



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kamau v Gakere & 2 others (Civil Appeal 55 of 2000)
[2024] KEHC 13913 (KLR) (Civ) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13913 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 55 OF 2000

JN NJAGI, J

NOVEMBER 7, 2024

BETWEEN

HILARY KIBUU KAMAU APPELLANT

AND

ALICE NJERI GAKERE 1ST RESPONDENT

MARGARET WAIRIMU 2ND RESPONDENT

HANNAH WAITHERA 3RD RESPONDENT

(Being an appeal from the judgment and decree of the Hon. J.B.A. Olukeye, Ag. Resident Magistrate in Murang'a SRM's Court Civil Suit No.290 of 1993 delivered on 19/1/2000)

JUDGMENT

1. The respondents herein instituted suit No.290 of 1993 before the Murang'a Senior Resident Magistrate's in which they were seeking for a declaration that the original owner of land parcel No. LCC.18/ Marumi/40 held the subject land in trust of the respondents' husband and other 4 persons. They consequently sought for orders that the appellant do sub-divide and transfer 0.6 acres out of the land to the respondents as their husband's share and in the alternative the court to authorize the Executive Officer to sign all the necessary forms for sub-division and transfer of 0.6 acres out of the suit premises.
2. The trial court in a judgment delivered on the 19th January 2000 found for the respondents and granted the orders sought. The appellant was aggrieved by the decision of the trial court and lodged the instant appeal before this court, the High Court. The grounds of appeal vide an amended memorandum dated 18th May 2009.



3. The court gave directions for the appeal to be disposed of by way of written submissions. The appellant filed his submissions through his counsel but counsel for the respondents did not file any submissions despite being served with the directions of the court.
4. I have gone through the submissions of counsel for appellant. Before delving into the appeal, there is an important matter that requires the determination of this court, which is on whether this court has the requisite jurisdiction to determine the appeal which relates to customary trust on land.
5. The jurisdiction of the court of law is such an important matter in dispensation of justice that it can be raised at any stage of proceedings even on appeal – see *Adero & Another v Ulinzi Sacco Society Limited* [2002] 1 KLR 577. It can also be raised by the presiding court even on its own motion. This is so because jurisdiction is everything and without it a court has no power to make any step, as held in the classic case of *The Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Ltd* (1989) KLR 1 where Nyarangi J.A stated that:

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

6. On the same issue, the Supreme Court in the case of *Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 others* (2012)eKLR held as follows:

“A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”

7. The 1st and 2nd respondents herein in their claim before the trial court contended that their late husband, one Gakere Kibuu, was a brother to the late Kamiru Kibuu. That the two brothers had three other brothers. During land registration, the family land No. LCC.18/ Marumi/40 was registered in the name of the said Kamiru Kibuu as the elder son among the brothers so as to hold the land in trust of the other brothers. This took place in 1963. The 1st and the 2nd respondents were already settled by their husband on the land and continued to occupy their portion of the land. The 3rd respondent who was wife to another brother of Kamiru called Maina, was also settled on the land. Later in the 1970s or thereabouts, the respondents learnt that the said Kamiru Kibuu had transferred the whole of the land to the appellant Kamiru Kibuu and the husbands to the respondents had by then died. The respondents sued the appellant herein claiming their share on the basis of customary trust.
8. The question then is whether this court has jurisdiction to determine an appeal relating to trusts on customary land in view of the provisions of Article 165 of *the Constitution* of Kenya, 2010 and section 13 of the *Environment and Land Court Act*, 2013.



9. Article 162(2) of *the Constitution*, 2010 provides that:

“Parliament shall establish Courts with the status of High Court to hear and determine disputes relating to, the environment and the use and occupation of, and title to, land.”

10. Section 4 of the Land and Environment Act, Cap 12A establishes the Land and Environmental Court of which Section 13 gives that Court powers to hear and determine disputes relating to land and environment.

11. In my view, appeals on customary trust are claims on land ownership and therefore lie within the jurisdiction of the Environment and Land Court and not the High Court. In the case of Joseph Koori Ngugi V Stephen Ndichu J. Mukima [2017] eKLR, where the issue was whether an interest in land should be heard before the Environment and Land Court, it was held that:

“A claim for an equitable interest in land is a claim against the legal owner of land and hence a dispute over ownership of the land. I am persuaded that the drafters of the Kenyan Constitution intended such questions to be determined in the ELC. The text of *the Constitution* and section 13 of the ELC Act seems perfectly clear to me on that question”.

12. In the Estate of Njuguna Igwima Succession cause No.1905 of 2012 where the issue was whether a succession cause involving customary trust should be heard at the Succession Court or not, the court stated that:-

“The issue of Customary trust raised by the protest must be heard and determined in another forum so as to inform on whether the net estate of the deceased is available for distribution to the beneficiaries includes the two suit property or half of the said property, determination can only be within the purview of the Environment and Land Court to decide whether the said trust does exist while looking into the substantive claim by the claimants.”

13. In view of the foregoing, it is my holding that the High Court does not have jurisdiction to determine appeals relating to customary trusts on land. The same is the preserve of the Environment and Trust Court.

14. That being the view of this court on the matter and relying on the Court of Appeal decision in Kenya Medical Research Institute v Samson Gwer & 8 Others [2019] eKLR, I order that the appeal be transferred to the Environment and Land Court at Murang'a for hearing and determination.

15. Costs to be in the cause.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF NOVEMBER 2024.

J. N. NJAGI

JUDGE

In the presence of:

Miss Alubi for Appellant

No appearance for Respondents

30 days Right of Appeal.

