



REPUBLIC OF KENYA



KENYA LAW
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**Gichuru v Gichuru (Environment and Land Appeal E5 of 2020)
[2022] KEELC 14503 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14503 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E5 OF 2020**

JO OLOLA, J

NOVEMBER 3, 2022

BETWEEN

GEOFFREY MUTHIGANI GICHURU APPELLANT

AND

MARION MUTUNDU GICHURU RESPONDENT

JUDGMENT

1. This is an appeal from the judgment of the Honourable A Mwangi, Principal Magistrate delivered on October 22, 2020 in Karatina PMELC No 43 of 2018 (Formerly Nyeri ELC Case No 114 of 2016).
2. By a plaint initially filed in this court on May 27, 2016 before the matter was transferred to the Magistrates Court, Geoffrey Muthigani Gichuru (the appellant) had sought judgment against Marion Mutundu Gichuru (the respondent) for:
 - (a) An order that the defendant be ordered to stop such sub-division of land parcel No Ruguru/Kiamariga/1392 to enable parties to sort out the dispute concerning such sub-division;
 - (b) An order be issued to compel the Nyeri Land Registrar to stop or prohibit any dealings in the said parcel of land Ruguru/Kiamariga/1392 till further notice;
 - (c) Any other or better relief this honourable court may deem fit and just to grant.
3. Upon hearing the suit and in a judgment delivered on October 22, 2020, the learned trial magistrate found that the appellant as the plaintiff then had failed to prove his case on a balance of probabilities and proceeded to dismiss the same with costs.
4. Aggrieved by the said judgment, the appellant moved back to this court and launched the memorandum of appeal dated November 19, 2020 wherein he urges the court to set aside the judgment of the trial court on the grounds that:



1. The learned trial magistrate erred in law and in fact in dismissing the appellant's suit with costs and interest without considering the fact (that) the (respondent) held land parcel No Ruguru/Kiamariga/1392 in trust for herself and the family;
2. The learned trial magistrate erred in law and in fact by failing to consider that the plaintiff bought and purchased land parcel Nos Narok/Mutara South Block 1/983 and Kieni East Farmers Company Limited which were erroneously registered in the names of the defendant instead of the plaintiff;
3. The learned trial magistrate erred in law and in fact in considering the defendant/respondent had given twelve (12) acres of land to (the appellant's) sisters in Kieni East Farmers Company Limited which was paid and bought by the plaintiff and which was in fact owned by the plaintiff but erroneously registered in the name of the defendant; and
4. The learned trial magistrate erred in law and in fact for dismissing the plaintiff's suit with costs giving the way to the defendant to sub-divide the land parcel Ruguru/Kiamariga/1392 knowing very well it was the ancestral land and (the appellant) has settled there together with his family since his sisters were allocated twelve (12) acres in Kieni East Farmers Company Limited as their inheritance.
5. This being the first appeal, this court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal.
6. From a perusal of the record herein, the appellant is a son to the respondent herein. Both the appellant and the respondent have been residing on the suit property – a parcel of land known as Ruguru/Kiamariga/1392 measuring some 3.62 Ha. The said parcel of land was registered in the name of the respondent herein on November 25, 1976.
7. By the suit filed against his mother, the appellant asserted that the respondent was at all material times registered as the owner of that parcel of land as a trustee for herself and her family. According to the appellant, the family had two other parcels of land purchased by his father and himself through shares in Kieni East Farmers Company Limited and at a place known as Mutara.
8. It was the appellant's case that his father who was a member of the said Kieni East Farmers Company Limited passed away in 1973 before completing the payments for the two parcels of land and that it was the appellant who had completed the payments before the said parcels of land were registered in the name of the respondent.
9. According to the appellant, the respondent whose age he gives as 95 years has been acting under the influence of the appellant's other siblings (sisters) and had given the said siblings 12 acres of the land that was bought through the appellant's efforts. The respondent had further acting under such influence and without the appellants knowledge and in total disregard of the appellant's interest and developments in the suit property sought the consent of the land control board (LCB) to sub-divide the suit property into three portions.
10. On her part, the respondent told the court that she is the registered proprietor of the suit property where she resides together with the appellant and carries thereon both subsistence and commercial farming. The respondent told the court the appellant is just but one of her children and that she has allowed him to live on the land and to do some subsistence farming thereon as a licensee.
11. It is the respondent's case that in January 2016, she sub-divided the suit property as she wanted to allocate the appellant and two of her daughters their share of land to enable them take charge and develop their respective portions. In that respect, the respondent told the court she had allocated the



- appellant 5 acres and she had given each of her daughters 2 acres each. She denied that she had held the suit property in trust for the appellant as stated.
12. Having considered the testimonies and the evidence placed before her, the learned trial magistrate determined in the penultimate paragraph of the impugned judgment as follows:
- “... Based on the evidence before court, the alleged trust if any should be on the Laikipia land because the plaintiff claims that when his father died, he took over the payment of the instalments but the defendant caused title to issue in her name after she filed an affidavit seeking to change names of ownership from Simon Gichuru (deceased) to herself. The plaintiff’s claim that the suit land is registered in the names of the defendant in trust for her and him because she has allegedly given the land he paid for in Laikipia to his sisters has no legal basis at all. The plaintiff has not proven their case on a balance of probabilities. The suit is therefore dismissed with costs and interest to the defendant.”
13. As it were, the legal burden of proving the existence of a trust rests with the person asserting a right under the said trust. As was stated in *Jutelabi African Adventure Limited and another -vs- Michael Lockley* (2017) eKLR:
- “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 intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”
14. In the matter herein, the appellant asserted that his mother was registered as the proprietor of the suit property in trust for himself and other members of the family. While his pleadings were unclear on exactly what sort of trust was in place between himself and the mother, the evidence adduced appeared to suggest that the appellant was asserting a right under a customary trust.
15. That being the case, the appellant was required to prove that:
- (a) The suit property were ancestral or clan land;
 - (b) During adjudication and consolidation, the respondent was designated to hold the same on behalf of the family; and
 - (c) The respondent was the designated family member who was registered to hold the parcels of land on behalf of the family.
16. From the material placed before me however, it was evident that the appellant had not provided any evidence as to how the respondent came to be registered as the proprietor of the land and how the trust was created. His contention was that he had contributed to the purchase of other parcels of land which were not in dispute herein and that given that some portion of those parcels of land had been given by the respondent to his siblings, the respondent should be restrained from sub-dividing the suit property before they agreed on how to share the same.
17. Those circumstances as the learned trial magistrate correctly determined could not lead to the creation of a trust on the suit property. If indeed the appellant had contributed to the purchase of the two other parcels of land said to be in Laikipia, his claim could only be in relation to the same and not on the suit property that was registered in the respondent’s name way back in 1976
18. It follows that I did not find any basis to disturb the findings of the learned trial magistrate in the judgment delivered on October 22, 2020. This appeal therefore fails and I dismiss the same with costs.



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

In the presence of:

Mr. Geoffrey Muthigani Gichuru – the Appellant present in person

No appearance for the Respondent

Court assistant – Kendi

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J. O. Olola

JUDGE

