



**Mbalilwa & 2 others v Mbalilwa (Environment & Land Case  
7 of 2014) [2022] KEELC 3429 (KLR) (7 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3429 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 7 OF 2014**

**DO OHUNGO, J**

**JUNE 7, 2022**

**BETWEEN**

**ANN VUNORO MBALILWA ..... 1<sup>ST</sup> PLAINTIFF**

**KEZIA MWENEJI MBALILWA ..... 2<sup>ND</sup> PLAINTIFF**

**ELMINA LULAYI MBALILWA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**LABAN MUTONYI MBALILWA ..... DEFENDANT**

**JUDGMENT**

1. The dispute in this matter pits siblings against each other: the plaintiffs are the sisters of the defendant. By plaint dated November 8, 2013, the plaintiffs averred that the parcel of land known as Kakamega/Lukose/1468 belonged to their late Loose father Lazarus Mbalilwa and that it was registered in the defendant's name to hold in trust for the plaintiffs. That on March 23, 2007 their mother wrote a will to a will that the suit property be subdivided into two portions, one to be occupied by the other by the defendant. They therefore prayed for judgment against the defendant for an order of subdivision of the suit property into two portions between themselves and the defendant. They also prayed for costs of the suit.
2. The defendant filed statement of defence on November 27, 2014. He averred that the suit property was registered in his name as a minor in 1973 as a first registration long after their father had passed away in 1965. That the property was reregistered in his name in 1987 when he obtained a national identity card. He denied that the registration was in trust for the plaintiffs. He therefore urged the court to dismiss the suit with costs.
3. The defendant Laban Mutonyi Mbalilwa later passed away on March 7, 2015 and was substituted by his widow Gertinah Isutsa Mutonyi and his son Hosea Chivole Mutonyi pursuant to an order of the court made on February 7, 2018. The plaint was however not amended to reflect the substitution.



4. The hearing proceeded on December 7, 2021. Ann Vunoro Mbalilwa testified as the sole witness in respect of the plaintiff's case. She stated that Laban was her blood brother and the registered owner of the suit property. That their father passed away in the year 1965 before the adjudication process took place and that their father promoted Laban to be registered as proprietor of the suit property to hold it in trust for the plaintiffs. That being that Laban was the first born and the only son in the family, February 23, 2007 before the parties' mother Ruth Mbalilwa passed away, a family meeting was held after which their mother wrote a will to the effect that the suit property be subdivided into two portions. That after the death of their mother, the plaintiffs' efforts to get the defendant to subdivide the land were met with refusal by the defendant. She added that she is married and lives with the third plaintiff at her marital home in Shinyalu and that the third plaintiff used to live on the suit property with her mother but Laban chased her away after the mother passed away in 2014. That the second plaintiff is also married and lives at her marital home.
5. The plaintiff's case was then closed.
6. The defence case also had only one witness: Gertinah Isutsa Mutonyi. She stated that Laban was late husband and that the plaintiffs are her sisters in law. That she is joint administrator of her late husband's estate together with Hosea Chivole Mutonyi, her first born son. She adopted a witness statement dated November 27, 2014 which her late husband had signed and filed. Laban stated therein that the parties' father passed away in 1965 leaving him, his three sisters who are the plaintiffs herein and their mother. That in the year 1973 during land adjudication and registration, the suit property was registered in his name when he was aged 11 years. That when the suit property was being registered in his name, it was clear that being the only son of his parents the land was exclusively his and that was why, though a minor, the land was registered in his name and not in the name of their mother to hold in trust, or even in the names of the plaintiffs and himself. He added that that this was in observance of Luhya Customary Law. That fortunately, the plaintiffs got married and left the parents' home and continue to stay where they are peacefully married. That he exclusively used the suit property as the only son of his late parents. He denied knowledge of any will by his mother and added that she in any case lacked capacity to make such a will.
7. Gertinah further testified that as at the date of her testimony, she was residing on the suit property with her 8 children and have lived on it since her husband was alive. That her husband did not inherit the suit property but acquired it by registration.
8. Defence case was then closed. Parties then filed and exchanged written submissions.
9. The plaintiffs argued that there is no dispute that the parties are siblings and that the suit property was family land which was registered in Laban's name purely because he was the only male child of the family. Citing section 28 of the *Land Registration Act*, they argued that Laban was holding the land in trust for them. They therefore urged the court to grant them the reliefs sought.
10. For the defendant, it was argued that Laban acquired the suit property as a first registration long after the parties' father had passed away and that the plaintiffs had not produced any evidence of trust. It was further argued while relying on the case of *Justus Maina Muruku v Jane Waitihira Mwangi* [2018] eKLR that the plaintiffs cannot sustain a claim of customary trust when it is clear that they are not in possession. It was further argued that the suit property was registered in Laban's name in 1973 under the Registered Land Act (repealed), sections 27 and 28 of which made the proprietor's rights indefeasible. The defendant therefore urged the court to dismiss the plaintiffs' suit with costs.



11. I have carefully considered the pleadings, the evidence and the submissions in this matter. The issues that arise for determination are whether Laban held the suit property in trust and whether the reliefs sought should issue.
12. The certificate of official search in respect of the suit property as on January 2, 2013, which the plaintiffs produced as an exhibit, shows that Laban was registered as the proprietor of the suit property on September 4, 1987 and that a land certificate was issued to him on December 3, 1987, under the Registered Land Act (repealed). It further shows that the approximate size suit property is 4.6 hectares which translates to approximately 11.36 acres.
13. Section 28 of the Registered Land Act (repealed) provided as follows:

The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

14. It is thus clear that his registration as proprietor did not relieve Laban of any duty or obligation to which he may have been subject as a trustee. Similar provisions are found at sections 25 and 28 of the [Land Registration Act](#). The [Land Registration Act](#) goes further by specifically providing at section 28 (b) thereof that trusts including customary trusts are overriding interests which do not require registration.
15. Whether or not trust exists is a question of fact which must be proven through evidence. In [Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another](#) [2018] eKLR, the Supreme Court stated as follows:

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.
16. There is no dispute that the plaintiffs and Laban Mutonyi Mbalilwa are the children of the late Lazarus Mbalilwa who passed away in 1965 and that prior to his death, he owned the suit property as family land where all the parties herein lived. It is equally not disputed that the suit property was registered in Laban's name owing to the fact that the late Lazarus Mbalilwa passed away before the adjudication process and also because he was both the first born and the only son of his father. It is clear that the plaintiffs, as children of the late Lazarus Mbalilwa, could have been registered as proprietors of the suit property were it not for the customs and practices of the day which favoured male children in matters concerning ownership of family land. The mere fact that the plaintiffs have since been married does not detract from the fact that they are children of the late Lazarus Mbalilwa and are entitled to the suit property. I am therefore persuaded that Laban held the suit property in trust for himself and the plaintiffs.
17. The plaintiffs have prayed that the suit property be subdivided into two portions between themselves and the Laban's estate. I think their request is reasonable. They have not asked for subdivision of the suit property equally among the siblings. In their proposal, Laban's estate will still get a bigger share. I am persuaded that they have made a case for that particular relief. Regarding costs, considering that the parties are siblings, I will make no order as to costs.
18. In view of the foregoing, I make the following orders:
  - a. Gertinah Isutsa Mutonyi and Hosea Chivole Mutonyi, as administrators of the estate of Laban Mutonyi Mbalilwa, are hereby ordered to subdivide the parcel of land known as Kakamega/Lukose/1468 into two equal portions, one to be retained by the estate of Laban Mutonyi Mbalilwa and the other to be registered in the joint names of the plaintiffs herein.
  - b. Gertinah Isutsa Mutonyi and Hosea Chivole Mutonyi to sign all necessary papers and take all necessary steps to facilitate the aforesaid subdivision and registration within 90 (ninety) days from the date of delivery of this judgment. In default, the deputy registrar of this court is authorized to sign all such necessary papers on their behalf.
  - c. No order as to costs of the suit.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 7<sup>TH</sup> DAY OF JUNE 2022.**

**D O OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

**Mr Mulama holding brief for Mr Indimuli for the plaintiffs**

**No appearance for the defendants**

**Court assistant: E Juma**

