



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 50 OF 2019**

**PATRICK MBASA.....APPELLANT**

**VERSUS**

**MESHACK ODHIAMBO MBASA..... 1<sup>ST</sup> RESPONDENT**

**PERCY OWINO OCHIENG..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The Appellant filed a Memorandum of Appeal on 26<sup>th</sup> November 2019, being aggrieved with the judgment and decree in Siaya PMC ELC Case No. 53 of 2018 dated 29<sup>th</sup> October 2019. The grounds for the appeal were that the learned Magistrate erred on law and in fact in delivering a fatally defective judgment and dismissing the Appellant's counterclaim while there existed a trust relationship between the Appellant and Respondents. Allowing the Respondents' case while there was overwhelming evidence that the Plaintiffs claim was statutorily time barred.

The appellant faults the hon magistrate for making no specific final findings on the counterclaim filed and holding that the existence of a trust had not been proved contrary to the evidence on record and holding that the Appellant was entitled to parcel No. EAST GEM/RAMULA/510 which is registered in the name of a person who is not a party to these proceedings.

The appellant states that the court erred by finding for the Plaintiff and disallowing the counterclaim against the weight of evidence on record. Lastly that the decision is against the evidence on record.

**BRIEF FACTS**

In Siaya PMC ELC Case No. 53 of 2018, the Respondents sued the Appellant seeking possession of the whole of LR. NO. EAST/GEM/RAMULA/874, the eviction of the Appellant from the suit property, and an injunction permanently restraining the Appellant, his employees, servants and/or agents from entering, remaining upon, taking possession of, carrying out any construction, or any other activity whatsoever on the suit parcel or from alienating or interfering by any means whatsoever with the suit property.

The Respondents' case was that the Appellant and 1<sup>st</sup> Respondent are brothers while the 1<sup>st</sup> Respondent was the uncle to the 2<sup>nd</sup> Respondent. That the Appellant's late father had transferred the suit parcel to the Respondents before his demise and that they were therefore the lawful registered owners. That the Appellant's father had called a family meeting to allocate each of his family members a parcel of land. That the Appellant was formally invited to the said family meeting but he stated that he was too busy to attend the meeting. That despite the Appellant's absention himself from the meeting, the family unanimously resolved to allocate the appellant parcel No. EAST GEM/RAMULA/510.

In response the Appellant filed an amended defence and counterclaim averring that the suit parcel was ancestral land registered in the names of the Respondents in trust for the Appellant and the family of his grandfather. That the Appellant was therefore entitled to remain in the suit parcel as his rightful home. That the parcel No. EAST GEM/RAMULA/510 was not registered or owned by the Appellant's father.

The basis of the Appellant's counterclaim was that he was legally under Luo customary laws entitled to a share of the suit land where he is residing; and that having been in continuous uninterrupted occupation of the suit land since 1975 to date, the Respondent's claim was statutorily time barred. The Appellant prayed for a declaration that the Respondents are registered as proprietors of the suit parcel in trust for the Defendant; a declaration that the Respondents' suit is statutorily time barred, an order that the Respondents registration as proprietors of the suit parcel be cancelled; an order that the Respondents transfer the suit parcel to the Appellant or in default the Deputy Registrar execute transfer documents in favour of the Appellant; and costs of the counterclaim.

The trial magistrate held that the Respondents were the registered owners of the suit parcel and their title was indefeasible subject to, in the instant case, trusts including customary trusts under Section 28 of the Land Registration Act. That a trust is a question of fact and has to be

proved by evidence.

The trial magistrate found that there was no evidence adduced by the Appellant to prove the existence of a trust, or the basis for which the Respondents could hold the suit land in trust for the Appellant who was over 50 years old then. That it was clear from the evidence on record that the Appellant's father intended to and indeed distributed his property during his lifetime and that the Appellant received a memo from his father requiring him to attend and avail documents so that his father could transfer his designated portion to him but the Appellant declined.

The trial magistrate held that although the Appellant alleged that their suit parcel was statute barred, the Appellant did not cite the actual statute for the Court's consideration. That the Appellant also placed no factual material to demonstrate that he was entitled to the suit parcel under Luo customary laws. That the Appellant's own father had restrained him from the parcel and therefore he ought to begin the process of acquiring the parcel EAST GEM/RAMULA/510. The trial magistrate dismissed the Appellant's counterclaim and granted the Respondent's prayers as sought in their amended plaint. *The Appellant did not file submissions.*

### **Respondents' Submissions**

Counsel for the Respondents submitted that the Appellant had failed to prove the basic requirements of creation of trust, citing *Alice Wairimu Macharia v Kirigo Philip Macharia [2019] eKLR* for the proposition that the legal burden to prove the existence of a trust rests with the one who is asserting a right under customary trust and that person must prove that the suit properties were ancestral land and that one family member was designated to hold the properties on behalf of the family.

Counsel submitted that the Appellant never challenged the first registration of the Respondents as the proprietors of the suit parcel on the grounds provided under Section 26 (1) of the Land Registration Act.

Counsel submitted that the Appellant never raised a preliminary objection on the issue of the suit being time barred, even though the suit was not actually time barred. Counsel submitted that the Respondents instituted the suit on 25<sup>th</sup> November 2015 immediately after the Appellant demolished a cowshed and commenced construction in late September 2015. That the Respondents were therefore within the time limit of filing their suit.

Counsel submitted that the matter in the counterclaim were not proved hence the counterclaim was dismissed.

### **Issues for Determination**

Being a first appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123*:

**“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”**

It was also held in *Mwangi v Wambugu [1984] KLR 453* that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.

#### *1. Whether the trial magistrate rightly held that the existence of a trust had not been proved*

The Court of Appeal in *Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR* held:

“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-

**“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”**

See *Gichuki vs. Gichuki [1982] KLR 285* and *Mbothu & 8 Others vs. Waitimu & 11 Others [1986] KLR 171.*”

Concerning proving customary trusts, the Supreme Court in *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR* 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.”**

The burden of proving that the suit parcel herein was ancestral land and that the Respondents were registered as proprietors of the suit land in trust lay squarely on the Appellant. The Appellant did not discharge that burden. The Appellant did not tender any evidence to demonstrate that the suit parcel was ancestral land. It was the Appellant’s own admission in his testimony that he was not aware of the nature of Parcels No. 874 and 510, and he did not tender any evidence to shed light on his averments.

The evidence on record, particularly the minutes for the family meetings and the meetings at the Yala District Officer’s office, demonstrated to the required standard of proof that Parcel No. 874 was where the Appellant’s father resided and Parcel 510 was ancestral land; and that the intention of the Appellant’s father was to transfer Parcel No. 874 to the Respondents as indefeasible proprietors and not as trustees for the benefit of the Appellant.

The trial magistrate therefore rightly held that the existence of a customary trust had not been proved by the Appellant.

*2. Whether the trial magistrate rightly found for the Plaintiff and disallowed the counterclaim*

Section 26 of the Land Registration Act provides that the certificate of title issued by the Registrar shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

Having failed to demonstrate that the Respondents were registered as proprietors of the suit land in trust for him, the Appellant also failed to demonstrate that the Respondents had acquired their title fraudulently, illegally, unprocedurally or through a corrupt scheme.

The Appellant had averred in his counterclaim that having been in continuous uninterrupted occupation of the suit land since 1975 to date. The trial magistrate correctly pointed out that Appellant failed to cite the relevant provision he was relying upon for his assertion. The apparent implication of this pleading would be that the Appellant intended to claim ownership of the suit land by virtue of adverse possession. The earliest point the Appellant’s occupation of the suit land being adverse to the Respondents is on the 25<sup>th</sup> of June 2015 when the Respondents were registered as proprietors of the suit parcel. This is still well within the twelve year limitation for bringing a cause of action as provided under Section 13 of the Limitation of Actions Act.

The Appellant did not tender any evidence indicating that Parcel No. 510 was not owned by his father, and that he was not entitled a portion of the property. The evidence tendered indicated that Parcel NO. 510 was ancestral property that was allocated to the Appellant and his brother Derrick.

In summary, the weight of the evidence adduced could not lead to any other conclusion than the dismissal of the Appellant’s counterclaim and the granting of the Respondent’s orders as prayed. The appeal ought to be and is hereby dismissed with costs.

**DATED AT KISUMU THIS 10<sup>TH</sup> DAY OF DECEMBER 2020**

**ANTONY OMBWAYO**

**JUDGE**

**This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**