



**Murithi & 2 others v Kinyanga (Civil Appeal E001 of 2022)
[2023] KEHC 20621 (KLR) (19 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 20621 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E001 OF 2022**

MS SHARIFF, J

JUNE 19, 2023

IN THE MATTER OF THE ESTATE OF ADRIANO NJIRU MUGO(DECEASED)

BETWEEN

CHARLES MBAE MURITHI 1ST APPELLANT

PATRICK GITONGA MURITHI 2ND APPELLANT

EUGENIO MWENDA NJIRU 3RD APPELLANT

AND

HARRIET MUTHONI KINYANGA RESPONDENT

*(Being an appeal from the judgment of the Senior Resident Magistrate Hon. N. Kahara
in Chuka Chief Magistrates Succession Cause No.87 of 2020 delivered on 13.1.2022)*

JUDGMENT

A. Background

1. This appeal emanated from the lower court suit where the petitioner (respondent herein) having filed summons for the confirmation of grant intestate of the estate of the deceased, the appellants filed their protest dated June 17, 2021. They opposed the confirmation on grounds that; the respondent had filed the same secretly, excluding the 1st and 2nd appellants who are beneficiaries to part of the land parcel number LR No Karingani/Muiru/1574 (herein after the ‘suit land’), forming part of the estate of the deceased. They alleged that the suit land was family land registered in the name of the deceased and held in trust for the family of one Andrew Murithi Mugo, who died in 1978. The 1st and 2nd appellants are brothers to the deceased and children to the late Andrew Murithi. The 3rd appellant is the son to the deceased. Further, the appellants alleged to being in occupation of parts of the suit land which they have developed. The said portions were sub-divisions of the suit land which had been excided from the suit land but the deceased passed on before effecting the transfers.



B. Testimony

2. PW1 was the petitioner and the respondent herein. She testified that the suit land measures 3 acres and it belonged to her late husband with whom they had four children namely; Eugenio Mwendwa, Charles Mutwiri, Doreen Wanja and Frida Wawira. She also stated that the 1st and 2nd protestors each have their own parcels numbers LR No Karingani/Mariani/1436 and Karingani/Mariani/2129. She produced green cards for the two properties as P Ex No1 and 2 respectively. She denied that the deceased wanted to sub-divide the suit land to the 1st and 2nd appellant but confirmed that the mutation form was for purposes of subdividing the land because the deceased wanted to sell one portion but died before the sale. She went further to state that she wanted the suit land subdivided so that the 3rd appellant and his brother Charles each would get 1 acre, her 2 daughters and herself to share the remaining 1 acre. In cross-examination, she testified that the suit land and the parcel numbers Karingani/Mariani/1436 & 2129 all belonged to Ndaka Mutegi. She also averred that the latter portions were never subdivided to the 1st and 2nd appellants and the deceased.
3. Further, PW1 claimed that she lived alone with her family on the suit land and that the deceased and her built the house alleged by the 1st appellant when he was a young boy. She further stated that the 1st and 2nd appellant's do not live on the suit land as they live elsewhere. PW1 also testified that the 1st appellant had taken her to the police for cutting down trees but she was not charged as the trees were hers. She denied that the two parcels were ever subdivided.
4. On the part of the protestors, the 1st appellant testified as PW1 and stated that the suit land belonged to their late father but was registered in the name of the deceased to hold in trust for them. He averred that there were parcels numbers 1436 and 3109 but denied knowledge of parcel No 2129. Further, PW1 said that the 2nd appellant subdivided his land between him and the deceased and that it was only the suit land which was not subdivided. He claimed to have a permanent house on the suit land and had connected water for irrigation. He however did not produce any evidence to this effect. He confirmed parcel number 2129 was in his name upon cross examination and at times denied knowledge of that parcel of land. He stated that parcel No 1436 was registered in the name of the 2nd appellant. PW1 also testified that he had no evidence that the suit land was held in trust. He averred that the other parcels were subdivided each into 3 portions and the deceased had portions in each of them and the title deeds were out but had no evidence of the same. He confirmed that the respondent cut down his trees but was not charged in court.
5. PW2 was the 2nd appellant, he testified that the land was registered in the name of the deceased to hold in trust for them. He also stated that he was given parcel numbers 1436 and 3109 to hold in trust. He alleged that the land parcel number 3109 was subdivided and registered in the names of the three brothers while parcel number 1436 was subdivided between him and the family of the deceased. In cross-examination, he confirmed to owning parcel number 1436 and that he had no green card to show he subdivided it.
6. PW3 was the son to the petitioner and the 3rd appellant. He stated that the suit land was from his grandfather and his uncles also lived thereon. That the 1st appellant built a house, put water for irrigation and planted avocados. He also alleged that the deceased had called all his children and told them that his brothers had a right to inherit the land. Thus, he did not want a curse. He confirmed that his father's words were not written down. However, PW3 did not have any evidence to show that the 1st appellant had a house and also farmed on the suit land.



The Appeal

7. The appellants filed the memorandum of appeal dated January 24, 2022 on grounds inter alia that: the learned magistrate erred in law and in fact by;
 - a. Unfairly dismissing /disallowing the appellants' protest thereby disinheriting them of their legitimate share from the estate which was held in trust by the deceased.
 - b. Misapprehending the law in arriving at an erroneous decision against and without considering the evidence on record.
 - c. Dismissing or declining, refusing or omitting to consider the appellants' evidence.
 - d. Making observations on issues not canvassed by parties thus arrived at wrong conclusions.
 - e. Misdirecting herself in using wrong principals of the law thus arrived at an erroneous decision when the evidence tendered by the appellants in support of their case.
 - f. Failing to consider the appellants submissions on their claim for the share in the subject matter on the issue of trust.
 - g. Dismissing the established and legitimate interests on the appellants in the subject matter.
 - h. Applying unknow principles of the law and arriving at wrong erroneous an injudicious decision.
 - i. Failing to be objective and omitting, failing or neglecting to try establish and ascertain the accuracy and veracity of the parties claims and contentions before making conclusions and arriving at wrong decisions.
 - j. Omitting to request for or invite evidence to prove the appellants' claim to the effect that were in actual occupation and utilization of part of the land they were laying claim to rendering decision that will unfairly deprive and disposes the appellants.
 - k. Failing to adhere to, rely on, uphold and be guided by the provisions of the Law of Succession Act thus rendering an unfair decision against the appellants.
8. The appellants further prayed that the appeal be allowed; the decision of January 13, 2020 and the subsequent orders be set aside; the prayers in the trial court suit be allowed and cost of the appeal. The record of appeal dated September 5, 2022 was filed on October 11, 2022.

Written Submissions

9. Parties canvassed the appeal by way of written submission dated December 19, 2022 and December 13, 2022, respectively
10. The appellants submitted that; the appellate court had the mandate to re-evaluate the evidence of the trial court and the judgment and arrive at its own findings. Reliance was placed on Section 78 of the Civil Procedure Act, *Selle vs- Associated Motor Boat Co* (1968) EA 123 & *Peters v Sunday Post Limited* (1958).
11. Similarly, the appellants relied on their submissions to the protest at pages 24-28 of the record of appeal; their averments in the affidavit of protest at pages 9-11 of the record of appeal; the witness statement at pages 18-23 of the record of appeal. However, the appellants averred that the typed proceeding did not capture the entire evidence of the parties and was thus scanty. More precisely, the proceedings left



out documents marked CMM '1' & CMM '2' the letter of consent and the application for consent of the land control board respectively. That the direct evidence of the 3rd appellant was left out.

12. The appellants also submitted that the trial court would have requested and allowed the appellants to tender photographs as evidence in support of their claim other than apply double standard when allowing or disallowing evidence from parties. Further, that their claim was solely based on trust and not inheritance. Reliance was placed on *[Twalib Hatayan & Another v Said Sagggar Ahmed AL-Heidy & others](#)* (2015) eKLR, to expound on the proposition of trust.
13. On the other hand, the respondent submitted that as the wife of the deceased, she had a life interest over the property of the deceased as provided under Section 35 of the *[Law of Succession Act](#)*. She referred to the proposed mode of distribution of the estate of the deceased at page 6 of the record which was magnanimous and generous. Nevertheless, the 3rd appellant was unhappy with the proposed mode of distribution. Reliance was placed on High Court of Kenya at Chuka Succession Cause No 23 of 2018, to further the proposition that equality between sons and daughter could not be over emphasized. Thus grounds 4, 5, 8, 9 and 11 of the appeal fail as seen at pages 2-4 of the record.
14. Additionally, the respondent submitted that under Section 107-109 of the *[Evidence Act](#)*, one who alleges bear the burden of proof. Thus, the trial court could not call for evidence from the appellants.
15. On grounds 1, 6 and 7, the respondent submitted that on the allegations of trust would be entertained by a probate court if it involved close relatives. She relied on; *[Zipporah Wanjiru Mwangi v Zipporah Wanjiru Njoroge](#)* (2017) eKLR, where the Court of Appeal confirmed the circumstances under which a probate court can hear and determine a claim of trust and on the Black's Law Dictionary on the definition of trust.
16. The respondent also submitted that during adjudication of Muiru and Mariani Adjudication Sections, the father to the 1st and 2nd appellants had passed on. That one Ndaka Mutegi, the uncle of the deceased, 1st and 2nd appellant walked the boundaries of the family land and subdivided it to the deceased, the 1st and 2nd appellants. That no one was given his land to hold on behalf of the other but to hold their shares absolutely. Further, it was submitted that if there was any trust, then it was discharged when each was given their respective shares. Subsequently, each of them became the registered proprietors as indicated in the green card and the official search.

Analysis and Determination

17. The court has looked at the lower court file, the appeal and written submissions herein. The issues for determination are;
 - a. Whether the appellants have proved trust over the suit land.
 - b. Whether the trial court considered the facts, evidence and the law and arrived at a correct decision.
 - c. Whether the appellant deserve the prayers sought.
18. On the first issue, Order 2 Rules 3, 4, 9, 10 & 11 of the *[Civil Procedure Rules](#)* provide for the manner in which parties should plead for and against trust. More specifically, Order 2 Rule 10 (1) thereof provides that the particulars of breach of trust must be specifically pleaded while Order 2 Rule 4 (2) thereof requires a defendant to an action for the recovery of land to plead specifically every ground of defence which he relies on and a plea that he is in possession of the land by himself or his tenants shall not be sufficient.



19. In this suit, the appellants filed an affidavit of protest sworn on June 17, 2021 by the 1st appellant on his own behalf and on behalf of the appellants. He averred that the suit land was ancestral land registered in the name of the deceased to hold in trust for all his siblings. That their late mother allowed the registration in the name of the deceased as the eldest son, on behalf of their late father. The deceased died before the said transfer to his siblings. He annexed copies of the application for consent and consent to subdivide marked CMM1 A & B, respectively. In *Mukangu v Mukangu* (ELC Case No 88 of 2015) (2022) KEELC 14787 (KLR) November 16, 2022) Judgment, the court held that the manner, character and the elements to found a customary trust as elaborated in *Isack M'inanga Kiebia v Isaya Theuri M'lintari & another* [2014] eKLR, where it was held that a party must ascertain that the land in question was before registration family land; the claimant belongs to that family; the relationship with the family was proximate; the claimant would have been registered as the owner save for some intervening circumstances and that the claim was directed at the registered owner, a member of the family. Further, in *Omollo vs Oduor* (Civil Appeal) 46 of 2017 (2022) KECA 371 (KLR) 18 February (2022) Judgment, the court held that evidence must be led to prove the existence of a trust and that each case has to be determined on its own merits and the quality of evidence presented before the court. What amounts to quality evidence was expounded in *Kambo vs Mwangi* (civil appeal) 186 of (2017) KECA 524 (KLR) (April 28, 2022) Judgment, where the court opined that the original suit property was family land before registration and fell under distribution in line with the Kikuyu customary law among the male elements in the family and the unmarried daughters. The court held that the evidence tendered before it was sufficient to presume a customary law trust.
20. In this suit, the suit land is alleged to be family land held by the deceased in trust for his siblings. The appellants testified that their uncle was the one who gave them each a parcel of land that they each own absolutely, including the deceased. The allegation by the appellants that all the parcels were to be subdivided into three portions is neither here nor there. There is no evidence that the first appellant has developments on the suit land. The testimony of the PW2 and PW3 does little to aid his case on the alleged developments. Further, the appellants failed to call any other witness that was present at the alleged family meeting convened by the deceased that purportedly discussed and agreed on the subdivision of the suit land and its distribution to inter alia the appellants .
21. Similarly, the appellants alleged that they have subdivided their individual parcels of land into three portions and titles were out. It defeats logic why they would fail or neglect to tender such vital evidence that tend to show that all the parcels were given to them by their uncle were to be held in trust. Looking at the application for consent and the consent to subdivide the suit land, the same were done in 2004. it has not been explained why the appellants failed to follow up until January 4, 2013, when their brother passed on. Therefore, the court finds that the evidence tendered by the appellant wanting to found a claim on trust. The claim of trust thus fails.
22. On the second issue, the trial court pronounced itself based on the pleadings and evidence tendered before it. It is a legal principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the *Evidence Act* provide as follows:

107

- (1) 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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.



108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

23. The *Halsbury's Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

24. The appellants fault the trial court for not asking them to bring evidence to prove their case. The onus to prove a case on trust lay squarely on the appellants to show how the concept of trust came about. They failed to do so. They therefore cannot shift the blame on the trial court for failing to call for the evidence. It is not the duty of the court to aid a party in prosecuting their case as to do so would be to descend into the arena yet the court is not a combatant but an umpire.

25. On the last issue, having found that the appellants failed to discharge their evidential burden of proof and thus failed to show how the land was held in trust for them, their prayers are bound to fail. Thus, the court upholds the judgement of the trial court and the orders made therein.

26. On costs, this being a family matter each party to bear their own cost.

It is hereby so ordered.

DELIVERED, SIGNED AND DATED AT CHUKA THIS 19TH DAY OF JUNE 2023

MWANAISHA. S. SHARIFF

JUDGE

