REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. E042 OF 2021

STANLEY IRIGA M'MWITARI.....APPELLANT

VERSUS

MERCY KANYIRI GATEKIA.....1ST RESPONDENT

PENINA ANKIROTE MARETE.....2ND RESPONDENT

PURITY KAROKI MARETE.....3RD RESPONDENT

IREENE NTINYARI (Suing as the legal representative and administrator of the estate of the late

SILAS GATEKIA M'MWITARI (Deceased).....4TH RESPONDENT

(Being an appeal from the Judgment of Hon. S. Ndegwa (S.P.M.)

delivered on 8th February 2021, in Githongo ELC No. 14 of 2015)

JUDGMENT

A. PLEADINGS

1. By a plaint dated 27.4.2015, the respondents sued the appellants for breach of customary trust of **L.R No. Abothuguchi/Ruiga/1866**. They sought for a declaration that the appellant held half share of the subject land in trust and that they deserved a registration of half share of it in their favour.

2. Through a defence and counterclaim dated 15.6.2015, the appellant denied that the suit land was ancestral in nature or that he held it in trust for the respondents. He averred that the suit was time barred, bad in law, the grant was invalid and counterclaimed for the removal of an illegal caution placed on the land by 4th respondent on 4.2.2015.

3. The respondents denied the contents of the defence through a reply to defence, a defence and to counterclaim dated 23.6.2015. They admitted placing the caution to prevent any transfer of the land to third parties. In his testimony, PW1 produced a search certificate, copy of grant, greed card, chief's letters dated 28.5.2013 and 28.5.2014 as **P exh 1- 4.**

B. TESTIMONY

4. PW1 and PW2's testimony was that, the appellant was their uncle but chased them away from the suit land in 1982 while they were infants and that the suit land initially belonged to their grandfather, before it was transferred to the appellant. They insisted they used to live on the land and had nowhere else to live.

5. Further, the respondent's testified that the land had been transferred and registered by the deceased in the name of his first born, the appellant in trust of their deceased father Silas Gatekia M'Mwitari so that he could later on share it with him.

6. PW3 told the court she was the elder sister to the appellant and that as per Kimeru customs, the eldest son was allocated land so as to share it with his siblings.

7. She testified that the land was initially in the name of her deceased father but upon nearing his death, he transferred it to the appellant so that he could share it with his siblings and at his death there were no issues over the arrangement.

8. PW4, as the area chief testified that the respondents came to his office and reported that the appellant had declined to give them their share of land.

9. He summoned the appellant to his office on 18.5.2013 and in the presence of clan elders. Later on, he wrote a letter dated 28.5.2013 which he produced as **P exh 4**. He denied that he conspired with the respondents to take away the appellant's parcel of land. He confirmed also he took the minutes for the meeting and that the letter was a summary of the issues discussed in the meeting especially on how the land came into existence and who were the rightful beneficiaries.

10. PW4 produced the original file in **Meru High Court Succession Cause No. 82 of 2015** which contained the death certificate of the late Silas Gatekia M'Mwitari who had died on 7.9.1998 contrary to what was in the suit as 7.9.2015. He produced the file as **P exh 5 and 6**. He also told the court that the appellant's father used to live at the suit premises together with the respondents' father.

11. DW1 told the court his surname was M'Mwitari and that he did not know the father to the respondents though his identify card reflected the names of his late father. He differed with her sister PW3 that Silas Gatekia M'Mwitari was their brother or that at the meetings held before the District Officer, District Commissioner and the area chief, it was decided that Silas Gatekia M'Mwitari was his late brother and that the respondents as his children were entitled to a share of his land.

12. He further admitted his father had some land but no one was living on that parcel of land. He did not answer the questions asked by the court if the land where he lived and that of his late father was one and the same land. Instead, he stated the land he lived on did not originally belong to his father and that he could not know where his father's land was. He further denied the land he lives on was given to him by his late grandfather.

13. Asked by the court if he was diverting from his witness statement that his father had some land, he flatly said he only knew about the land where he lived and that he could not know if the land was bought as he found it in existence when he was born and hence was ancestral trust land – i.e. Mburago.

14. DW1 denied ever seeing or knowing Silas Gatekia M'Mwitari as he grew up. He admitted however that Silas Gatekia M'Mwitari was living on the same land that all of them were living in the suit land at the time he died in 1981.

15. Asked whether he knew how Silas Gatekia M'Mwitari met his death, he kept quiet but later on said that he was the one who killed him in self-defense after he came to the market and started beating him up. Afterwards, he was charged and convicted with the offence of manslaughter. He denied the cause of death was as a result of a land dispute involving the suit land.

16. Further, DW1 denied that the jail sentence, he came home and chased away the respondents. He vehemently denied that the chief's letter had captured that history or that there was a caveat in existence placed by the respondents.

17. Further, DW1 stated he did not know the respondents interests over his land and or that they were entitled to half share of the land. However, he admitted that the land was given to him by his grandfather as he was named after him (Ntagu).

18. In re-examination, DW1 admitted he used to know Silas Gatekia M'Mwitari at the age of 3 years born after him by his mother Karea.

19. Recalled to testify in support of his counterclaim, DW1 told the court he did not know his deceased brother or the respondents as the deceased children. He denied ever telling the court earlier on that he had killed Silas Gatekia M'Mwitari though the death certificate indicated that they had the same surname. He also told the court he was in jail for between 6-7 years but could not remember the name of the victim.

20. DW1 stated his mother had a child who had no name, that the suit land belonged to his grandfather and denied that his father had land since he did not pass any to him.

21. DW1 admitted that the land was initially Parcel No. 1062 which he subdivided into two portions. He sold 1865 and remained with Parcel No. 1866.

22. DW2 told the court the appellant's mother used to live on the suit land initially belonging to his grandfather. He testified the land was family land which was left to the appellant and that the reasons the land was not left to the father to the appellant was because he had leprosy.

23. Asked by the court, DW2 said his grandfather left no land to any of his sons and since he told them to look for their own parcels of land.

24. DW3 told the court, the appellant's grandfather was known as M'Antugi M'Negwa but he did not know the respondents' late father. He stated he was born on the suit land and lived there together with his father and other sons to the appellant's grandfather. In his view, the appellant did not have any brothers or sisters for he used to stay alone.

25. DW3 denied attending the meeting at the chief's office even though the letter dated 28.5.2013 indicated he was one of the attendees. He however confirmed all the members of the appellant's family were living on the suit land before it was subdivided. He could not however remember where the appellant's father was buried or if his mother lived on the suit land.

C. GROUNDS OF APPEAL

26. The appellant complaints are that the trial court should have found the suit time barred; bad in law; the pleadings not signed; that it ruled against the weight to the available evidence; it used evidence taken without proper and good translation; wrongly found the land ancestral in nature; failed to decide the counterclaim; made a finding there was a prove of customary trust and lastly delivered a judgment which was bad in law.

D. WRITTEN SUBMISISONS

27. The appellant submitted that the respondents did not establish when the claim arose and going by the date of the registration in his favour and the death certificate of respondents'' father in 1981, the suit was brought beyond 12 years as provided for under **Section 7 of the Limitation of Actions Act Cap 22** since the cause of action arose in 1982 which then translated to 33 years.

28. Secondly, the appellant submitted the pleadings offended **Order 2 Rule 16 Civil Procedure Rules** for they were unsigned.

29. Thirdly, it was submitted the appellant had denied any relationship with the respondents' deceased father hence there was need for medical evidence to prove the blood relationship. Reliance was placed on ***Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others [2015] eKLR*** on the proposition that customary trust must be proved by leading evidence.

30. The appellant further submitted land in Kenya was scarce and the court should have exercised caution without relying on the similarities of the names and failing to consider all the evidence in support of the counterclaim particularly on the issue of caution.

31. The respondents submitted under **Section 20 of the Limitation of Actions Act Cap 22** as held in ***Mumo –vs- Makau [2002] E.A 170*** a claim based on trust had no time limitation in law.

32. The respondents also submitted under **Section 25 of the Land Registration Act** that nothing in this **Section** shall be taken to relieve a proprietor from duty or obligation to which the person was subject to as a trustee hence there was no time limitation.

33. Regarding the unsigned plaint, it was submitted the pleadings in the court file were duly signed and no prejudice had been occasioned to the appellant otherwise such was a mere technicality curable under Article 159 of the Constitution. Reliance was placed on the holding in ***Isack M'Inanga Kiebia –vs- Isaya Theuri M'Linturi & Another [2018] eKLR*** on the requirements for the establishment of a customary trust which the respondents had met.

34. The respondents submitted the appellant had admitted killing this deceased's brother under oath but later on changed tune. His demeanour was evident that he was not truthful and hence there was no basis to fault the trial court on the basis of an alleged wrong translation.

35. As regards the counterclaim, given that the trial court found the customary trust established to the extent of half share, the caution therefore was lawful so as to safeguard the interests of the respondents.

36. The respondents submitted that the trial court based its judgment on the evidence and documents tendered and there was no demonstration on how the judgment was bad in law.

37. This being a first appeal, the duty of the this court is to re-evaluate and re-assess the case and come up with its own independent findings and conclusions while bearing in mind that the trial court had occasioned to see and hear the witnesses first hand. **See *Peters –vs- Sunday Post Ltd (1958) EA 424.***

E. ISSUES FOR DETERMINATION

38. There are two issues commending themselves for determination:-

1) Whether the respondents met the threshold of founding a customary trust.

2) If the trial court applied the correct law in reaching its decision.

39. As a starting point, the plaint filed on 30.4.2015 was duly signed by the respondents' counsel on record. The verifying affidavit is duly signed by the 1st respondent. All the witnesses' statements are duly signed. Similarly, there is on record an authority to swear affidavit and plead dated 27.4.2015 filed alongside the plaint duly signed by the 2nd, 3rd and 4th respondents.

40. The defence and counterclaim dated15.6.2015 was not filed under protest as well as the notice of appointment dated 10.6.2015. There was no single objection on the issue of unsigned pleadings raised in the aforesaid defence and counterclaim.

41. In the filed issues for determination dated 9.2.2016 by the appellant, no issue was raised on bad pleadings, time limitation and lack of a medical report. My finding therefore is that such issues as raised in this appeal are an afterthought and hence lacks merits.

42. Looking at the proceedings, there is no indication the appellant complained over irregular or incorrect translation of his evidence. Even after the recall, the appellant did not through his advocates on record make such a request and or objection that the appellant's evidence was

not being translated as appropriate.

43. The appellant had all the opportunity to demand for a different interpreter or translator if at all he had issues with the one before court. The trial record does not contain such a request at all and therefore I find no merits in ground 3 of appeal.

44. Turning to grounds 2, 4, 5, 6 and 7 of the appeal, the issue before the trial court was a claim of customary trust over **L.N No. Abothuguchi/Ruiga/1866** registered in favour of the appellant on 14.5.1999.

45. At paragraph 1 of the plaint, the respondents averred that they were suing as legal representatives and administrators of the estate of their deceased father Silas Gatekia M'Mwitari, while in paragraph2, they described the appellant as their uncle and brother to their deceased father.

46. The appellant in his statement of defence and counterclaim at paragraph 2 specifically admitted that description.

47. At paragraph 8 of the defence, the appellant admitted the deceased though his brother, had been born out of an adulterous union and was allegedly disowned by his father. So the question of the medical report by way of a D.N.A was in my view unnecessary due to admission of basic facts in line with **Section 25A of Evidence Act**. **See *Express Automobile Kenya Ltd.-vs- Kenya Farmers Association Ltd [2020] eKLR***

48. The law on customary trust and the manner to prove it has now been settled by the ***Supreme Court in Petition No. 10 of 2015, Isaya Kiebia case (supra).*** The elements are:-

i. The land in question was before registration, family, clan or group land.

ii. The claim belongs to such family, clan or group.

iii. The relationship of the claimant to such family, clan or group is not so remove or tenuous as to make his/her claim idle or adventurous.

iv. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.

v. The claim is directed against the registered proprietor who is a member of the family, clan or group.

49. In applying the above conditions, the appellant admitted the descriptive parts of the plaint and went on to claim at paragraph 8 of the defence, that even though the respondent's deceased father was his brother, he had been born out of an adulterous relationship hence was disowned by his late grandfather. That admission in my view does nothing to discount the obvious fact that the parties were family members. The respondents' claim could not therefore be said to be adventurous or farfetched.

50. Turning to the issue of the suit land, the copy of green card produced before court indicted the initial Parcel Number was No. 1062 which was registered on 15.9.1965 in favour of Iriga Mwitari and a certificate issued to him on 22.8.1973. Later, the land was transferred to the appellant on 18.10.1996 and a title deed issued on 30.12.1996.

51. Further, the green card showed the appellant on 10.5.1999 closed the title deed for subdivisions to two new parcels of land namely Parcel No. 1865 and 1866.

52. There is no dispute that Iriga Mwitari was the grandfather to the respondents'' deceased father. The appellant in his evidence admitted that the land was both family and ancestral in nature before the first registration under Iriga Mwitari on 15.9.1965 and subsequent transfer to him in 1996.

53. Even though the appellant has tried to call the respondents' deceased father a bastard, the fact remains and which has been proved is that he was his brother from the same mother and that they grew up together on the same ancestral or family land together with his other relatives including PW3, DW2 and DW3.

54. The history of the suit land as both ancestral and family land was contained in **P exh 4**. The appellant admitted he killed the deceased as a result of which he was arrested, charged, convicted and sentenced for manslaughter. The death certificate of deceased confirmed the cause of death as such and similar information was shared in **P exh 4**.

55. The respondents' testified the appellant chased them away from the suit land in 1981/82 after the death of their father. PW3 confirmed these facts as the elder sister to the appellant and indicated there was an attempted intervention by the clan in 1970's while the deceased brother was alive. She also confirmed that the respondents were prior to 1981 living on the suit land where the appellant had showed them a portion to construct their houses and had planted coffee. PW2 was clear also on how they moved out of the land for fear after their late father passed on 7.9.1981.

56. Further, PW3, the elder sister to the appellant was clear on the circumstances the appellant was registered as the elder brother to hold the land in trust for his younger brother, the respondents' deceased father.

57. Similarly, given the respondents used to live on the suit land but circumstances changed after the demise of their father which was caused

by the appellant, obviously they did not vacate the premises out of choice. They have afterwards directed their claim on the registered owner, the appellant.

58. Obviously, the appellant was not the registered owner until 1996 and therefore it cannot be said that the respondents were indolent or guilty of laches.

59. Given the above evidence, my finding is that the respondents had proved their relationship with the initial owner Iriga Mwitari and subsequently established that the subject land belonged to the family and was ancestral in nature.

60. The **slayer of forfeiture rule** precludes an individual who has unlawfully caused the death of another from benefitting in consequence of the killing as held in ***Cleaver –vs- Mutual Reserve Fund Life Association Case Study [1892] 1QB 147.*** **Section 96 (1) of the Law of Succession Act Cap 160** incorporates this **Rule**.

61. The appellant admitted he was convicted out of the murder of his own brother. He now wants to benefit from the crime and unjustly deny the respondents their rightful share.

62. The appellant showed no remorse and has disregarded the respondents yet he was the cause of their departure from the suit land. He cut short the life of their deceased father and has kept them out of their rightful share. They had every right to lodge a caveat.

63. If indeed the appellant had any objection with the caveat, he should have sought for its removal through the Land Registrar under **Section 73 (2) and (3) of the Land Registration Act.** ***See Mwangi Rukwaro & Another –vs- Land Registrar Nandi [2019] eKLR.***

64. In my considered view and given the circumstances, to deny the respondents their rightful share would not only be against the slayer forfeiture rule but also be against the very foundations of justice under **Articles 40 and 159 of the Constitution.**

65. The appellant on the other hand did not shake that evidence. His demeanor which was noted by the court was of an untruthful witness who declined to answer crucial questions put by his lawyers and the court itself.

66. He feigned ignorance on the basic issues touching on the suit land. He alleged he did not know the root source of the suit land yet the green card was clear his grandfather was the initial first registered owner. Had the respondents' father not passed out of the cruel hand of the appellant, he would have been a co-registered owner of the suit land with the respondents' deceased father.

67. In my view therefore, the respondents proved all the ingredients for the establishment of a customary trust. I find no fault on the holding by the trial court.

68. The appeal herein lacks merits. The same is dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

THIS 9TH DAY OF MARCH, 2022

In presence of:

Orimbo for appellant – present

Mukanguru for respondents – present

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE