lacking merits. The same is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 20TH DAY OF SEPTEMBER 2023

In presence of

C.A Kananu/Mukami

Aketch for the defendant

Gerald in person

HON. CK NZILI

ELC JUDGE

