



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 19 OF 2019

M'ERURI NKARIMA.....APPELLANT

VERSUS

JACOB NTONJIRI NKARIMA.....1ST RESPONDENT

ESTHER MWATHI NKARIMA2ND RESPONDENT

(Being an appeal from the Judgment of Hon. G.M. Wakahiu (C.M.) delivered on 27th December, 2018, in Maua CMCC No. 279 of 2011)

JUDGMENT

1. The appellant appeals against the lower court judgment on the basis that his evidence was not considered as opposed to that of the respondents yet the land was solely acquired and registered under him without any overriding interests; the burden of proof was shifted to him as a first registered owner; he had absolute rights against the respondents and lastly the respondents' claim was allowed yet there was no evidence in supporting it.
2. The respondents had sued the appellant over **L.R No. Maua/Amwathi/3980 and 6063** hereafter the suit land claiming that as his elder brother, he was holding the land in trust for them and hence sought for the land to be shared equally and or transferred to them.
3. The appellant denied the suit land was initially ancestral land and or acquired by their late father as alleged or at all and instead claimed the respondent were colluding with purported clan elders to unjustly subdivide his land and deny him occupation rights. He insisted the respondents' suit was bad in law, time barred and that they lacked locus standi to initiate it.
4. In a reply to the defence the respondents stated the land had initially been gathered by their late father who passed on while they were young, the appellant was to hold the parcel in trust for them and eventually transfer the land to them upon attaining the age of majority.
5. Further the respondents averred whereas they were still in occupation, the appellant in utter breach of the trust had declined to share and on transfer the land to them.
6. During the hearing PW1 testified his late father was interred in the suit land when he was 5 years old leaving them under the care of the appellant on the understanding that he shall share the land with them upon attaining the age of majority.
7. PW1 further testified he was married with five children and though he works on the subject land, his other brothers were duly transferred their shares by the appellant yet he had refused to transfer to him and PW2 of their portions. PW1 insisted the land was ancestral and that the appellant was holding it in trust for them.
8. Further, PW1 clarified the appellant had not given him any notice to vacate or stop any developments thereon. As a result PW1 stated his efforts to intervene through the area chief and the clan elders were unsuccessful as the appellant had ignored them. He produced the clan elders' minutes to that effect.
9. Additionally, PW1 produced a copy of the title deed for **Parcel No. 3980**. He reiterated he was born in Kirarai and not Mutuati and urged the court to order the appellant to give out his share.
10. In cross examination PW1 stated his father passed on while he was a minor but the appellant was over 18 years old hence the reason he was recorded the owner of the suit land so as to hold it in trust for the rest of his siblings who were by then minors. Further he insisted their late father convened a meeting prior to his demise and gave clear instructions on the mode of sharing his land. He insisted the defendant had since honoured in part by giving out a share of to Kirema out of the 7 children.

11. PW1 confirmed he had tea bushes, trees and bananas on the suit land which was approximately 0.5 acres, and fenced from the other portion utilized by the appellant. Further that between the two portions, there was a path separating the two portions.
12. PW1 also testified that the appellant had been using the smaller portion alone where his late father was buried but the rest was utilized by them as part of their entitlement from their late father.
13. PW2 told the court during the clan elders meeting, the appellant had agreed he was holding the land in trust for them. She stated her late father had acquired the land through inheritance, she maintained she was born on the land and out of the 7 siblings, it was only her and PW1 claiming the land since the rest had parcels of land where they live, while others got land from their father directly before he passed on.
14. Further, PW2 claimed PW1 and herself were young at the time of their father passed on hence their their share was left out with the appellant to hold in trust until they became adults. Additionally, PW2 stated she was never married and hence was living on the suit land though not formally transferred to her in accordance with the directives s of her late father.
15. PW2 told the court under the Meru customs, the eldest child having been married could not take land and insisted the land was acquired by their late father after migrating from Amwathi area. She confirmed her late father had convened an elders meeting prior to his death and gave out his last wishes on how the suit land should be shared out among his children. She insisted the parcels are duly partitioned and occupied by them. She testified that as per Kimeru customary rites, the parcels were under the name of the appellant as the eldest son in trust for the other children.
16. PW3 testified he was a secretary to the Antubochiu clan when they convened a meeting over the disputed land in which a resolution was made for the land to be shared out among the parties. He confirmed all the three parties attended the meeting held at the defendants' home.
17. The appellant adopted his witness statement and produced **D exh 1 and 2, the** title deeds for Parcels **No's 398 and 6063** under his name. He stated he had bought the parcels for value prior to the adjudication process. Further he claimed his late father used to live in Mutuati but not on **Parcel No. 3980**. He denied PW1 was aged 6 years at the time his father passed on, claimed he was unaware of **Parcel No. 4241**, denied he was holding the suit land in trust for the respondents and further denied PW1 was living with his brother one Kirema.
18. DW2 told the court the appellant's late father was living on one M'Eruri's land and that there was no evidence he had bought it using goats.
19. Through written submission dated 3.11.2021 the appellant urges the court to find that there was no evidence showing the parcels in issue ever belonged to his deceased father so as to found a claim that they were ancestral land hence capable of being held by him in trust for the respondents.
20. Secondly it is submitted all the siblings of the appellant were given their parcels land, moved into their respective pieces and none except the respondents were claiming his land since he had legally bought and or gathered it prior to registration.
21. Thirdly, it is submitted the respondents had not lived on the suit land and that they had pieces allocated to them just like the other siblings and that had the deceased intention been for the land to be held in trust, the same would have been registered in the name of their eldest brother M'ERuri Nkarina as per Meru customs.
22. The appellant urges the court to be guided by *Isack Kieba M'Inanga –vs- Isaya Theuri M'Linturi & Another [2015] eKLR* on the proposition that evidence must be produced on the root of the land and that an intention to create a trust must be evident before a trust can be determined.
23. Regarding the intention to found a trust, the appellant relies on *Peter Ndungu Njenga –vs- Sophia Watiri Ndungu [2000] eKLR and Patrick Mathenge Gachui –vs- Karumi Wambugu & Another [2010]eKLR* on proposition that a mere occupation of premises does not create a trust and *Njenga Kimani & 2 Others –vs- Kimani Nganga K. Wainaina [2017] eKLR* on the proposition that it is normal for African families to allow relatives to live on another's land and that even if a kin is buried that does not by itself prove that there existed any customary trust hence a party stating so must give more material in support in.
24. In sum the appellant submits the respondents did not call any elder or an independent witness to prove any customary trust against him in line with **Section 107** of the **Evidence Act** so as to impeach his title to the suit land in accordance with **Section 26** of the **Land Registration Act**.
25. Having gone through the appeal, pleadings, evidence and submissions, the issues for determination are whether in applying the law to the facts and evidence, the respondents had proved the appellant was holding the suit lands in trust for them and secondly if the trial court reached the correct findings as to facts and the law
26. As a starting point, parties are bound by their pleadings in the trial court. The respondents pleaded to be the children of the late Nkarima Muthuira who had acquired **L.R No's Maua/Amwathi/3980, 6063 and 4241**. Further they pleaded they were in occupation of **L.R No. 4241** in the name of Kirema Nkarima while they had beneficial share of **Parcel No.'s 3980 and 6063** which the appellant had fraudulently and in breach of trust failed to distribute to them despite a clan meeting's resolution to that effect. They sought the court to declare that the appellant holds the suit in trust for them.
27. In his defence the appellant denied any fraud and or breach customary trust, claimed the suit parcels were out of a purchase and not inheritance, and that the alleged clan meeting's resolutions were inconsequential given the land was not ancestral in nature.

28. Both parties framed separate issues for determination dated 16.5.2014 and 29.4.2014 respectively which in my considered view are similar in nature and hence are properly captured by the trial court at pages 94 – 97 of the record of appeal.

29. The law on trust is that for a claim to succeed it must be shown that at the conclusion of the adjudication process but before the suit land was registered in the name of the proprietor, the adjudication committee had ascertained the interest of the claimant and confirmed that the suit land belonged to them. And further that the reason why the claimant was not registered was because of some legal impediment which precluded the claimant from taking title immediately thereby making it necessary for the suit land to be registered in the proprietor in trust See *George Mbiti Kiebia & Another –vs- Isaya Theuri M’Linturi & Another [2014] eKLR.*

30. In *Isack M’Inanga Kiebia –vs- Isaya Theuri M’Linturi & Another [2018] eKLR* the Supreme Court of Kenya held thus:-

“Land in a traditional settling is always the subject of many interests and derivative rights. The content of such interests and rights is often a complex area of inquiry. Such rights could be vested in individuals or group unto the rights and interests infrequently co-exist with each other.

Trust land did not cease upon the application of the Land Consolidation Act and the Land Adjudication Act to that land.”

It is customary law and practice that clothes of a person in possession or actual possession with legal validity.

The court went on to state that customary trust may take several forms including if the land was always reserved for family, clan uses, burials and other traditional rites, future uses; and that the court has to make a determination on the basis of evidence as to which category such a trust subsists as to bind the registered owner.”

31. Flowing from the above dicta the respondents had the burden to prove:-

- a) **The land in question was before registration family, clan or group land.**
- b) **They belong to such family, clan or group.**
- c) **Their relationship is close.**
- d) **There were intervening circumstances which made them not be registered as owners.**
- e) **The defendant is a member of the family.**

32. In the instant case, the respondents pleaded and proved the appellant was their brother and that the land in issue belonged to their late father prior to the adjudication. Similarly they pleaded and led evidence that the deceased father was buried on the suit land. Further, they tendered evidence and which the appellant admitted that he had transferred a portion to one of their brothers in honour of the deceased wishes and in line with the customary trust. Similarly they tendered evidence that the only reason they were not registered at the time of their fathers demise was because they were still minors .Again the respondents testified they had been utilizing the suit lands and the appellant had not blocked and or ordered them to vacate the suit lands.

33. Whereas the appellant pleaded he acquired the suit land through purchase, he could not remember the details and particulars of the seller, the date of the sale and how much he had paid for it. The appellant did not provide any documentary evidence to challenge the respondents version that the suit land was family land and therefore ancestral in nature. The respondents on the other hand also called the appellants brothers and clan elders who were consistent and credible that the suit land formed part of the deceased land in which all his siblings were entitled to a share.

34. As held by the Court of Appeal in *George Mbiti Kiebia Supra*, when the root of a title to land is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. The registered owner has to go beyond the instrument and rebut the notion that the property is not free from any overriding interests.

35. The appellant did not take that extra mile and call forth for whoever sold him the land and perhaps witnesses to that effect. He who avers must prove. It was the appellant who pleaded he had bought the land from someone else and that it was not ancestral or family land. The burden was upon him to trace the root of his title and could not therefore shift the burden to the respondents.

36. Again there was the irresistible evidence that he had transferred a portion to Kirema and that the respondents were utilizing the suit land with his full knowledge and approval to the extent that there were existing partitions and or fences clearly indicating each of their boundaries. The appellant did not deny all these facts and or call evidence that evidence.

37. Moreover the appellant did not lead evidence on what basis he had continued to allow the respondents to use and or occupy his parcels of land if it was not family land.

38. Evidence was tendered that the deceased parents were buried on the suit land. It could only have been a burial site for the members of the family otherwise if at all their late father had a homestead at Mutuati area as alleged by the appellant he would not have allowed the interment therein. He did not counter the respondents’ evidence on where the deceased should have been buried in line with Ameru customary rites.

39. The appellant submits there was no evidence tendered to show the intention to create a trust and that had there been any, the land would have been registered in the name of the 1st born and not him.
40. The respondents pleaded and testified all other brothers had acquired land particularly M'Eruri Nkarima prior to their father's death and subsequently the appellant had transferred land to one Kirema without any dispute or denial of trust.
41. As much as customary trust is a matter of evidence, the respondents pleaded and called evidence to show that existed Parcel No. 4241 which formed part of the deceased ancestral land and which was given to the aforesaid brothers. Instead of calling evidence to rebut those facts, the appellant failed to call his elder brother and or other young brothers to refute that evidence.
42. Similarly the respondents testified that they were living on land belonging to Kirema who had threatened to evict them unless they got their rightful share. The witnesses' statements at paragraphs 10, 11, 13 and 14 of the record of appeal allude to those facts.
43. In my considered view therefore the evidence of Isaack Kirema Nkarima at page 78 of the record confirmed the existence of Parcel No. 4241 and which the said witness stated was transferred to him by the appellant .He also confirmed all his siblings had been brought up in Parcel No. 3980.
44. PW4 Isaac Kinyauru as the uncle to the parties confirmed the clan meeting resolution and stated Parcel No's 6063 and 3980 were ancestral land held in trust for the respondents. The same facts were confirmed by PW5 Jackson Kariuki Ntari. The appellant did not put any specific questions to PW 3, 4 and 5 that they were either biased, exaggerating the facts and or were misleading the court as concerns their factual evidence.
45. In his defence testimony, the appellant claimed he did not know any parcel known as 4241 yet PW4 stated he was given the said land by the appellant as part of his inheritance from his late father. Similarly the appellant claimed he did not know where PW1 was living yet PW4 confirmed he was staying with the 1st respondent since the appellant had declined to transfer him his share.
46. Having heard the evidence of the respondents, the appellant in my view called no evidence to break the chain of facts and evidence before the trial court all pointing to the that the suit lands were family land belonging to their late father and out of which he shared with PW4 but for unknown reasons had declined to share with the respondents.
47. Whereas the appellant claimed and has by written submissions stated that the respondents are being selfish and have pieces of land allocated to them just like the other siblings, no pleadings and evidence was brought before the trial court to support those averments .
48. Incidentally, the appellant states his late father was living in Mutuati and had parcels of land therein. No evidence was tendered by the appellant as to how indeed there existed such parcels and which perhaps were shared out between the respondents and hence could not possibly claim entitlement of his parcels.
49. In my considered view the lower court drew out three issues for determination namely whether Parcel No's Maua/Amwathi/3980, 6063 and 4241 belonged to Nkarima Muthiuru, if they were held in trust for the other beneficiaries and lastly whether the respondents were entitled to them. After drawing out the three issues, the court analysed the case law of *Kanyi –vs- Muthiora [1984] KLR on trusteeship, Gathiba –vs- Gathiba [2001] 2 E.A 342* on whether customary trust was extinguished upon the registration of the appellant as the owner of the suit land and lastly found evidence in the respondents pleadings and evidence that there was a presumption of a customary trust.
50. In my view the appellant had failed to discharge the burden that the titles to land he held over the suit land were not subject to the overriding customary trust rights in favour of the respondents as his siblings.
51. In *Mwangi –vs- Wambugu [1984] KLR 453*, it was held an appellate court will not interfere with a finding of fact by the trial court unless such finding is based on no evidence at all or there was a misapprehension of the evidence or where the trial court has clearly failed on some material point to take account of particular circumstances or probabilities material to the trail of evidence.
52. In the instant case, the trial court did not only imply or presume customary trust but also considered the irresistible evidence pointing the intention and existence of customary trust. The intention of the parties especially the deceased was clear and evident. The respondents pleaded and by evidence stated all of them had been brought up on the Parcel No. 3980 and wherein their late father is interred o. The appellant claims he gathered the land by way of purchase prior to land adjudication process. He however admits he does not live there yet he allowed his late father to be buried there.
53. The appellant could not say who allegedly sold him the land. Further the appellant could not explain under what basis he had allowed the respondents to utilize the parcels.
54. In *Juletabi & African Adventure Ltd. & Another –vs- Christopher Michael Lockley [2019] eKLR* the court held every case has to be determined on its own merits and on the quality of evidence. The evidence tendered by the respondents demonstrated the suit lands were ancestral in nature and that the appellant out of that knowledge of an existence of trust had transferred to one of his siblings Parcel No. 4241. He would only have done so if he was a trustee.
55. Since the appellant had honoured his trusteeship to PW4 the trial court was right in my view in finding a presumption of existence of trust in favour of the rest of the appellant's siblings that is the respondents in absence of any evidence by the appellant to the contrary.
56. Regarding the **Land Registration Act** the appellant submits he holds indefeasible titles to the suit land which could only be impeached on account of fraud, misrepresentation and or acquisition through a corrupt scheme.

57. Whereas fraud had been pleaded by the respondents, no evidence was produced in support thereof and to the required level as held in Vijay Morjaria –vs- Nausingh Madhusingh Darbar & Another [2000] eKLR.

58. However the respondents main ground was based on breach of customary trust and which the trial court made a finding that:

“The appellant’s act of transferring Parcel No. 4241 to Kirema Nkarima was a clear indication that he comprehends that he held the suit land in trust for the other beneficiaries who are rightfully and legitimately entitled to the same”

59. Given the foregoing, the respondents claim fell under **Section 25** as read together with **Section 28** of the **Land Registration Act**. The respondents led evidence on the history of the suit land and the relevant Ameru customary law on which the trust is founded.

60. Lastly the appellant herein has not attached the decree appealed against contrary to **Order 42 rules 2 and 13 (4)** of the **Civil Procedure Rules**.

61. In Bwana Mohamed Bwana –vs- Silvano Buko Bonaya & 2 Others [2015] eKLR the court held a record of appeal lacking a decree appealed against is incompetent and defective since it goes to the root of the appeal.

62. Be that as it may, and guided by **Article 159 (2) (d)** of the **Constitution** and **Section 1A, 3B and 3A of the Civil Procedure Act**, I have endeavored to look at the wider interests of justice in considering the merits of the appeal instead of technicalities as to form given the respondents have not established how noncompliance has affected their participation in the appeal..

63. In view of the foregoing it is my considered view that the trial court did not err in fact and in law in reaching the conclusion that the respondents had proved customary trust. The appeal herein lacks merits and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 15TH DAY OF DECEMBER, 2021

In presence of:

NO APPEARANCE FOR PARTIES

COURT ASSISTANT - KANANU

HON. C.K. NZILI

ELC JUDGE