



**Mbiti v Mbiti & another (Environment and Land Appeal
E023 of 2022) [2025] KEELC 96 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 96 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E023 OF 2022
EC CHERONO, J
JANUARY 23, 2025**

BETWEEN

FERDINAND MUGESAN MBITI APPELLANT

AND

SIMON OLINDO MBITI 1ST RESPONDENT

AGNES VOSOLO NYALANDO 2ND RESPONDENT

JUDGMENT

Background

1. The Appellant, Ferdinand Mugesa Mbiti was the 1st Defendant and Agnes Vosolo Nyalando was the 2nd Defendant while Simon Olindo Mbiti was the plaintiff in the former suit being Kimilili PM-ELC No. 40 of 2019. In that suit, the plaintiff/1st Respondent had sued the Appellant and the 2nd Respondent jointly and severally vide a plaint dated 30th August 2019 seeking the following orders;
 1. An order that the defendants are holding land Title Number Bungoma/Kiminini/2449 in trust of themselves and the rest of the family Members as appearing in paragraph (6) above.
 2. Alternatively, the defendants be ordered to curve, vest and transfer same in names of all family members in equal names.
 3. Costs of the suit.
2. The Appellant/1st Defendant and the 2nd Respondent/Defendants filed separate statements of defence and counterclaim dated 20th September, 2019 and 18th October 2019 respectively.
3. After pre-trial conference was taken, the case was confirmed ripe for hearing and parties agreed to proceed by viva voce evidence. The Plaintiff testified alone and closed his case. The 1st Defendant/



Appellant and the 2nd defendant/Respondent also called one witness each and closed their respective cases.

Plaintiff/1st Respondent's Case

4. The plaintiff testified on oath and identified himself as a teacher and resident of Tongaren, Kiminini Scheme within Bungoma County. He referred to his witness statement dated 30/08/2019 which he adopted as his testimony-in-chief. He also referred to his list of documents dated the same date containing 5 items which he produced as P-Exhibit no. 1,2,3,4 & 5 respectively. He stated that he is the eldest son of elder Esau Ombiti and Ferdinand Mugesha Mbiti (Appellant) and Agnes Vosolo Nyalango are his younger brother and elder sister. He stated that while their father was alive, he subdivided his land Parcel NO. Bungoma/Kiminini/725 into 8 portions and shared seven portions amongst all his children without discrimination. He stated that when their father was sharing his land, he wanted to give them title to the 8th portion being LR No. Bungoma/Kiminini/2449 but they agreed that once he dies, the same would remain a family land and that the 1st and 2nd Defendants would hold the same in trust for the family. He stated that they used the suit land as a family for five years but after the demise of their father, Ferdinand Mbiti (1st Defendant/Appellant) fenced off the suit land and prevented the entire family from accessing the same. He stated that the 1st Defendant(Appellant) caused chaos and brought goons on the suit land. He tried to engage the 1st Defendant (Appellant) to attend a clan meeting organised through the area chief and church elders but he refused to attend.

1st Defendant's Case

5. The 1st defendant (Appellant) was sworn and identified himself as a teacher and a resident of Kakamega County. He referred to his witness statement dated 20/9/2019 which he adopted in his testimony-in-chief. He also referred to his list of documents containing 3 items dated the same day and a further list of documents also containing 3 items dated 11/8/2021 which he produced as 1st D-Exhibits 1, 2 3, 4, 5 and 6 respectively. He stated that the suit land parcel NO. Bungoma/Kiminini/2449 was allocated to him and Agnes by their father and mother in the year 2013

2nd Defendant's Case

6. The 2nd Defendant was sworn and identified herself as a resident of Kisii and a retired teacher. She referred to her witness statement dated 14/2/2020 which she adopted in her testimony-in-chief. She confirmed that the suit land parcel NO. Bungoma/Kiminini/2449 is registered in her name and Ferdinand Mbiti, the 1st defendant herein as joint tenants. She stated that she has another parcel of land given to her by her father. She stated that their parents were buried in the suit land NO. Bungoma/Kiminini/2449. After considering the testimonies and the evidence adduced by the parties, the trial Magistrate rendered herself on 29/08/2022 by ordering the subdivision of the suit property into two portions, one portion in the name of the 1st defendant and the other portion containing the houses and graves of their parents in the name of the 2nd Defendant. Being aggrieved by the said decision, the 1st Defendant preferred the present Appeal on the following three grounds;
 1. The Learned Magistrate erred in law and in fact by directing how the suit land Title Number Bungoma/Kiminini/2449 should be shared between the 1st Defendant (ferdinand Mugesha Mbiti) and 2nd Defendant (Agnes Vosolo Nyalango) when the said land was jointly owned by the two Defendants.
 2. The Learned Magistrate erred in law and in fact by ordering that upon subdividing the suit land Title Number Bungoma/Kiminini/2449 into two equal portions, the portion on which



lies the graves and the houses of the parents be registered in the names of the 2nd Defendant Agnes Vosolo Nyalango to enable her allow other siblings to access the said home and graves yet the Magistrate had already found that the said land was not held in trust for the said siblings.

3. The Learned Magistrate erred in law and in fact by granting a prayer that had not been sought in the pleadings.

Appellants Submissions

7. The Appellant through the Firm of M/S Teti & Company Advocates submitted on the three grounds as follows;
8. On the first ground, the Appellant submitted that it is not disputed that the suit Land Title Number Bungoma/Kiminini/2449 is jointly registered in the name of the Appellant and the Respondent and that being the case, it was upon the 1st and 2nd Defendants in the trial court to come up with a way of sharing the land on their own terms. He submitted that it was wrong for the trial court to decide for the parties on how to share the land when there was no prayer in the plaint for sharing out of the said land between the said parties.
9. On the 2nd ground, the Appellant submitted that the Learned Magistrate erred in law and in fact by ordering that upon subdividing the suit land Title NO. Bungoma/Kiminini/2449 into two equal portions the portion on which lies the graves and the houses of the parents of the parties be registered in the name of the 2nd Defendant Agnes Vosolo Nyalango to enable her allow other siblings to access the said home and graves yet the Magistrate had already found that the said land was not held in trust for the plaintiff and his siblings. He submitted that the trial Magistrate erred on two fronts; First, She decided for the Appellant and his sister on how they should share the suit land yet they had equal rights in the said land being joint tenants thereof and ought to have come up with a formula for sharing among themselves. Second, the learned Magistrate allowed the Appellant's siblings to enter into the suit land through Agnes Vosolo Nyalango as if the same was being held in trust for them yet she had already found there was no evidence in law and in fact and that this era ought to be corrected. Reliance was placed in the following cases;

VFM V AW (Divorce Appeal E130 of 2022) KEHC 11742 (KLR) (Family) (3 October, 2024) (Ruling); Lamba v National Social Security Fund & Anor (2023) KECA 124 (KLR); Esswell International AB V Kaab Investments Limited (2016) eKLR; Jack Mukhongo Munialo v Nzoia Sugar Co. Ltd & Anor (2017) eKLR; Gichuki v Gichuki (1982) KLR 285; Mbothu & 8 Others v Waitimu & 11 Others (1986) KLR 171; Salesio M'itonga M'arithi M'athara & 3 Others (2015) KLR (Court of Appeal at Nyeri, Civil Appeal Case NO. 6 of 2013); Order 1 Rule 8CPR; Section 107(1) of the *Evidence Act*

1st Respondent's Submissions.

10. The 1st Respondent filed a Cross Appeal and raised 8 grounds of Appeal as follows;
 1. The learned Magistrate erred in law by dismissing the Appellant's suit in total disregard of the issues of law and fact raised therein
 2. The Learned Magistrate erred in law in ruling in favour of the Respondents despite overwhelming points of law and facts tilting heavily against the Respondents.
 3. The Learned Magistrate erred in law and in fact as the Judgment was against the weight of evidence adduced by the plaintiff which facts were justifiable, substantive and overwhelming as provided for in the law.



4. The learned Magistrate erred in law and in fact as the conclusions drawn from the facts were perverse in that the findings of fact by the learned Magistrate were unreasonable, improper and inadequate in law,
 5. The learned Magistrate erred in law and in fact by totally ignoring and not taking into consideration the submissions of the Appellant and fully upholding the 1st Respondent's submissions which fell short of the evidence adduced by the parties at the hearing of the suit.
 6. The learned Magistrate erred in law and in fact as the Judgment was against the weight of evidence adduced by the Appellant.
 7. The learned Magistrate erred in law and fact by failing to test all the facts and evidence pleaded and adduced on a balance of probabilities.
 8. The Learned Magistrate erred in law in failing to take into consideration the High Court and Court of Appeal decisions cited by the Appellant which authorities are binding on the lower court.
11. On the first ground of his Cross Appeal, the 1st Respondent submitted that the Learned Magistrate made a wrong holding that the suit land was not trust land. He submitted that the suit land is so sacred as it contains their parents' house and graves and any careless handling them will automatically affect any reasonable man. He relied in the case of *Isack M'Inanga Kiebia v Isaya Theuri M'Lintari & Anor* (2018) eKLR.

2nd Respondents Submissions

12. The 2nd Respondent through the Firm of Chisengo & Co. Advocates submitted on the following two issues;
1. Whether the Learned Magistrate erred in her decision as appealed by the Appellant and Cross Appealed by the 1st Respondent?
 2. Whether Land Parcel Number Bungoma/Kiminini/2449 is trust land or it is for the exclusive ownership and use by the Appellant and 2nd Respondent to the exclusion of the 1st Respondent and his siblings?
13. On the first issue, the 2nd Respondent submitted that land parcel NO. Bungoma/Kiminini/2449 is jointly registered in the name of the Appellant and 2nd Respondent in trust of the Esau Mbiti family comprised of Agnes Vosolo Mbiti, Simon Olindo Mbiti, Florence Deizu Mbiti, Ferdinand Mugesani Mbiti, Onesmus Kinara Mbiti, Johnstone Mwenya Mbiti and Ismael Njojo Adegoo. She placed reliance in the case of *Domici Otieno Ongoyo & 2 Others v Helida Akoth Walori* (2022) eKLR

Legal Analysis and Determination.

14. I have considered the Memorandum of Appeal, the extract of the record of appeal, the testimonies and evidence adduced by the parties at the trial court, their submissions and the relevant law. This being a first Appeal, this court's obligation is to reconsider, re-evaluate and re-analyse the facts afresh and come up with its own Conclusion. (see *Selle v Associated Motor Boat Company Limited* (1968) EA 123)
15. The plaintiff's substantive claim in his plaint dated 30/8/2019 was for an order that the defendants are holding the suit land Title NO. Bungoma/Kiminini/2449 in trust for themselves and the rest of the family members and that everybody is entitled in its value in equal shares.



16. It is not in dispute that the plaintiff and the defendants are siblings and the suit property parcel NO. Bungoma/Kiminini/2449 is a subdivision of the original Land parcel NO. Bungoma/Kiminini/725. It is not also in dispute that during his lifetime, the plaintiff and the defendant's father Esau Mbiti (deceased) subdivided his land into 8 portions and shared amongst all his children and caused the suit land which was one of the resultant parcels to be registered jointly in the names of the defendants. It is also not in dispute that the suit land contains their parents home and grave yards.
17. Section 107(1) of the *Evidence Act* provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. It is trite law that trust is a question of fact and has to be proved by evidence. In *Juletabi African Adventure Limited & Another v Christopher Michael Lockley* (2017) eKLR, the Court of Appeal held as follows;
- “it is settled that the onus lies on the party relying on the existence of a trust to prove it through evidence. That is because;-
- “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 intentions of the parties to create a trust must be clearly determined before a trust will be implied.”
18. Again in *Isack Kiebia v Isaya Theuri M’Lintari & Another* (2018) eKLR, the Supreme Court of Kenya held 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
 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 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.”
19. The burden of proving that the suit parcel herein was trust land and that the defendants were registered as proprietors of the land in trust lay squarely on the plaintiff/1st Respondent herein. The trial Magistrate rendered herself at page 81 of her Judgment as follows;
- “I will be guided by the aforesaid authority and I find that though the plaintiff claimed that the 1st and the 2nd defendants held the suit property in trust for the plaintiff and his siblings, no evidence was tendered to support the claim. There are no circumstances surrounding



the registration of the 1st and 2nd defendants as absolute proprietors of the suit property that would make the court treat that the 1st and 2nd defendants as trustees and impose trust...”

20. I agree with the findings by the trial Magistrate that no evidence was adduced by the plaintiff in the former suit that the defendants as proprietors of the suit property held the same in trust for the plaintiff (1st Respondent) and the rest of his siblings.
21. Having found that the defendants (Appellant and the 2nd Respondent) as absolute joint proprietors of the suit property did not hold the same in trust for the plaintiff (1st Respondent) and the other siblings, I find that the trial Magistrate erred in law and fact by directing that the same property be subdivided into two equal portions and shared between the defendants (Appellant and the 2nd Respondent) and that the portion which lies the graves and houses of the parents of the parties be registered in the names of the 2nd defendant/Respondent. I also find that order by the trial Magistrate flies against the prayers sought by the plaintiff/1st Respondent in his pleadings.
22. I also note that the suit property was registered in the names of the 1st and 2nd Defendants (Appellant and 2nd Respondent) as joint tenants. In the case of Isabel Chelangat v Samuel Tirop Rotich & 5 Others (2012) eKLR, Justice Sila Munyao distinguished between joint ownership and land held in common and stated as follows;

“A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else, they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities”. The right of survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant.”

In a tenancy in common, the two or more holders hold the property in equal shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants. In other words, they have separate interests only that it remains undivided and they hold the interest together...”

23. Under the law, a joint tenancy can be converted into a tenancy in common by the doctrine of severance. Section 91(7) of the [Land Registration Act](#) provides that joint tenants are free to sever the tenancy which severance must be completed by registration. It is trite that parties can only sever joint tenancy by executing an instrument in the prescribed form signifying that they agree to sever the joint ownership. Other than that, there is no other lawful way of separating co-ownership of property.
24. From the foregoing analysis, I find this appeal is merited and grant the following consequential orders;
 1. The Appellant’s main Appeal is allowed
 2. The 1st Respondent’s Cross-Appeal is devoid of merit and the same is hereby dismissed.
 3. The Judgment of the trial Magistrate Hon. G. Adhiambo PM delivered on 29/8/2022 in PM-ELC No.40 of 2019 be and is hereby set aside and substituted with an order dismissing the plaintiff’s claim.
 4. This being a dispute between close family relations, each party to bear their own costs of the Appeal.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 23RD DAY OF JANUARY, 2025

HON. E.C CHERONO



ELC JUDGE

In the presence of;

1. Mr. Teti for the Appellant.
2. 1ST Respondent/Advocate-absent
3. 2nd Respondent/Advocate-absent.
4. Bett C/A

