



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 57 OF 2019**

**JULIUS KIMATHI MUGWIKA ..... APPELLANT**

**VERSUS**

**JOHN GUANTAI MUGWIKA ..... RESPONDENT**

*(Being an appeal from the judgment of the Hon. J. Irura (PM) delivered on 20/3/2019 in Nkubu PMCC No. 64 of 2013)*

**JUDGMENT**

1. The parties herein are brothers, born of the same father but different mothers. The appellant was the defendant, while respondent was the plaintiff in the lower court case. The respondent had sought for a declaration by the court that LR MITUNGUU/MITUNGUU/80 (the suit land) is family land which appellant held in trust for the respondent. The respondent had wanted a portion of this land. On 20.3.2019, the trial court entered judgment in favour of the respondent as follows:

***a) It is hereby declared that the defendant holds parcel of land No. MITUNGUU/MITUNGUU/80 in trust for the plaintiff and his siblings.***

***b) The defendant is hereby ordered to transfer a portion the parcel of land No. MITUNGUU/MITUNGUU/80 to the plaintiff and his other siblings. In default, the Executive Officer of this court is authorized to execute all the necessary documents to effect the transfer.***

***c) The parties being brothers, each to bear their own costs***

2. The appellant being aggrieved by the decision filed this appeal based on nine (9) grounds As follows;

***1) That the learned trial magistrate erred in law and fact by finding that the appellant held the suit land in trust for the Respondent and his siblings whereas there was overwhelming evidence to the contrary.***

***2) That the learned trial Magistrate erred in law and fact by failing to find that the Respondent was bound by his pleadings and that the evidence presented by the Respondent materially departed from his pleadings and therefore the Respondent failed to prove his claim.***

***3) That the Learned Trial Magistrate erred in law and fact by granting the Respondent, a prayer which he had not sought in the plaint, namely, that the appellant held the suit land in trust for the Respondent and his Siblings.***

***4) That the Learned Trial Magistrate erred in law and fact by relying on the law of succession Act whereas the dispute was not a succession matter.***

***5) That the Learned Trial Magistrate erred in law and fact by totally disregarding that the Respondent had actually benefited from another parcel of land and that the Appellant discharged the trust by transferring the same to the Respondent.***

***6) That the Learned Trial Magistrate erred in law and fact by awarding strangers who were not parties to the suit portions of the suit land.***

***7) The Learned Trial Magistrates erred in law and fact in his interpretation of the land Registration Act and as a result came to wrong conclusions.***

***8) The Learned Trial Magistrates erred in law and fact in that he failed to evaluate the material evidence placed before him and***

came to wrong conclusions.

9) *That the judgment of the Learned Trial Magistrate is against the law and weight of the evidence on record.*

3. From the above mentioned grounds, I frame the issue for determination as **whether the appellant held the Suit Land in trust for the respondent and his siblings**. In determining this issue, the court will analyze the question as to whether the learned trial magistrate erred law and fact in failing to evaluate the evidence adduced and in interpretation of the law, particularly on the issue of succession.

4. The appeal was canvassed by way of written submissions. The appellant submitted that from the respondent's pleadings, the latter's claim for the Suit Land is based on allegation of long time occupation and physical possession of the same, that this was inconsistent to what was testified before the court and that the trial court erred in law and fact in taking and considering evidence that was inconsistent with the pleadings presented. Moreover, that the respondent failed to adduce evidence to support the existence of customary trust over the Suit Land. Reference was made to the following authorities;

i. *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014]eKLR.*

ii. *Alice Wairimu Macharia Vs Kirigo Philip Macharia (2019)eKLR.*

iii. *Martha Thairora Gikunda Vs Elizabeth Kananu Another(2019)eKLR.*

iv. *Salesio M'itonga Vs M'arithi M'athara & 3 Others(2015) eKLR.*

v. *Isaak Kiebia M'inanga Vs Isaaya Theuri M'lintari & Another (2018)eKLR.*

5. The respondent submitted that the trial court was right in finding that he had proved customary trust on the Suit Land having met the requirements laid down in the case **Isack Kieba M'Inanga v Isaaya Theuri M'Lintari & another [2018] eKLR.**

6. As the first appellate court, this court has to evaluate, assess and analyze the extracts on the record and to make its own determination having in mind that it did not have the advantage of hearing the testimony of the witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123.**

7. **PW1 John Guantai Mugwika** relied on his statement dated 7.11.2013 together with his documents filed on 19/11/2013. He stated that the Suit Land measuring 6.64Ha is family land as it was owned by their deceased father who died in 1979. When he died he was 4 years old and the defendant filed a succession cause where the land was wholly transferred to him. The deceased had three parcels of land which are, the Suit Land, NKUENE/NKUMARI/1211 and another parcel which he could not remember the number. He was invited to attend the Land Control Board meeting where the defendant wanted to transfer to him Parcel No. 1211, but he doesn't know if consent to that effect was given. He stays on parcel no. 1211 and he has never built or cultivated on the suit parcel no.80.

8. He recalled that on 4/2/2012 there was a meeting at the appellant's home in Mitunguu to discuss the Suit Land. The entire family including himself and the appellant were present. He was not contended and the defendant told him that if he was not satisfied, he could go to court.

9. **PW2 Margaret Kajuju, PW3 Eneriza Kathumi Jacob** and **PW4 Lydia Kanugu Mugwika** are all sisters of the two litigants (but step sisters of the respondent). They relied on their statements dated 7.11.2013. They stated that before their father died, he had indicated how his land was to be distributed. They met at the defendant's home on 4/2/2012 but they did not conclude. They further averred that the appellant filed a succession cause but did not inform them of which they have not objected or protested.

10. Pw2 and pw4 stated that they (the sisters) desire to have a share of their father's estate, while pw3 stated that they are using the respondent to claim their father's estate.

11. Appellant, **DW1 Julius Kimathi M'Mugwika** on the other hand gave a sworn testimony and called two (2) witnesses. He also relied on his statement dated 27.3.2014 and his two documents, one being an extract of the minutes of the Land Control meeting held on 8/2/2007. He stated that his mother's name is Celine Karimi and that **PW2, PW3** and **PW4** are his sisters. Before their father died, he informed him of the existence of the plaintiff whom he bore out of wedlock. **DW1** educated and gave the respondent their ancestral land NKUENE/NKUMARI/1211 as per the deceased's wishes once he was mature and married. As for him, he was to retain the Suit Land.

12. In 2006 the respondent got married and DW1 informed him of the deceased's wishes. In 2007 they both attended the Land Control Board at the DO's office Nkubu in the company of their spouses and DW1 transferred Parcel No. 1211 to the respondent which he has been in possession and use of to date. As for the Suit Land it is his absolutely and does not hold it in trust for the respondent.

13. The meeting on 4/2/2012 was held after the death of their mother where all family members were present. The siblings were claiming land but Simon Mwirebua informed them of the deceased's wishes. When he filed the succession cause their mother was present and they followed their father's will.

14. **DW2 Elijah Mwebia Mungiria** and **DW3 Jediel Riungu** relied on their statements dated 27/3/2014. They confirmed that they were present at the meeting of 4/2/2012 where it was agreed that the wishes of the deceased were to be followed such that Suit Land was for the appellant while parcel No. 1211 was for the respondent. DW2 is the one who was recording the minutes.

## DETERMINATION

15. The issue for determination is *whether the appellant holds the Suit Land in trust for the respondent.*

### Customary Trust

16. The rights of a registered proprietor of land are anchored under **Section 25 of the Land Registration Act**, where it is stipulated that:

*“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—*

*(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and*

*(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.*

*(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”.*

17. However, a registered proprietors' rights may be defeated by the overriding interests stipulated under **Section 28 of the Land Registration Act**; one of them being trust including customary trusts.

18. Customary trust was well explained by the Supreme Court in the case of **Isack Kieba M'inanga v Isaaya Theuri M'Lintari & another [2018] eKLR** where it 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 land.*

*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 remote or 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. In the case of **Susan Mumbi Waititu –VS- Mukuru Ndata & 4 others (19 of 2007) eKLR** Justice M.S.A Makhandia stated that:-

*“As for trust, the plaintiffs must prove with cogent evidence that the suit premises was ancestral land and thus family land. In the circumstances of this case, the plaintiffs have miserably failed in this onerous task. The 1<sup>st</sup> defendant has deponed that he purchased the suit premises for value. Accordingly, it is not family land passed over through the ages. I have no reason to cast doubts over this averment. The plaintiffs themselves have not in the supporting affidavit deponed to anything to suggest that the suit premises were actually ancestral land. Trust cannot be imputed. It must be proved. In the absence of such proof, I find and rule that there was no trust envisaged by the 1<sup>st</sup> defendant in favour of the plaintiffs”.*

20. The respondent being the plaintiff in the trial court had the burden of proving that the Suit Land is family, clan or group land which was being held by the appellant in trust for him. It is not in dispute that the Suit Land belonged to their father who is deceased. The respondent claims in his pleadings that he is in physical occupation of the suit land together with other family members. Thus, the long time of occupation gave rise to a trust. On the other hand, the appellant alleged that there is no trust for the respondent is not in occupation of the land as the suit land was bequeathed to him by their father while Parcel No. 1211 was to go to the respondent.

19. The documents produced in court indicate that the initial proprietor is the parties' father. Thereafter, the appellant got the land through transmission in a succession cause. I find that the pleadings of the respondent are not in tandem with his evidence. In paragraph 8 and 10 of his plaint, the respondent stated as follows;

*“The plaintiff state that he has utilized the suit land since his childhood and aver that the defendant does not utilize or cultivate the whole land occupied by the plaintiff's other family members.*

***The plaintiff aver that the defendants' intention is to deny him and other family members of land L.R No. Mitunguu/Mitunguu/80 in breach of trust and the plaintiff's right are protected under section 28 of the land Registered Act No.1 3 of 2012 and he prays for a declaration to that effect and an order that the defendants do transfer the parcel of land to him.***

***The plaintiff further contends that by virtue of his considerable long time occupation of the suit land it gave rise to a trust and he is entitled to the same as he has no other family land."***

20. However, the evidence adduced by himself and his step sisters was to the effect that respondent has never utilized the suit parcel. In his own words, the respondent stays on parcel No. 1211 which land also belonged to their father.

21. The respondent did not lead any evidence to support the claim that the suit land was ancestral or family land which was to be handed down through the subsequent generations. The fact that the father of the two litigants owned the land does not in itself give rise to a customary trust. The core determinant as far as a claim of this nature is concerned is whether the land is held for the benefit of other family members. If in the affirmative, then it is presumed that a customary trust has been created in favour of the said members.

22. The trial magistrate had taken the proper legal position that customary trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded, when she cited the cases ***of Njenga Chogera vs. Marai Wanjira Kimani & 2 Others (2005)Eklr, and Peter Gitonga vs. Francis Maingi Mikiara Meru H.C.C NO. 146 of 2000.*** However, she failed to analyse the facts correctly since it was clear that the dispute was one touching on the distribution of the estate of the deceased. My conclusion is that the respondent did not tender any evidence before the trial court to show that the suit land no. Mitunguu/Mitunguu/80 was customary land to be held in trust for successive generations.

### **Succession**

23. It emerged during the trial before the magistrate's court that the respondent and his step sisters were not happy with the way their fathers land had been distributed. The sisters of the respondent have stated that they were not aware of the succession cause of their father's estate which resulted in the appellant getting the Suit Land which is larger than Parcel No. 1211. On this point, PW2, Margaret Kajuju had stated as follows;

***"My sisters and I would like a share of our fathers land. The land does not belong to Kimathi. It is our fathers. We are not using John Guantai to claim a share of Kimathi's land. I am also interested in my father's estate. It was distributed when I did not know"***.

As for Eneriza Kathuni Jacob, PW3, she had this to say;

***"Am also claiming a share of my father's land. We agreed as sisters that John Guantai brings this case. We are using John Guantai to claim our father's land..."***

The other sister, Lydia Kanugu, PW4 had stated that;

***"I also need a share of my father's estate"***.

24. These issues fall under the ambit of the probate and administration court. What more, they were not raised in the pleadings. I find that the distribution of the estate of a deceased person is anchored through the statute which is, the law of succession Act, hence it is a lawful process. It was therefore erroneous for the trial court to arrive at a conclusion is that that the appellant had disinherited his siblings contrary to the law of succession Act. I am in agreement with the submissions of the appellant that the trial magistrate did not have the requisite jurisdiction to venture into issues of succession of the estate of deceased, as the matter before her was not an issue of succession.

25. Accordingly, I find merits in this appeal, which I allow in the following terms;

***i. The judgment delivered on 20.3.2019 in the Principal Magistrate's Court at Nkubu in Civil Suit No. 64 of 2013 be and is hereby set aside and substituted with a dismissal order.***

***ii. On costs, I usually take into account the relationship between the parties. However, in this case, the respondent has turned out to be someone who is not truthful. The respondent is therefore condemned to pay costs of the suit in both the appeal and the lower court.***

**DATED SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 12TH DAY OF FEBRUARY 2020.**

**IN THE PRESENCE OF: -**

C.A Kananu

Kimaita holding brief for Manasses K for Appellant – present

Ashaba holding brief for Igweta for Respondent – present

Appellant present

Respondent absent

**HON. LUCY N. MBUGUA**

**ELC JUDGE**