



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. E011 OF 2020

LYDIA NDURU MIRITI.....1ST APPELLANT

JUDITH KAROKI KIRIMI.....2ND APPELLANT

CHARITY KINANU KABURU..... 3RD APPELLANT

EVANGELINE M. KIENDE GICHURU..... 4TH APPELLANT

VERSUS

GERALD MARANGU WILSON..... RESPONDENT

(Being an appeal from the Judgment of Hon. C. Kemei (P.M.)

delivered on 4th May 2018, in Githongo S.P.M. ELC No. 83 OF 2018)

JUDGMENT

1. The appellants urge this court to find the lower court decision unsustainable given the subject suit land was ancestral family land, female children were entitled to a share as they were discriminated in the judgment; the trial court showed bias on the basis of gender and marital status and lastly was made against the evidence tendered in support of their case.

2. This being a 1st appeal, the court is mandated to review, recast and reassess the entire court record, come up with its own findings and conclusions on both matters of fact and law and establish if the lower court reached the right decision while bearing in mind the trial court had benefit of seeing and hearing the witnesses.

A. PLEADINGS

3. The appellants claim was that the respondent had fraudulently and in breach of customary trust transferred to himself Parcel No. Abogeta/U-Kiungone/2262 contrary to their late father's wishes subsequent to which he chased them away from the suit land. They sought for a declaration the suit land was held by the respondent in trust for them, cancellation of the title and registration in their favour.

4. The respondent denied the claim, held the appellants had never lived, used or occupied the suit land for over 25 years since they were married elsewhere, claimed his late father voluntarily transferred to him the land among other parcels to his brothers, for his own benefit and in line with their late father's wishes.

B. TESTIMONY

5. PW1 told the court her late father shared his original P/N 734 in six portions awarding them to only his sons, among them the respondent and hence claimed the suit land belonged to them as daughters of the deceased in accordance to their late father's wishes should the two parents pass on hence the reason they had placed a caution over the land.

6. She alleged her late father was tricked by the respondent to allegedly transfer the land to him yet he was ailing and mentally ill. She claimed a meeting attended by the chief and the Area Manager took place in which the deceased expressed regret that the respondent had allegedly unlawfully transferred his land.

7. In **cross examination** PW1 admitted she had produced no evidence over fraud against the respondent and gave no reason why she had not sued the Land Registrar for fraud.
8. In **re-examination, PW1** maintained as daughters they had a right to inherit land and was only interested in Parcel 2262 and not the rest since it was the one left for them.
9. **PW2 and PW3** associated their evidence with that of PW2 save to add the sons got a portion each and hence daughters were only interested in the suit land where their parents were living and got buried.
10. **PW4** a cousin to the appellants told the court the deceased had 5 sons and four daughters. He gave the boys land but left 2 acres for the appellants though he produced no minutes to that effect, claimed land was ancestral and admitted the appellants were married elsewhere but still were entitled to a lawful share of the land left to them by their late father.
11. **PW5** told the court he was at the meeting when the deceased allocated land to his children including the two acres for the appellants. He insisted denial of their share in the suit land would be against the wishes of the deceased who was also his uncle. He claimed the land was ancestral.
12. **DW1** testified his late father shared out his land while alive alongside his other brothers in 1998 – 2002 and 2013 but the appellants got no share for they did not ask for it since they were all married. He denied he was holding his land in trust for the appellants. Similarly he admitted the land was ancestral in nature but was not willing to share out the same with the appellants since whoever gave out the land was his late father. Further DW1 admitted there were other two parcels namely **P/N 2259** but they belonged to his brother, one Karani.
13. In **re-examination** DW 1 admitted he was ordered to give the 1st appellant a portion should she get divorced. Similarly he admitted each of his sisters were paired out with the brothers and given a responsibility of sharing out a portion in the event they divorced from their husbands.
14. DW2 confirmed the deceased was buried on P/N 2262, admitted the appellants would occasionally visit their ailing father (deceased) during his lifetime, told the court the appellants had a right to inherit land from their father but could only happen if they ever divorced.
15. DW3 expressed his views that it was perfectly in order for daughters to inherit a father's land but in the instant case their father's wish was only upon the unfortunate event of divorce.
16. DW4 testified he was present when their deceased father shared out his lands in 1998 and left a portion for himself but eventually gave it out to the respondent in 2015.
17. **DW5** told the court he was given Parcels 2260 and 2377 in 1995 and their father left a portion for himself where they lived with his mother but upon his demise one Marangu was occupying it. He confirmed his late father passed on in 2018. Though his sisters got no share he denied they were entitled to Parcel No. 2262.
18. The appellants through written submissions dated 22.10.2021, the pleadings, evidence and submissions show they had established the land was ancestral, a customary trust existed and was breached by the respondent yet the trial court ignored the evidence of which was enough to find the concept existed as held in **Isack M'Inanga Kiebia –vs- Isaaya Theuri M'Lintari & Another [2018] eKLR, Kanyi –vs- Muthiora [1984] KLR 712**, relied on **Re Estate of Cesimbili Sindani (Deceased) [2021] eKLR** on equality of children of all genders on estate distribution **Article 27 (3)** of the **Constitution** on equality of gender, **Jane Mwarania & 3 Others –vs- Francis Murithi M'Kiunga [2018] eKLR, Jason Gitimu Wangara –vs- Martin Munene Wangara & Others [2013] eKLR.**

C. THE LEGAL ANALYSIS AND FINDINGS

19. What turns around for determination is whether females who are married in Kenya are constitutionally and statutorily entitled to a share of ancestral land belonging to their biological parents and secondly any share of their parcels from their parents, the said daughters can assert and claim customary trusts, beneficial interest and or any other form of overriding interests.
20. The appellants pleaded the suit land in particular was initially in the name of their deceased father, was left through an oral will for them but was secretly, fraudulently and illegally transferred to the respondent during the period their father was sickly, mentally unsound and or senile hence sought to impeach the title deed on that account.
21. It is trite law that fraud must not only be specifically pleaded but must be also adequately proved. The onus under **Sections 107, 108 and 109** of the **Evidence Act** is on he who asserts. In **Mellen Mbera –vs- Theuri Wambugu [2020] eKLR**, it was held the burden of proof is over and above the balance of probabilities. See **Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Others [2000] eKLR.**
22. In the instant case, the appellants did not produce any forensic reports to demonstrate the signatures appearing on the transfer forms did not belong to their deceased father. Secondly they did not call evidence from the land registrar, land control board members and medical reports to strengthen their strong view that their father had no capacity in 2015 to transfer the suit land to the respondent.
23. Additionally there were no documents from the land registrar to show when exactly the transfers were made and how the respondent orchestrated the fraud and which other players participated in it. PW1, PW2, PW3 and PW4's evidence did not at all cast any particulars of fraud on the part of the respondent.
24. Again no independent witness was ever called to substantiate the allegations that the deceased once summoned a meeting where the

respondent was absent and complained he had been tricked and or made to sign documents to transfer land to the respondent without his consent or capacity. If indeed that was true, there was no reason given why the deceased was not taken to the relevant authorities to make a formal complaint. Similarly if their father was complaining at the time, it is unconceivable the appellants would await until his demise and lodge a claim against the respondent and not use the opportunity before it got out of their hands. The deceased would have given a statement or evidence that the respondent had doped him.

25. Further the appellants have given no reason why they did not confront the respondent to know why he had taken away their only inheritance before their father passed on. To my mind there was no good reason why the appellants did not lodge their claim soon after the discovery and before their father who was aged, passed on.

26. Thirdly it has not been proved and evidence tendered that the late father had a mental lapse or a mental condition in 2015, such that an inference can be made he was incapable of transferring the land. Even if their father was unable to converge a meeting, the appellants have not told the court why they did not visit the offices of the land registrar and lodge a complaint soon after learning of the transfers while their father was still alive for the reversal of the said entries.

27. Coming to the second ground of attaching the title deed held by the respondent as that the suit land was ancestral or family land which was available for children male or female. Evidence has been led by both parties the suit land was part of the ancestral land of the deceased. The point of departure is whether the concept of customary trust only applies patrilineally and not matrilineary.

28. The respondent takes the view and indeed brought evidence from DW4, 5 and 6 that the conditions given by the deceased was the appellants could only acquire a share from their brothers so long as they got divorced from their husbands and since that eventuality had not occurred their claims could crystalize. No evidence has been tendered to show the appellants have now divorced. Similarly, it cannot be said the conditions given were discriminatory and unconstitutional.

29. Due to the following reasons, it is therefore my finding that the appeal lacks merit.

The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 1ST DAY OF DECEMBER, 2021

In presence of:

HON. C.K. NZILI

ELC JUDGE