



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 233 OF 2013**

**FRANCIS KITHURE.....APPELLANT**

**VERSUS**

**GITHONGA M'THAMBURA M'RUKUNGA.....RESPONDENT**

*(Appeal from the Judgment/Decree of Meru Principal Magistrate Hon. D.O Onyango*

*dated 19<sup>th</sup> March, 2013 in Meru CMCC No. 572 of 2010)*

**JUDGMENT**

**Background**

1. The Appellant herein was the Defendant in the lower Court case while the Respondent was the Plaintiff. The background of this case is that the Appellant had apparently bought **Parcel Land No. 2195 Kianjai Adjudication Section** (herein after referred to as the subject parcel of land) from one Patrick Kuthiora who had acquired the subject parcel of land from his deceased father M'Narangwi M'Ithibutu after filing Succession Cause in Meru High Court No. 116 of 2000 where he became the beneficiary of the estate and taking possession of the property which was transferred to his name. Subsequently, the Respondent moved to Court in the Meru CMCC No. 572 of 2010 from which this appeal arises from and sought eviction orders against the Appellant who were in occupation of the subject parcel of land.

2. In response to the suit, the Respondent filed their statement of defence dated 24<sup>th</sup> November, 2010 laying a claim to the property based on breach of customary trust.

3. The Lower Court upon hearing witnesses and the respective parties' claims entered judgment in favour of the Respondent. The Appellant was aggrieved by this Judgment hence filed this Appeal on the following grounds in their memorandum of appeal dated 21<sup>st</sup> March 2013:-

- 1) The learned trial magistrate erred in law and in fact in that he failed to consider that the appellant had lived all his life on the disputed land with his family and that the right and trust under the relevant laws and customary law had been established.***
- 2) That the learned magistrate erred in law and in fact in ignoring and failing to consider or sufficiently consider the appellant's case and the evidence that was adduced.***
- 3) The learned trial magistrate failed to consider or sufficiently consider the law and authorities put before him by the appellant in support of his case.***
- 4) The judgment of the trial magistrate is against the weight of evidence and the law***
- 5) That giving 30 days to the appellant to vacate the disputed land was unreasonable and showed lack of justice, good conscience and discretion after receiving evidence and photographs of the appellant family living on the land and developments.***
- 6) That the judgment of the learned trial magistrate is against the spirit of the Constitution of Kenya, the Land Act, the Land Consolidation and Land Adjudication Acts.***

4. When the Appeal came up for hearing on 26<sup>th</sup> November 2018, parties agreed to dispose of the same vide written submissions. The submissions have duly been filed and exchanged.

5. This Court is conscious of its role as a first appellate Court as it was stated in **SELLE VS ASSORTED MOTOR BOAT LTD (1965) E.A 123**. This Court has to reconsider and evaluate the evidence that was tendered before the trial Court, assess the same and make its own conclusion.

### **Evidence**

6. The parties gave evidence before the Lower Court. The Respondent called 2 witnesses In support of his case, he testified as **PW1** where he told the court that he purchased the subject parcel of land from Patrick Kuthiora, who had acquired ownership from his deceased father M'Narangwi M'Ithibutu after filing succession and having the land transferred in his name. He told the court that after purchasing the land one Kolu M'Akwalu was in the land and he filed CMCC 759 OF 2002 where he secured orders to evict her, and after her eviction the appellant trespassed in the land, and that he only entered the land after hearing that the same had been sold to him.

7. PW2 Patrick Kuthiora in his testimony told the court that he acquired the subject parcel of land from his deceased father M'Narangwi M'Ithibutu after filing for succession in Meru Succession cause No. 116 of 2000, which was not objected to. He told the court that after acquiring the property, he sold and transferred the same to the plaintiff. In addition, he told the court that he had filed proceedings against one Koru who was a sister to his father at the lands office and a decision was reached that the land belonged to his deceased father. He denied being related to the appellant.

8. The appellant on the other hand called 3 witnesses in their defence. The appellant testified as DW1 where he told the court that he lives in the subject parcel of land with his family and his mother. He testified that the subject parcel of land belonged to the father of his grandmother one called Koru, and that the brother of Koru who is M'Narangwi M'Ithibutu was given the parcel of land in trust of his sister who is his mother, and would transfer the same to her on attaining the age of majority, however he died before making the transfer and his son Patrick Kuthiora went behind his back and filed for succession and sold the subject property to the respondent. He claims the parcel of land alleging that the transaction was illegal.

9. DW2 Gideon Mathiu testified that he was 87 years old and in his testimony told the court that that the Land Parcel No. 2195 was originally owned by his uncle Called N'thibute, who had a daughter called Koru and a son called M'Narangwi M'Ithibutu, and that during adjudication his uncle was ailing and his son had ID and had the land registered in his name. And that Koru never got married but lived with men in the subject property whereas M'Narangwi M'Ithibutu lived in Ntheru. He told the court that Koru had a daughter by the name Janet Kolota who is the mother of appellant, and now living in the property. Further, he told the court that the succession of the deceased M'Narangwi M'Ithibutu was done in a clandestine manner and they only became aware of his death when the land was sold to the Respondent. It is his position that the subject parcel of land was meant for Koru.

10. DW3 Janet Kaloti testified that he is the mother of the appellant, and that she is the daughter of Koru who was not married and was the sister to M'Narangwi M'Ithibutu who the land was registered in his name. She alleged that the land belonged to Koru, and told court that they were not aware of the succession filed by the son one Patrick Kithiora, and only knew of the same when they received a letter from the chief to vacate the property.

### **Submissions**

11. The appellants in their written submissions combined the above grounds of appeal in to two and submitted on it jointly. In regard to grounds 1, 2, 3 and 4, they submitted that the trial court failed to consider the appellant's evidence and submission and in particular the evidence of developments on the subject parcel of land and that the adjudication process at Kianjai is still ongoing and therefore an order evicting them is uncalled for. In addition, they submitted that the trial court failed to take into account that M'Narangwi M'Ithibutu was registered as a trustee of the appellant and his family and that customary trust was created which passed to them and the same is recognized under **Section 28 of the Land Registration Act, 2012**, and therefore the trial court failed in considering this causing a travesty of justice.

12. In regard to grounds 5 and 6 of appeal, the appellants submitted that the trial court imposed a higher burden of proof and disregarded the authorities on the ground. And that it failed to consider customary trust common in all African set ups especially in land issues where ownership is by everybody and therefore the court ought to have considered the registration background. In this they rely in the case of **Gathiba Vs Gathiba Nairobi HCC 1647/84 (2001) 2 EA 42 at Pg 368**. In sum they urged the court to consider all the evidence and allow this appeal with costs.

13. The respondents vide their written submissions reiterated their submissions filed in the lower court urging the court to find that the lower court decision is sound in law. They submitted that the Respondent acquired the subject parcel of land from Patrick Kuthiora who acquired the same vide succession proceedings Meru No. 16 of 2000 of the Estate of his deceased father M'Narangwi M'Ithibutu, where no objection was raised and therefore the parcel of land was passed to the respondent as an innocent purchaser for value, they relied in the case of **Moses Bundi Njeri Vs John Kagendo Njeri & Others Meru High Court Succession cause No. 706 of 2012**. They argued that **Section 93 of the Act** was intended to protect innocent purchasers for value.

14. Additionally, they submitted that since the appellant never filed a counterclaim nor plead fraud as envisaged in law, his claim ought to fail and so is the instant appeal. They relied in the case of **Kampala Bottlers Ltd Vs Damanico (U) Ltd** and argued that the authorities cited by the appellants are not applicable as the respondents case was not based on trust or fraud. In sum they urged the court to uphold the lower court decision.

### **Issues and Analysis**

15. As noted above, this is a first appeal, and therefore I have a duty to re-evaluate the evidence adduced before the trial court and arrive at my own independent conclusion, as was held in **Selle Vs Associated Motor Boat Company Ltd** (supra), where it was stated:-

***“..... this Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect...” See Jivanji Vs. Sanyo Electrical Company Ltd. (2003) KLR 425.***

16. I have carefully considered the evidence on record and the rival submissions, and in my view two issues arise for determination which would settle the dispute. Firstly, did the appellant prove his claim that the deceased held the suit land in trust for him? Secondly, whether the respondent is the absolute owner of the suit land?

**Whether the appellant proved customary trust**

17. In the case of *Kanyi Vs Muthiora (1984) KLR 712* the Court stated that;

***“The registration of the land in the name of the appellant under the Registered Land Act (Cap 300) did not extinguish the respondents rights under Kikuyu Customary Law and neither did it relieve the appellant of her duties or obligations under Section 28 as a trustee..... The trustees referred to in Section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under Customary law, if the Act had intended to exclude Customary law rights it would have been clearly so stated.”***

18. Additionally, Justice Khamoni in *Gathiba Vs Gathiba Nairobi HCCC No. 1647/84* case cited by the appellant stated that:

***“The position as I see it is therefore as follows: Correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interest under Section 30 of the Registered Land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to Section 28 and Section 126 (1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary law has the piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to the proviso to section 28 of the Registered Land Act such registration does not “relieve a proprietor from any duty or obligation to which he is subject as trustee”.***

19. It has been accepted that Customary trust is one of the overriding interest hinged on the land that is recognized in the *Land Registration Act, 2012* as implied in *Section 27 & 28 and 30 of Registered Land Act*.

20. In this case the defendant has pleaded customary trust in the suit land. The plaintiff’s case is that he is the absolute registered owner of the suit land pursuant to a grant of administration. The provisions of the law above are to the effect that the overriding interest such as customary trust need not be noted on the Register of the suit land. It therefore follows that registration of a person as a proprietor of land does not preclude him from holding an interest in trust for another. Customary trust is an encumbrance on land. These are non registrable rights which run with the land. They are overriding. They subsist on the land.

21. In *MERU HCCC NO. 146 OF 2000- PETER GITONGA VERSUS FRANCIS MAINGI M’IKIARA*, it was stated that :-

***A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what Muli J. to say this; “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged”.***

22. In *Mbui Mukangu Vs Gerald Mutwiri Mbui C.A No. 281 of 2000*, the Court of appeal noted that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. The Court also held that possession and occupation are key elements in determining the existence of a customary trust.

23. Therefore, to determine whether a customary trust has been established by the appellant in the present case, it is important to examine the root of the suit land. It came out from the evidence tendered herein that one Koru who is the grandmother of the appellant is the sister of the deceased M’Narangwi M’Ithibutu the father of Patrick Kuthiora who sold the subject property to the appellant.

24. DW2 who was 87 year old told the court that the father of M’Narangwi M’ithibutu was his uncle and had allowed the land to be registered in the name of M’Narangwi M’ithibutu because he had an ID. He confirmed that they were only two siblings, and in his evidence told the court that the sister by name Koru who is the grandmother of the appellant had been living in the subject property.

25. PW1 in his evidence tendered a decree which he had obtained against the said Koru to be evicted from the said parcel of land, however on cross-examination he told the court that he doesn’t know exactly at what time the appellant and the said Koru entered into the subject parcel of land.

26. As noted above possession and occupation are key elements in determining the existence of a customary trust. The suit and orders produced by PW1 against the said Koru who is the grandmother of the appellant is enough prove that appellant family entry into the property was based on his grandmother claim on the subject parcel, which claim was supported by DW2.

27. It is therefore clear to this court that there is a relationship established between the appellant and Patrick Kuthiora the registered owner of the subject parcel who later sold the same to the Respondent. The relationship is that the grandmother of the appellant is the sister to the

father of Patrick Kuthiora.

28. The question that this court is now faced with is as to whether the said Koru who is the sister of M’Narangwi M’Ithibutu was entitled to the subject property and that the registration of the subject parcel of land was in trust.

29. Based on the foregoing it is my finding that the appellant established the genesis of the claim which is based on ancestry and therefore they established the existence of customary trust.

30. **Section 28 of the Land Registration Act** provides as follows that:-

*“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register - (b) trusts including customary trusts”.*

31. Consequently, it is my finding that on a balance of probabilities the appellant established the existence of customary trust.

32. The respondents have argued that the appellant ought to have filed a defence and a counterclaim in this regard as held by the lower court, however, it is my finding that this Court ought to do justice to the parties and guided by **Article 159(d)** this Court in exercising its judicial authority ought to administered justice without undue regard to procedural technicalities.

**Whether the Respondent is the absolute owner of the suit land?**

33. Based on the foregoing finding, the determination of this issue is therefore in the negative. The registration of the title in the name of Patrick Kuthiora the seller to the respondent carried with it some encumbrance in the form of customary trust. The subject parcel of land was therefore held by the deceased M’Narangwi M’ithibutu in trust of his sister Koru and therefore both were entitled to a share of the subject parcel of land. **Article 27 of the Constitution** prohibits any form of discrimination and therefore Koru being a daughter was also entitled to a share of her father’s land, and this being the case I grant half of the subject parcel of land to the appellant and the other half retained by the respondent which share belonged to the family of M’Narangwi M’ithibutu, which share was sold to the Respondent by his only heir Patrick Kuthiora.

**Conclusion**

34. The upshot of the foregoing is that this appeal succeeds to the extent that the Appellant is entitled to half of the subject parcel of land based on the establishment customary trust. Each Party to bear their own costs.

**DATED and SIGNED at Kerugoya this 7<sup>th</sup> day of February, 2020.**

.....

**E.C. CHERONO**

**ELC JUDGE, KERUGOYA**

**READ, DELIVERED and SIGNED in open Court at Meru this 10<sup>th</sup> day of February, 2020.**

.....

**L.N. MBUGUA**

**ELC JUDGE, MERU**

In the presence of: