



Kalinda & 2 others (All suing as the legal representatives of the Estate of Kalinda Mwangi) v Muthami & 2 others (All sued as the legal representatives of the Estate of Muthami Mwangi - Deceased) (Environment & Land Case E046 of 2022) [2023] KEELC 20804 (KLR) (11 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20804 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E046 OF 2022**

**TW MURIGI, J
OCTOBER 11, 2023**

BETWEEN

**ESTHER WAYUA KALINDA 1ST PLAINTIFF
LAWRENCE MBUVA KALINDA 2ND PLAINTIFF
MUTUA KALINDA 3RD PLAINTIFF
ALL SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF
KALINDA MWANGA**

AND

**MONICAH MUTHAMI 1ST DEFENDANT
FRANCISKA KATAA 2ND DEFENDANT
PETER MUTINDA MUTHAMI 3RD DEFENDANT
ALL SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF
MUTHAMI MWANGA - DECEASED**

JUDGMENT

1. By an Originating Summons dated 14th November, 2022 brought under Order 37 Rule 1 (a) & (g) of the Civil Procedure Rules, Section 28(b) & 29 of the *Land Registration Act* and Section 3, 13, 18 & 19 of the *Environment and Land Court Act*, the Plaintiffs seeks the following reliefs against the Defendants: -
 1. A declaration be issued to the effect that the Defendants' father (deceased) held LR. No. Makueni/Kako/189 in trust for the estate of the late Kalinda Mwangi.



2. The Defendants be compelled to forthwith execute (sign) all the necessary transfer instruments, and transfer half LR. No. Makueni/Kako/189 to the estate of the late Kalinda Mwanga and in default the Executive Officer or administrator of this Court be directed, empowered and authorized to execute (sign) such transfer instruments in place of the Defendants to facilitate transfer of half of LR. No. Mkaueni/Kako/189 to the estate of the late Kalinda Mwanga.
 3. A permanent injunction be issued restraining the Defendants, their family members, representatives, employees, servants, agents and/or anybody else claiming for, through or on their behalf or acting at their direction, instructions or behest from entering into, trespassing onto, farming on or whatsoever interfering with the Plaintiffs' peaceful, quiet, undisturbed, uninterrupted and exclusive possession, cultivation, development, user and enjoyment of half of LR. No. Makueni/Kako/189.
 4. Costs of the suit plus interest thereon from the date of taxation till payment in full.
2. The originating summons is supported by the joint affidavit of Esther Wayua Kalinda, Lawrence Mbuva Kalinda and Mutua Kalinda sworn on 2nd November, 2022 and by the list and bundle of documents dated 14/11/2022. It was averred that the 1st Plaintiff is the widow of Kalinda Mwanga (Deceased) while the 2nd and 3rd Plaintiffs are his sons. It was further averred that Kalinda Mwanga (Deceased) and Muthami Mwanga (Deceased) were biological brothers. The Plaintiffs added that the suit property, LR. No. Makueni/Kako/189, is registered in the name of Muthami Mwanga (Deceased) who was the husband to the 1st and 2nd Defendants and the father to the 3rd Defendant. It was averred that the suit property was registered in the name of Muthami Mwanga to hold in trust for his brother.
 3. It is the Plaintiffs' case that following a clan meeting held on 17/03/1999, it was decided that the suit property is ancestral land which was supposed to be divided equally between Kalinda Mwanga (Deceased) and Muthami Mwanga (Deceased). That in a separate meeting held between Kalinda Mwanga and Muthami Mwanga after the clan meeting of 17/03/1999, the Plaintiff's father agreed to take a smaller portion of the suit property and his decision was adopted as the judgment of the clan which proceeded to subdivide the suit property marking the boundary with thirty-two (32) sisal plants.
 4. The Plaintiffs further averred that being dissatisfied with the clan's decision, they entreated the area Chief and Sub-chief to resolve the land dispute. That the Defendants' father failed to honor the Sub-chief's summons and as a result frustrated the efforts aimed at resolving the dispute. The Plaintiffs averred that sometimes in early 2022, after their family trimmed a tree around their compound, the Defendants handled the incident in a manner likely to suggest that the Plaintiffs were squatters in the suit property which resulted in the suit herein.

The Defendants' Case

5. The originating Summons was opposed by the Defendants who filed a replying affidavit sworn by the 3rd Defendant on 9th February, 2023 on his own behalf and on behalf of the 1st and 2nd Defendants. He averred that his late father Muthami Mwanga is the exclusive owner of the suit property as evidenced by the Title deed annexed to the Plaintiffs' supporting affidavit. He added that Muthami Mwanga raised Kalinda Mwanga on the suit property and allowed him to use a portion of the land on an informal settlement agreement. He denied that his grandfather, Mwanga Musoi acquired the suit property and instead, stated that Makueni Settlement Scheme allotted the suit property to Muthami Mwanga after he paid the requisite fees.



6. The 3rd Defendant insisted that the suit property is not ancestral land as the Plaintiffs have claimed. That the Plaintiffs have ancestral land elsewhere that was inherited by Kalinda Mwanga (Deceased) and therefore, their claim to the suit property was mistaken. The 3rd Defendant further averred that the Clan elders stuck with the decision that the suit property was not ancestral land despite the area Chief's letter calling for a review of the Clan's decision. The 3rd Defendant further refuted the claim that the suit property is registered in trust for the whole family. He urged the Court to dismiss the suit with costs.

The Response

7. The Plaintiffs filed a supplementary affidavit which was sworn on their behalf by the 3rd Plaintiff on 24/02/2023. He averred that the Defendants had merely denied the Plaintiffs' claim without substantiating their allegations with evidence. The 3rd Plaintiff stated that his father was born and raised in the suit property and that they had extensively developed the same. He added that the Defendants had not adduced any evidence to demonstrate that Kalinda Mwanga had ancestral land elsewhere.
8. The 3rd Plaintiff averred that their ancestors are interred on the suit property to wit their great grandmother, Wavinya Musoi, their grandfather Mwanga Musoi and their respective fathers among other kinsmen. The 3rd Plaintiff urged the Court to allow the suit as prayed.
9. The parties were directed to canvass the suit by way of written submissions.

The Plaintiffs Submissions

10. The Plaintiffs filed their submissions on 14th March, 2023.
11. Counsel for the Plaintiffs identified the following issues for the court's determination:-
 - i. Whether or not the Defendants' father held half of the suit land in trust for the Plaintiffs' father?
 - ii. Whether or not the Defendants are in breach of the said trust?
 - iii. Whether or not the said trust should crystallize in favour of the Plaintiff?
 - iv. Who should bear the costs of the suit plus interest thereon?
12. On the first issue, Counsel submitted that the suit property is ancestral land which had been acquired by the great grandfather of both the Plaintiffs and the Defendants. Counsel contended that the Plaintiffs have demonstrated with photographic evidence that the graves of their great grandmother and other kinsmen were on the suit property. Counsel argued that the Defendants' father had only been registered as the proprietor of the suit property during the demarcation period because the requirement had been that only married men could be registered.
13. Counsel submitted that the Defendants' father was a trustee for the following reasons: -
 - i. The suit property is family land;
 - ii. The Defendants' father was the elder brother to the Plaintiffs' father and hence their relationship is not too remote or tenuous;
 - iii. The Plaintiffs' father could have been entitled to be the registered owner but for the reasons that only married men could be registered.



14. Counsel invited the Court to peruse the Clan meeting's proceedings and decision of 17/03/1999 where the Defendants' father affirmatively answered that the Plaintiffs' father was born and brought up on the suit property. In the Clan meeting proceedings, the Defendants' father affirmatively replied that his parents lived and were buried on the suit property. Moreover, when asked whether between him and his father Mwanga Musoi who had settled in the suit property earlier, the Defendants' father replied that it was Mwanga Musoi.
15. It was learned Counsel's submission that the Plaintiffs have demonstrated the existence of a customary trust in accordance with Section 28 (b) of the [Land Registration Act, 2012](#).
16. On the second issue, Counsel submitted that the Defendants' father was in breach of trust for failing to transfer half of the suit property to the Plaintiffs' father after the Clan had decided that the suit property was ancestral land.
17. On the third issue, Counsel submitted that the Plaintiffs had demonstrated with evidence that the suit property was ancestral land. Counsel submitted that the Clan had unanimously agreed that the land belongs to the Plaintiffs' and the Defendants' fathers in equal shares.
18. On the fourth issue, Counsel contended that having proved their claim on merit, the Plaintiffs were entitled to the costs of the suit. To buttress the Plaintiffs' submissions, Counsel relied on the following authorities: -
 1. Kanyi Muthiora v Maritha Nyokabi Muthiora [1984] eKLR; and
 2. Peter Gitonga v Francis Maingi M'Ikiara [2007] eKLR

The Defendants' Submissions

19. The Defendants submissions were filed on 3rd April, 2023.
20. On behalf of the Defendants, Counsel outlined the following issues for the court's determination: -
 - i. Whether the suit land is ancestral property;
 - ii. Whether the Defendants' father held the suit land in trust for the Plaintiffs' father;
 - iii. Whether the Plaintiffs are entitled to half of the suit land; and
 - iv. Who should bear the costs of the suit and interest.
21. Counsel for the Defendants argued that the suit property was acquired by the Defendants' father who was allotted the parcel of land by Makueni Settlement Scheme after payment of the requisite fees. It was Counsel's contention that the suit property is private property and not ancestral land as claimed by the Plaintiffs. Counsel submitted that the Plaintiffs had not presented sufficient proof that the suit property is ancestral land.
22. Counsel contended that in line with Section 24 of the [Land Registration Act, 2012](#), the registration of a person as the proprietor of land vests in that person the absolute ownership thereof. Counsel urged the Court to dismiss the Plaintiffs' suit with costs.



Analysis and Determination

23. Having considered the pleadings, the evidence on record and the respective submissions the following issues arise for determination:-

- i. Whether the suit property is ancestral land or private property;
- ii. Whether the Estate of Muthami Mwanga (Deceased) holds half a share of the suit property in trust for the Estate of Kalinda Mwanga.
- iii. Whether the Plaintiffs are entitled to the orders sought.

24. From a disposition of the facts of the case, the following issues are common ground: -

1. The suit property, LR. No. Makueni/Kako/189 is registered in the name of Muthami Mwanga (Deceased).
2. Muthami Mwanga (Deceased) and Kalinda Mwanga (Deceased) were siblings whose wives and children are settled in the suit property.
3. A Clan meeting was held on 17/03/1999 to resolve a dispute over the suit property between Muthami Mwanga and Kalinda Mwanga.

25. Order 37 Rule 1 of the Civil Procedure Rules, 2010 vests in this Court jurisdiction to determine questions on the rights and interests of a person claiming to be the beneficiary of a trust in the estate of a deceased person as follows: -

The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions—

- (a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust;
.....
- (g) the determination of any question arising directly out of the administration of the estate or trust.

Whether The Suit Property is Ancestral Land or Private Property

26. The Plaintiffs alleged that the suit property is ancestral land. They contended that the Estate of Muthami Mwanga holds half a share of the suit property in trust for the Estate of Kalinda Mwanga. The Defendants' contention against the Plaintiffs' claim is that the suit property is private land which was validly registered in the name of Muthami Mwanga and as such, he is the absolute proprietor.



27. According to Black's Law Dictionary 9th Edition, a trust is defined as follows:-

“The right enforceable solely in equity, the beneficial enjoyment to which another holds a legal title, a property interest held by one person (trustee) at the request of another (settler) for the benefit of a third party (beneficiary).”

28. A customary trust is a valid claim to land as noted under Section 28(b) of the [Land Registration Act, 2012](#) and being an overriding interest, it affects the rights of a proprietor of land under Section 25 (1) (b) thereof.

29. A customary trust falls within the ambit of the proviso to Section 28(b) of the [Land Registration Act](#) which provides as follows:-

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(b) trusts including customary trusts.

30. It is clear from the above provisions of the law that the registration of a person as a proprietor of land does not automatically exclude any obligation to which such proprietor may be subject as a trustee. These are non-registrable rights which run with the land. The legal burden of proof in demonstrating that the suit property is trust land lies with the Plaintiffs who wishes the Court to make a finding as to the existence of such trust.

31. Customary trust is a matter of evidence and not inference. It is an issue both of fact and law which requires serious demonstration through proper evidence. This was the holding by the Court of Appeal in the case of *Mbothu & Others Vs Waitimu & 11 Others*, (1980), K.L.R 171 cited in the Estate of the late Jonathan Kinyua Waititu (deceased) eKLR Succession Cause No. 488 of 2010 where it was stated:-

“The law never implies, the Court never presumes a trust but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.

Since the plaintiff's claim was based on trust, the law places the onus on her to prove the existence of such trust..... It is however clear from the evidence herein that the plaintiff has neither pleaded nor proved any of the particulars as to how the trust subject matter of this claim arose with respect to the suit land. There is really no evidence upon which this Court can make a finding that the defendant holds the suit land in trust for him.”

32. The question that begs is whether the Plaintiffs have demonstrated that the suit property is trust land. In the case of *Isack M'inanga Kiebia Vs Isaaya Theuri M'lintari & another* [2018] eKLR, the Supreme Court articulated the elements which a person must prove to demonstrate the existence of a trust as follows:-

“

“(52) Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered [Land Act](#). Under this legal regime, (now repealed), the



content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

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.”

33. In their evidence, the Plaintiffs adduced Clan proceedings of 17/03/1999 (PEX3). The occurrence of the said proceedings and the contents thereof were neither denied nor controverted by the Defendants. According to the clan proceedings, when Muthami Mwanga was quizzed by the clan elders on whether it was him or his parents that settled on the suit property first, he replied that it was his parents who settled there first. Again, when quizzed about where the Plaintiffs’ father, Kalinda Mwanga, was born and raised, Muthami Mwanga replied that it was on the suit property. When asked where his parents were buried, Muthami Mwanga replied that it was on the suit property.

34. According to the judgment of the clan, the clan stated as follows in part:-

“The clan after considering the evidence from Muthami and his younger brother Kalinda Mwanga has come to a conclusion that the land belongs to their father Mwanga but does not belong to Muthami. Further, we note that the land was acquired by their father Mwanga Musoi time immemorial even before the land registration committee (ndala) starting operation in Makueni.....The clan after considering the evidence has come to a conclusion that this land should be shared equally to the surviving children of Mwanga who are Muthami and Kalinda.”

35. In addition, the Plaintiffs produced photographs showing the permanent houses they have built on the suit property. The photographs also show several graves of where their kinsmen are buried most prominently, Wavinya Musoi, the great grandmother of the parties herein. The Defendants on the other hand alleged that the suit property is private property and not ancestral land. It was averred



that the suit property was allocated to Muthami Mwanga by the Makueni Settlement Scheme upon payment of the requisite fees. The Defendants did not lead any evidence to demonstrate that the suit property was allocated to Muthami Mwanga by Makueni Settlement Scheme.

36. There is evidence that the Plaintiffs have settled on the suit property and developed it for many years without objection from the Defendants. There is evidence that family members are interred on the suit property. It is therefore undisputable that the suit property is ancestral land and not the private property belonging to Muthami Mwanga. All the above elements characterize ancestral land which in turn establishes a customary trust.

Whether The Estate Of Muthami Mwanga Deceased Defendants Hold Half A Shareof The Suit Property In Trust For The Estate Of Kalinda Mwanga

37. The Plaintiffs averred that the estate of Muthami Mwanga holds half a share of the suit property in trust for the Estate of Kalinda Mwanga. The circumstances which prevented Kalinda Mwanga from being registered as proprietor of the suit property were explained in the Plaintiffs' evidence. The Plaintiffs averred that only married men were allowed to be registered as land owners during the demarcation period in the 1960s. It was averred that Muthami Mwanga qualified to be registered as his younger brother was not married at the time.

38. The Court of Appeal in *George Mbiti Kiebia & another v Isaya Theuri M'lintari & Another* [2014] eKLR endorsed the decision of Kwach J.A. as it aptly held as follows: -

“In *George Roine Titus & Another v John P. Ngurai*, Civil Appeal No. 107 of 1999, Kwach, J.A., stated that in adjudication matters, in order to succeed on a claim to land based on trust, it must be shown that at the conclusion of the adjudication process but before the suit land was registered in the name of a proprietor, the adjudication committee had ascertained the interest of the claimant and confirmed that the suit land belonged to them. And further, that the reason why the claimant was not registered was because of some legal impediment which precluded the claimant from taking title immediately thereby making it necessary for the suit land to be registered in the proprietor in trust.”

39. Having found that the suit property is ancestral land, there is no doubt that the Estate of Muthami Mwanga (Deceased) holds half a share of the suit property in trust for the Estate of Kalinda Mwanga (Deceased). The Defendants did not mount a substantive challenge to the Plaintiffs' evidence besides mere denials. The Defendants alleged that the Plaintiffs have their ancestral land. They did not demonstrate or adduce any evidence to prove their allegations.

Whether The Plaintiffs Are Entitled to The Orders Sought

40. Having found that the suit property is ancestral land and that the estate of Muthami Mwanga (Deceased) holds half a share of the suit property in trust for the estate of Kalinga Mwanga (Deceased), I find that the Plaintiffs are entitled to the orders sought.
41. In the end I find that the Plaintiffs have proved their case on a balance of probabilities against the Defendants. Accordingly I enter judgment for the Plaintiffs against the Defendants as follows:-
1. A declaration be and is hereby issued to the effect that the Defendants father (deceased) held LR. No Makueni/Kako/189 in trust for the estate of the late Kalinda Mwanga.
 2. The Defendants be and are hereby compelled to forthwith execute (sign) all the necessary transfer instruments and transfer half LR. No. Makueni/Kako/189 to the estate of the late Kalinda Mwanga and in default the Executive Officer or administrator of this court be directed,



empowered and authorized to execute (sign) such transfer instruments of half of LR. No. Makueni/Kakao/198 to the estate of the late Kalinda Mwanga.

3. A permanent injunction be issued restraining the Defendants, their family members, representatives, employees, servants, agents and/or anybody else claiming for, through or on their behalf or acting at their direction, instructions or behest from entering into, trespassing onto, farming on or whatsoever interfering with the Plaintiffs peaceful, quiet, undisturbed, uninterrupted and exclusive possession, cultivation, development, user and enjoyment of half of LR. No. Makueni/Kako/189.
4. The Plaintiffs are awarded costs of the suit with interest.

.....

HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 11TH DAY OF OCTOBER, 2023.

IN THE PRESENCE OF:-

Court assistant - Mr. Kwemboi.

Mutisya holding brief for the Plaintiff.

Ms. Muinde holding brief for Mr Kioko for the Defendant.

