



M'Arimi v Naito (Suing as the legal representative of the estate of Lawrence Ikunda M'arimi - Deceased) (Environment and Land Appeal 21 of 2020) [2022] KEELC 2599 (KLR) (13 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2599 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 21 OF 2020**

**CK NZILI, J
JULY 13, 2022**

BETWEEN

MICHAEL MPURIA M'ARIMI APPELLANT

AND

CECILIAN NAITO RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF LAWRENCE
IKUNDA M'ARIMI - DECEASED**

JUDGMENT

1. By an amended memorandum of appeal filed on November 11, 2021 the appellant claims the trial court; failed to find he had produced sufficient evidence in support of his claim for a breach of customary trust; erred in holding the deceased parent had gifted the land to the respondent's mother to the exclusion of parties; failed to find the land was family land held in trust in equal shares; found the respondent as the rightful proprietor and the appellant as an imposter; mis interpreted and mis applied the law on customary trusts; failed to find the transfer of the suit land from the respondent's mother to the respondent irregular; disregarded the appellant's evidence and written submissions; failed to determine the filed issues and or frame the issues and make a finding and lastly made a judgment which was biased, full of errors, against evidence and a travesty of justice.
2. This being a first appeal the court is mandated to rehear, rehearse and re-appraise itself over the lower court record, come up with independent findings on both law and fact while mindful that the trial court had an opportunity to hear and see the witnesses. See *Mwanasokoni vs Kenya Bus Service* (1982-1988) 1 KAR 870.



A. Pleadings

3. The appellant in the lower court sued the respondent, his step brother the registered owner of parcel no. L.R Nkuene/Ngonyi/22 claiming it was ancestral land held in trust for him hence was entitled to half a share. He sought to enforce the said customary trust through a permanent injunction, excision of the half share and the same be transferred to him.
4. The respondent denied that the suit land was ancestral land or held in trust for the appellant and instead he averred the appellant had without justification declined to move out of the suit land to go and settle on his late father's L.R No. Nkuene/Ngonyi/37. Further the respondent averred there was a Tribunal Case No. 14 of 2008 at the appeal committee pending before the chief magistrate's court Meru. Additionally, the respondent averred the suit land was occupied together with his sister as per the deceased parent wishes hence the appellant ought to vacate the suit land and move to his own share in L.R No. Nkuene/Ngonyi/B7
5. In compliance with order 11 *Civil Procedure Rules* the parties filed list of documents and list of witnesses' statements dated March 14, 2012 and dated 8.6.2012 respectively. The appellant also filed a supplementary list of witness statements dated April 2, 2013.

B. Testimony

6. The appellant testified his late father M'Arimi M'Mugune had three wives and that they lived on the suit land with the respondent's deceased mother who had brought him up as the only child after his mother the 1st wife died at his tender age. He maintained his step mother was left by his late father to hold the land in trust for him. Further he said in 1976 the respondent purported to evict him following which he lodged a claim before the clan elders who resolved the land be shared equally. He subsequently filed a tribunal case no. 14 of 2008. He produced the decision, the award, the appeal decision at Embu and the copy of the green card as P. exh 1, 2, 3 & 4 respectively.
7. In cross examination PW 1 insisted he was seeking for half share of the land since his brothers were not interested in their share more so since this was where he has been living all his years unlike his other brothers who live elsewhere. He denied that the land was gifted solely to his step mother. As regards L.R No. Nkuene/Ngonyi/37 PW 1 insisted it belonged to his brothers Gitonga and Nkonge. PW 1 stated that his late father's wish was he lives with his late step mother hence his share thereof was justified unlike in the other parcels of land occupied by his step brothers.
8. PW 2 a brother to the appellant confirmed the testimony of the appellant save to add he lived on L.R No. 37 unlike the appellant whose share, possession, developments and occupation was the suit land as a matter of right by virtue of being a son to the initial owner. He confirmed they were all raised by their step mother Elizabeth on the suit land but left after he became an adult to occupy L.R NO. 37 which he was expected to share with his brother Francis Nkonge.
9. PW 3 a neighbor told the court the late M'Arimi had three wives. He stated he was present at the elder's proceedings who recommended that the suit land be subdivided among the parties herein which award was also adopted by the tribunal at Embu.
10. The respondent's evidence was that he was given the suit land by his late father who also shared out other parcels of land to his brothers among them the appellant who had refused to vacate his land and take up his share. He admitted his late mother was alive at the time the suit was filed but had not taken any witness statement from her for he did not wish to call her as a witness. His reason for not calling her was because he did not want her to tell the court the whole truth.



11. According to DW 1 her mother was given the suit land for he did not at the time possess an identity card. DW 2 & 3 told the court that they had bought a parcel of land from the appellants late father but the respondent and his late mother objected to the transaction which land eventually was registered in the name of the late Elizabeth since the respondent had no ID card.
12. Further DW 2 testified that the respondent's late father told the land control board members that his other sons had their share elsewhere. He however confirmed that at the time he was buying the land the appellant was in occupation of the same as the son of the deceased.

C. Submissions

13. The appellant has submitted he is entitled to inherit a share of the ancestral land where he has been living on, which customary rights need not be registered as it is an encumbrance by itself, running with the land as per Section 28 (B) of the Land Registration Act 2012. Reliance was placed on Gerald Mutwiri Mbui vs Mbui Mukangu (2004) eKLR on the key elements to be proved namely possession and occupation.
14. In his view the appellant submitted that he shares the ancestor with the respondent, the land was ancestral or family land, he was living on the land and that as of right he was entitled to the said land.
15. On the other hand, the respondent submitted two issues call for determination. On whether the 1st registration vested absolute ownership rights, the respondent averred the 1st owner was the late Arimi Muguone in 1967 which was later transferred to the respondent's late mother in trust for him being gift inter vivos. Reliance was placed on Jemutai Tanui vs Juliana Jeptepkeny and 5 others (2013) eKLR and Paul Kirinya vs Delfna Kathiri (2019) eKLR.
16. On the issue of whether a customary trust has been established reliance was placed on the ingredients of the same as set out in Kiebia vs Isaaya M'Lintari & another (2018) eKLR.

D. Issues for Determination

17. Having gone through the pleadings, evidence, grounds of appeal and written submissions, the issue for my determination is whether the appellant established any customary trust against the property held by the respondent.
18. The law relating to and the manner of proving customary trust has been settled in Kiebia vs Isaaya M'Lintari supra. To find a trust a party must prove that; the land was before registration family, clan or group land; he belongs to the family, clan or group, his relationship with the family, clan or group is proximate; he would have been entitled to be registered but for some intervening circumstances and that the claim is directed against the registered owner who is a family clan or group member.
19. In this matter a copy of records produced as P. exh 4 shows the original registered owner on April 18, 1967 was the father to the two parties herein who transferred the same to the appellant's step mother on September 3, 1976 while the appellant and the respondent were still minors. Eventually the land was registered in the name of the respondent on July 24, 1976.
20. So, on the 1st and 2nd and 4th limbs of the Kiebia (supra) principles the appellant through his pleadings and testimony has satisfied the said principles.
21. Coming to the issue of whether there was an intention to found a trust and why the land was not registered under the name of the appellant if at all his late father so intended it to be beneficial to him, evidence tendered was that the appellant's late mother passed on at his tender age and was brought up by his step mother who was the respondent's mother as her own "son". In my view just like the



- respondent in 1976, the appellant was 18 years. Therefore if the respondent was his elder brother and the only reason he was registered as the owner at the time was not because he was a minor but for lack of an ID card.
22. There was however the issue of occupation at the time. The appellant pleaded and testified that he had only known the step mother as his only mother. She took care of him and brought him up and stayed with him while in occupation up to the time she passed on during the subsistence of this suit. The respondent takes the view that the transfer to his step mother from their late father was a gift *inter vivos* and was therefore not subject to the customary and occupation rights of the appellant.
 23. The respondent did not bring before the trial court anything by way of a transfer to show that the transaction was a *gift inter vivos* and hence extinguished the possessory and occupation rights already in existence by the appellant.
 24. He who alleges must prove. The respondent was categorical he did not wish to call his mother to support his claim that she had been gifted the land by her late husband to the exclusion of the appellant and that the deceased husband had wished the appellant who was already in occupation to move out and occupy the alleged other land parcel No. Nkuene/Ngonyi/370.
 25. The inference is that and which is actually admitted in cross examination by the respondent, that her mother would have given prejudicial evidence to his defence.
 26. exh 2 & 3 indicate the issue of occupation and developments by the appellant have been clear and are admitted by the respondent.
 27. In *Kiebia* case (supra) the Supreme Court of Kenya held each case has to be determined on its own merits and on the quality of evidence presented. There is no dispute that the parties herein are step brothers. The appellant has pleaded and brought testimony that the suit land is what which he has known as his home since birth where he was also brought up unlike the alleged L.R No. 37 which belongs to the other house and is currently occupied by his brothers Gikunda and Nkonge. PW 2 & 3 corroborated that evidence.
 28. The evidence of the appellant on this has been consistent throughout the previous proceedings before the filing of the instant case.
 29. In my view, the appellants ancestral rights and privileges did not extinguish after the transfer of the land from his late father's to the step mother, and later on to the respondent. See *Peter Moturi Ogutu vs Emelda Basweti Matunda & 3 others* (2013) eKLR.
 30. The respondent has been unable to tell why his late mother and by extension himself did not evict and or direct the appellant to move out of the suit land since 1976 up to the filing of this suit. See *M'Mbijiwe M'Tuota vs Jane Kathanga* (2022) eKLR. The only inference and reason is that the respondent did not evict him since the possession was permitted by customary law and practice. Such a customary right was not extinguished by virtue of subsequent registration of the land in 1967 at which time the appellant was aged 9 years and thereafter in favour of the respondent in 1976.
 31. As regards the issue that the land was a gift *inter vivos*, in *Peter Ndiritu Kibui vs Ann Mugure Kibai* (2016) eKLR the court held three conditions must be met for a gift *inter vivos* to be proved namely that the individual making the transfer actually intended to make a gift, the donee accepted the gift and that lastly the delivery of the property was made to the donee.
 32. In this matter and as indicated above the respondent did not call the late mother to testify about the gift.



33. Secondly there was no evidence that the donor took any action against the appellant who was in occupation of the land since 1958 to vacate ensures that he the land and hands it over to the donee as exclusively his. Similarly, if the intention of the donour was to have the appellant move out and occupy another of his land, that would have amounted to a gift. Nothing would have been easier than for the deceased step mother to direct the appellant to honour the wishes of his late father by moving out of the suit land and selling in the other land.
34. In my view the appellant through pleadings and evidence met the ingredients in the Kiebia case hence the trial court erred in fact and law in dismissing his suit.
35. In the premises, I find the appeal with merits. The same is allowed with costs. The lower court suit is allowed with costs to the appellant.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 13TH DAY OF JULY, 2022

In presence of:

No appearance

HON. C.K. NZILI

ELC JUDGE

