



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. E006 OF 2020

ALICE WANDIA KARIITHI APPELLANT

-VERSUS-

JOSEPH N. KARIITHIRESPONDENT

JUDGMENT

1. This Appeal arises from the Judgment of the Honourable Mrs. A. Mwangi, Principal Magistrate Karatina delivered on 12 November 2020 in Karatina MELC Case No. 23 of 2019.

2. By an Originating Summons dated 13th December 2019 as filed in the Lower Court, Alice Wandia Kariithi (*the Appellant*) as the Plaintiff has sought for the determination of the following issues:

1. *That the Defendant as the registered owner of land parcel No. Magutu/Gatei/864 holds 0.177 Ha (of) that land in trust for the Plaintiff;*
2. *That the trust in relation to the 0.177 Ha. out of land parcel No Maguta/Gatei/864 be determined;*
3. *That the Defendant be ordered to transfer 0.177 Ha. out of Maguta/Gatei/864 to the Plaintiff; and*
4. *That the Defendant do pay the Plaintiff's costs of the suit.*

3. The Originating Summons proceeded by way of formal proof after Joseph N. Kariithi (*the Defendant/Respondent*) failed to enter appearance and/or to file any response thereto. Having heard the Appellant's sole testimony and by her Judgment delivered on 12th November, 2020 as aforesaid, the Learned Trial Magistrate determined that the Appellant had failed *inter alia* to prove that the suit land was ancestral land and proceeded to dismiss the suit.

4. Aggrieved by the said determination the Appellant appealed to this Court on 9th December, 2020 seeking to have the Judgment set aside and to be substituted with one allowing the Appellant's Originating Summons as filed in its entirety.

5. In her Memorandum of Appeal dated 10th December, 2020 but filed herein on 9th December 2020, the Appellant faults the findings of the Learned Trial Magistrate on the following grounds:

1. *That the Learned Trial Magistrate erred in law and fact in failing to appreciate that there was already a Judgment in default of appearance and defence against the Defendant which had not been set aside;*
2. *That the Learned Trial Magistrate erred in law and fact in failing to appreciate that the matter proceeded as undefended and all the averments by the Plaintiff were not denied or controverted by any evidence;*
3. *That the Learned Trial Magistrate erred in law and in fact in not upholding that the Plaintiff had established all the elements of a customary trust after (correctly) enumerating them; and*
4. *That the Learned Trial Magistrate erred in law and fact in raising the bar on the standard of (proof) to one of beyond reasonable doubt as opposed to that of a balance of probabilities (by requiring strict proof of certain facts).*

6. I have examined and considered the Record of Appeal, the four (4) broad grounds of appeal as well as the written submissions of the

Appellant who was acting in person in both the Subordinate Court and in the Appeal. Just like in the Subordinate Court, the Respondent neither appeared nor filed anything in response despite service.

7. As the first appellate Court, this Court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and to make my own conclusions about it bearing in mind that this Court did not have the opportunity of seeing and hearing the witnesses first hand. As was stated in **Selle & Another -vs- Associated Motor Boat Company Limited & Others (1968) EA 123**:

“... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions 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 account of particular circumstances or probabilities materially to evaluate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally ...”

8. Taking those principles into account, this Court must then turn its attention to the facts and evidence that was placed before the Learned Trial Magistrate in the course of trial and to consider if the grounds of appeal raise any matter of substance.

9. As is borne from her pleadings in the trial Court, the Appellant was basically asking the Court to determine that the Respondent holds title to the parcel of land known as LR No. Magutu/Gateri/864 in trust for herself and that she is entitled to a portion thereof measuring some 0.177 Ha.

10. The basis for those prayers was the Appellant's contention that the said parcel of land belonged to her family and that she was born therein. It was the Appellant's case that the parcel of land initially belonged to her father one Kariithi Njogu who is now deceased. The said Kariithi Njogu according to the Appellant had two wives – Anna Ngima and Joyce Wangigi.

11. The Appellant told the Court she was the daughter of Joyce Wangigi who has also since died and that the property was initially sub-divided into two portions, one for each of the houses. The Appellant told the Court she lived on the land with the Respondent who is her elder brother, until sometime in 1984 when she gave birth to a baby boy. She told the Court that her brother then chased her away telling her to go look for a husband in order to ensure that her son would not lay claim to the land. The Respondent was subsequently registered on the sole proprietor of the suit land in the year 1993.

12. A perusal of the impugned Judgment reveals that having summarized those issues, the Learned Trial Magistrate then proceeded correctly in my view to conclude that the main issue for determination before her was whether or not the Respondent's registration as the proprietor of the parcel of land was encumbered by a trust in favour of the Appellant.

13. In that respect, the trial Court citing the case of **Isack M'Inanga Kiebia -vs- Isaaya Theuri M'Lintari & Another (2018) eKLR**, proceeded to set out the elements that need to be proved for one to establish a customary trust. Having evaluated the evidence against those elements, the Learned Trial Magistrate then proceeded to conclude at Page 3 of her Judgment as follows:

“... the assertions by the Plaintiff prove that the Defendant from whom she is claiming a trust from is her relative him being a brother. She however did not table any evidence to confirm her assertions that the land was initially in the names of Joshua Njogu Kariithi and that it was sub-divided into two for the benefit of the two houses with Joshua Njogu retaining a title and the Defendant being registered on behalf of their family. The only evidence tendered by the Plaintiff is the copy of the Certificate of Official Search which does not reveal from whom the Defendant got the land. This makes it difficult for the Court to declare that the registration captured in the Certificate of Official Search was encumbered by a customary (*trust*) as there is no evidence to confirm who the previous owner was. The Defendant could have gotten title from any other source including succession or even through purchase. The Plaintiff by failing to establish that the Defendant got the suit land from Kariithi Njogu's eldest son has failed to prove a critical element which is that the suit land's registration history proves that it is ancestral land. The prayers sought in her Originating Summons dated 13th December, 2019 are not allowed. The suit is dismissed with no order as to costs.”

14. I was however unable to agree with the said conclusion. As the Learned Trial Magistrate correctly stated earlier on in her Judgment, the elements that need to be established for one to prove the existence of a customary trust in land include the following:

(i) *Whether the land in question was before registration, family, clan or group land;*

(ii) *Whether the claimant belongs to such family, clan, or group;*

(iii) *Whether the relationship of the claimant to such family, clan or group is so remote or tenuous as to make his/her claim idle or adventurous.*

(iv) *Whether the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and*

(v) *Whether the claim is directed against the registered proprietor who is a member of the family, clan or group.*

(See *Isack M'Inanga Kiebia -vs- Isaaya Theuri M'Lintari & Another (supra)*).

15. Taking those elements into consideration, there was no doubt in my mind that the Appellant had established the necessary connection to the land. I say so because the Appellant testified that she was born on the suit land and that the Respondent herein was her elder brother. She told the Court the parcel of land was left behind by their parents Kariithi Njogu and Joyce Wangigi. It was further her evidence that her brother chased her away from the land when she got a baby boy in 1984 before the Respondent subsequently caused himself to be registered as the sole proprietor of the property in the year 1993.

16. As it were, the Respondent was served with the suit papers and was thereby given the opportunity to come to Court and rebut the assertions made by the Appellant. The Respondent was thereby given an opportunity to come to court and deny that he was related to the Appellant and/or that he bought or inherited the suit property.

17. In my considered view, the Appellant had proved her case on a balance of probabilities as her evidence before the Court was not controverted. It was her case before the Court and I did not think in the circumstances herein that it was open for the trial Court to speculate that the registered proprietor could have bought the land when he had been given an opportunity but had failed to come to Court to state so.

18. Arising from the foregoing, I was persuaded that there is merit in the Appeal as the Appellant had proved her case to the required standard in the trial Court. Accordingly, I allow the Appeal and set aside the Judgment delivered on 12th November, 2020 in Karatina MELC Case No. 23 of 2019. The same is substituted by an order allowing the Appellant's Originating Summons in its entirety.

19. I make no order as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 3RD DAY OF FEBRUARY, 2022.

In the presence of:

Ms. Alice Wandia the Appellant present in person

No appearance for the Respondent

Court assistant - Mugambi

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J. O. OLOLA

JUDGE