

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**  
**ELC LAND APPEAL NO. E033 OF 2024**

**WANDWI RIOBA.....1<sup>ST</sup>**  
**APPELLANT**

**NYAMUGIRI RIOBA.....2<sup>ND</sup>**  
**APPELLANT**

**STEPHEN RIOBA..... 3<sup>RD</sup>**  
**APPELLANT**

**NYAMUGIRI RIOBA.....4<sup>TH</sup>**  
**APPELLANT**

**DANIEL RIOBA.....5<sup>TH</sup>**  
**APPELLANT**

**VERSUS**

**MENGANYI NYAMUGIRI**

**SAIMO.....RESPONDENT**

*(Being an Appeal against the judgment and decree of the Hon. M. O. Obiero (SPM) in  
Kehancha CMCELC No. E003 of 2023 delivered on 21<sup>st</sup> November)*

**JUDGEMENT**

- 1.** By way of a Plaintiff dated 21<sup>st</sup> February 2023 the Respondent herein, then Plaintiff in the trial Court, sought for judgment against the Appellants (then Defendants) for following reliefs:
- a) An order of eviction directed at the Defendants, their agents, their family members, their servants, employees or any person claiming under them and/or acting under them and/or with the Defendants' express and/or implied authority from**

**land parcel known as L.R BUKIRA/BWISABOKA/10947 or any portion thereof.**

**b) An order of permanent injunction restraining the Defendants jointly and severally by themselves ,their agents, their family members ,their servants ,employees or any person claiming under them and/or acting under them and/or with the Defendants' express and/or implied authority from entering ,re-entering ,encroaching onto, trespassing upon, alienating ,occupying, possessing, developing, building on, cultivating or in any way interfering with the land parcel known as L.R BUKIRA/BWISABOKA/10947 or any portion thereof.**

**c) An order directing the O.C.S Kehancha Police Station to provide security during eviction,**

**d) General damages for trespass,**

**e) Costs of the suit,**

**f) Interest on (b) and (c) above at Court's rate and,**

**g) Any other relief the Court would deem fit to grant to the Plaintiff.**

2. The defendants filed a Statement of Defence dated 16<sup>th</sup> June 2023. In the joint Statement of Defence, they denied the contents of the Plaint. Further, they averred that they had been living on the suit property since they were born, facts which were, according to them, well within the plaintiff's knowledge. They prayed that the suit be dismissed with costs.

### **Hearing at the trial court**

- 3. PW1** was the **Menganyi Nyamugiri Saimo** who adopted his witness statement as evidence in chief. He also produced his documents as evidence in chief.
- 4.** During cross examination, he stated that he did not know the Defendants and was not related to them. That he bought the land from Magige and he had the title deeds. Additionally, that the Defendants had refused to vacate his land.
- 5.** The Plaintiff then closed his case and the defendants called 7 witnesses to testify in support of their case
- 6. DW1** was **Elijah Chacha Rioba** who adopted his witness statement and list of documents as evidence in chief and exhibits respectively. He stated that the Plaintiff was his uncle and further, that their grandfather purchased the suit property but passed on before he obtained title for the said land. He left behind two beneficiaries namely Joseph Rioba Nyamugin, his deceased father and Menganyi Nyamugiri Saimo. He urged that they had established their respective hoes on the suit land and had been in occupation of the suit property from the time they were born to date.
- 7.** It was his testimony that the plaintiff had in previous years taken advantage of his brothers and his weak financial status to deprive them of their rightful share of their father's estate. That without their knowledge or consent procured title for the entire suit property using fraudulent means to the exclusion of himself and his brothers. He stated that they put up a caution over the suit property at the lands Registry and went ahead to demand from the plaintiff through Edward

Kisia and Co. Advocates for their rightful share of the suit property which demand solicited no action nor response from him. He denied having trespassed onto the suit property and urged that he has been living in the suit property for the past 42 years.

**8.** During cross examination he stated that he had nothing to demonstrate his claim over the land. He stated that D. Exhibit 2 was the title for parcel number Bukira/Bwisaboka/1109 in the name of Gitimaa Magige. That the Plaintiffs land is Bukira/Bwisaboka/10947. That he could see 1109 gave rise to 1135, 1138 and 1191. That plot number 10947 was a subdivision of 9922. When shown see exhibit 5 he stated that the meeting was about land. He further urged that he was born on the land which is the subject matter and it is the Plaintiff who brought him up. He stated that he had not produced any photographs to show his house in the land.

**9. DW2 was Peter Rioba** who adopted his witness statement as evidence in chief. He stated that the suit property is ancestral land and it is in the public domain that his grandfather purchased the land and he duly paid 6 cows as consideration. The same was to be sub-divided into two between Joseph Rioba Nyamugiri (his deceased father) and the Plaintiff. That Menganyi Nyamugiri without their knowledge or consent transferred the whole land to himself using fraudulent means. That the plaintiff herein later disposed of part of the suit property to PEFA Church after which the plaintiff obtained new' title number being land

parcel number Bukira/Bwisaboka/10947 totalling to 1,058 HA. That as a family, his brothers objected to the sale and consequentially the plaintiff herein assaulted him causing me grievous bodily harm. Thereafter, they were called to a baraza by Monkorogo Unity village elders first on 24<sup>th</sup> January 2020 and the second meeting was on 28<sup>th</sup> November 2020. At the said forum, the main agenda was the issue of sub-division of the suit property and the plaintiff agreed to sub-divide the land and them their equal share but he never did.

**10.** He stated that they procured the services of a surveyor and upon surveying the portion given to them and established that the same was only 1 acre and that the remainder piece of land was measuring approximately 2.5 Acres. Being dissatisfied with the said portion from the land parcel, they did a demand letter to him for equal sub-division of the suit property which demand solicited neither a response nor action on his part. He stated that he was born in 1992 and found his parents in occupation of the property and denied trespassing on the suit land.

**11.** During cross examination, he stated that the land is ancestral land but he had not produced any document to prove that the land is ancestral land. That his grandfather bought the land by exchange with six cows but he did not have any proof. He also had no document to show that my father was the Plaintiffs brother. He stated that the Plaintiff sold a portion of the land to a Church, and further, that he has a right to live on the land. That his father died in the year 1989 and he was born in the year 1992.

**12. DW3** was **Stephen Rioba Nyamugiri** who adopted his witness statement and list of documents as evidence in chief and exhibits. He stated that the suit property is ancestral land and that it is the public domain that his grandfather purchased the land and he duly paid 6 cows as consideration. That in 2009, his mother passed on and was interred on the suit property herein. At the time, he was living with the plaintiff who was his guardian then and catered for his school fees at Kehancha Progressive Academy. He stated that he has been in occupation of the suit property since he was born and to date. He stated that he was aware that the plaintiff called a baraza by Monkorogo Unity village elders first on 24<sup>th</sup> January 2020 and another on 28<sup>th</sup> November 2020 wherein the main agenda was the issue of sub division of the suit property herein amongst their family and that of the plaintiff herein, the plaintiff agreed to sub-divide the land and give them equal share but he never did.

**13.** During cross examination he stated that he is claiming land from his uncle that is the Plaintiff. He was shown the Certificate of Registration and stated that it has no relationship with the suit land. He stated that the Green Card (D. Exhibit 3) did not show his father's name. When shown D, Exhibit 4, the search, he stated that it was in the name of Menganyi Nyaminga who holds it as a trustee.

**14. DW4** was **Paul Rioba Nyamugiri** who adopted his witness statement dated 16<sup>th</sup> June 2023. He stated that the suit property is ancestral land and it is in the public domain

that his grandfather purchased the land and he duly paid 6 cows as consideration. He stated that he was aware that the plaintiff called a baraza by Monkorogo Unity village elders first on 24<sup>th</sup> January 2020 and another on 28<sup>th</sup> November 2020 wherein the main agenda was the issue of sub division of the suit property herein amongst their family and that of the plaintiff herein, the plaintiff agreed to sub-divide the land and give them equal share but he never did. That they also have a right to a share of the land.

- 15.** During cross examination, he stated that his father died in 1989 and he was born in 1997, 8 years after the death of his father. He was not his and he did not know my biological father,
- 16. DW5 was Daniel Rioba Nyamugiri** who adopted his witness statement as evidence in chief.
- 17.** During cross examination it emerged that his father died in the year 1989 and he was born in the year 2000.
- 18. DW6 was John Sorai Nkubo** who adopted his witness statement dated 15<sup>th</sup> June 2023 as evidence in chief. He urged that the plaintiff is his nephew. That the defendants are the Plaintiff's nephews, as their father was the Plaintiffs brother. Further, that the land belonged to Nyamugiri Saimo. Nyamugiri Saimo was the father of Menganyi that is the Plaintiff. He was the grandfather of the Defendants.
- 19.** During cross examination, he stated that he did not have any document to show that the land belongs to Nyamugiri Saimo. Further, that he had not produced any document to show that Rioba was the brother to the Plaintiff.

**20. DW7 was Thomas Kituka Magege** who stated that he knew the Plaintiff and that the defendants are the Plaintiff's nephew as their father is the Plaintiffs brother. He stated that the suit land belongs to Nyamugiri Saimo and is currently registered in the Plaintiffs name. That the Defendants are living on the land and the Court should order that the land be subdivided into equal portions between the Plaintiff and the Defendants.

**21.** During cross examination, he stated that he did not have any documents to show that the Defendants are nephews of the Plaintiff. That the land was bought but he did not have a sale agreement.

**22.** The defence closed its case and parties filed submissions.

**23.** Upon considering the submissions, pleadings, evidence and testimonies, the trial court entered judgement in favour of the Plaintiff and ordered an eviction of the Defendants from the Plaintiff's land.

**24.** Being dissatisfied with the judgement and decree, the Appellants instituted the present appeal vide a Memorandum of Appeal dated 4<sup>th</sup> December 2024 premised on the following grounds;

**1) That the Learned Trial Magistrate erred in law and in fact in entering judgment in favour of the Respondent when the Respondent failed to prove that the Appellants were trespassers.**

**2) That, the Learned Trial Magistrate erred in law and in fact in relying on procedural technicality to arrive**

**at his finding as opposed to considering the evidence tendered on record.**

**3) That, the Learned Trial Magistrate erred in law and in fact in failing to find that the Respondent had failed to prove his case as pleaded.**

**4) That the Learned Trial Magistrate erred in law and in fact in disregarding the available evidence hence arriving at a wrong conclusion.**

**5) That, the Learned Trial Magistrate grossly erred in Law and in fact in considering irrelevant facts thus consequently coming to a wrong conclusion.**

**6) That, the Learned Trial Magistrate's Judgment is against the weight of the evidence adduced by the Appellants.**

**7) That, the Trial Magistrate's Judgment is against well laid down legal principles.**

**25.** The parties prosecuted the appeal vide written submissions.

### **Appellants' Submissions**

**26.** On whether the Appeal is merited, Counsel urged that according to the Trial Court, upon consideration of the evidence adduced, he found out that the parties are well known to each other. That the testimonies by the Appellants corroborate the fact that the parties are relatives and have been staying on that piece of land.

**27.** Counsel reproduced the contents of paragraph 61 of the Judgment and posed the question as to what evidentiary value should then be attached to the Respondent's

testimony and evidence, considering the fact that he denied being related to the Appellants? Counsel referred to page 5 of the proceedings, urging that the testimony therein was misleading. Further, that the Respondent's testimony was never corroborated.

**28.** Counsel urged that the Trial Court as well as Counsel for the Respondent were in agreement that the Appellants raised an issue of customary/constructive trust in respect of the suit land except that they faulted the manner in which it was so raised. He reproduced paragraph 53 of the Trial Court's Judgment and urged that the trial magistrate was alive to the fact that could the Appellants have specifically counterclaimed customary/constructive trust, based on their evidence adduced, the same could have been successful.

**29.** Counsel urged that since the Court admitted that the Appellants had adduced enough evidence in that respect, the law demanded that the court do consider that issue as a matter of Law. Instead, and in variance to the law, the Court considered an irrelevant factor to arrive at his conclusion. Counsel further submitted that there are numerous authorities that a Court can infer a trust arising from the facts of a case even if the same was not specifically pleaded. He cited the case of Kisumu Court of Appeal case of John Gitiba Buruna & another -v-Jackson Rioba Buruna [2007] KECA 431 (KLR). Further, that the Appellants statements formed part of their entire pleadings and the same having been adopted, became part of the Court records.

- 30.** The Appellants stated that they lived on the suit land and the respondent was registered as the proprietor to the suit land without involving other members of the family. The fact of fraudulent registration of the suit land in the name of the Respondent was raised by the Appellants and it remains unchallenged by the Respondent even though the Trial Court never considered it in his Judgment.
- 31.** Counsel submitted that the copy of Title Deed dated 07.06.2022 (PEXH No.3) shows that the Respondent got registered as the proprietor to the suit land in 2022 long after the Appellants' parents had died. He asked why the appellants took so long to register the land.
- 32.** Counsel urged that while the Appellants led evidence that the suit land was originally purchased by their grandfather, when he (their grandfather) died, the title to it transferred to their fathers. The Appellants then became beneficiaries to the suit land in the circumstances. On the other hand, there is no clarity on how the Respondent acquired title to the suit land. Further, that such registration can only be in trust constructively for all the family members. In specific terms, the Respondent was merely registered as a trustee. As has been held times without number, there is no legal requirement that when a person is registered as a trustee, the Title should indicate that that person is registered as a trustee.
- 33.** Counsel cited the Supreme Court case of Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023)

(Judgment) in this regard on constructive trusts and prayed the court allow the appeal.

### **Respondents' Submissions**

- 34.** Learned Counsel for the Respondent submitted that on the on lawful ownership and section 26 of the land registration act the Respondent produced a Title Deed dated 7<sup>th</sup> June 2022 showing his registration as proprietor under the Land Registration Act, 2012. Further, that Section 26(1) of the Act is explicit that a certificate of title is prima facie evidence of absolute ownership, only impeachable on grounds of fraud or misrepresentation to which the proprietor is proved to be a party, or where the title has been acquired illegally, unprocedurally or through a corrupt scheme.
- 35.** Counsel urged that the Appellants neither pleaded fraud with particularity as required under Order 2 Rule 10 of the Civil Procedure Rules nor proved it to the requisite standard set out **in Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR**. Additionally, that the trial court correctly found that the Respondent's ownership stood unimpeached in law, and thus he was entitled to the proprietary remedies sought and therefore correctly upheld the Respondent's registered ownership and granted orders to protect that right.
- 36.** Counsel submitted that the Appellants' argument that the trial court ought to have inferred a trust is misguided for three reasons: (a) Absence of Pleadings; (b) Lack of Evidence; and(c) Distinguishing Authorities Cited.

- 37.** Counsel submitted that while Article 159(2) (d) of the Constitution mandates courts to administer justice without undue regard to procedural technicalities, this provision cannot be invoked to ignore substantive legal requirements such as proper pleading of causes of action. He cited *Raila Odinga v Independent Elections and Boundaries Commission & others*, Petition No. 5 of 2013 in this regard. Counsel urged that the trial court's insistence on proper pleadings was therefore consistent with the law and was correct to insist that a claim for trust must be properly pleaded and proved.
- 38.** Counsel urged that the Appellants' claim that their grandfather purchased the land and that their parents took over proprietorship is unsupported by any documentary proof. The Respondent's denial of relationship with the Appellants is irrelevant to the proprietary dispute. He maintained that the trial court's decision was sound in law and fact. The Appellants failed to dislodge the Respondent's registered title or prove any trust, fraud, or illegality. He prayed that the appeal be dismissed with costs.

### **Analysis and Determination**

- 39.** The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of **Gitobu Imanyara & 2 others Vs Attorney General [2016] eKLR**. It was held as follows;

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that 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 allowances in this respect.”**

**40.** In **Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** the Court held as follows;

**“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”**

**41.** The following issue arises for determination; **Whether the trial court erred in ordering an eviction of the Appellants from the suit land**

**42.** The crux of the claim in the trial court was that the Defendants therein had trespassed on the suit land. It was not in dispute that the suit land was registered in the name of the plaintiff.

**43.** In Black’s Law Dictionary 8<sup>th</sup> Edition, a continuing trespass is defined as:

**“A trespass in the nature of a permanent invasion on another’s rights, such as a sign that overhangs another’s property”.**

**44.** In **Clerk & Lindsell on Torts 16<sup>th</sup> Edition**, paragraph 23 - 01, it is stated that:-

**“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues”.**

**45.** Notably, the Appellants, in their statement of defence, acknowledged that they have been in occupation of the suit land over the years. This admission was sufficient to prove trespass as the Plaintiff had vehemently contended that they entered into his land without permission and all efforts to remove them were not fruitful. Faced with a similar situation in Kakamega **HCCC 33 of 2006 Buluku vs Peter Osieko Oboki**, Justice GBM Kariuki expressed himself as follows;

**The plaintiff has shown that she has the legal title to the suit land and has exhibited a copy of the title deed issued to her on 3/3/76. The defendant does not deny this but obliquely concedes that the land is in fact a subdivision from land that previously belonged to his (defendant’s) father’s land as aforesaid.**

**That allusion does not even remotely suggest that the defendant has any legal or equitable claim over the suit land. His allegation that he lives on it does not confer any interest or right upon him over it. Rather, it is an admission of trespass unless it can be shown that he is lawfully there either because he has the consent of the plaintiff to be on it or has some other right recognized by law. This has not been shown.**

**46.** The burden of proof was upon the appellants to show that they and not trespassed on the suit land. By admitting that they lived on the suit land, which was in consonance with the allegations of the plaintiff, they failed to meet and discharge this burden. Coupled with the fact of the registration of title in the respondent's name and the allegations of the respondent that they were trespassers, the trial court rightfully concluded that the appellants were trespassers on the suit land.

**47.** I note that on appeal, the Appellants have raised the issue of the Respondent holding the suit land in trust for them. However, the same was not pleaded by way of counterclaim and only came up during submissions and therefore, could not be considered by the court. It is worth recalling that the cardinal rule of law is that parties are bound by their pleadings. Further, that submissions do not qualify to be pleadings or evidence but rather persuasive arguments for each party in trying to convince the court to decide a matter in its favour. Thus, the court cannot base its determination on this issue on submissions of the parties and not their pleadings.

**48.** The Court of Appeal in the case of **Kenya Hotels Limited Vs Oriental Commercial Bank Limited (2018) eKLR** expressed itself as follows;-

**'Due to these fundamental concerns, the Courts has developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal. In Openda v. Ahn, (supra) this Court**

**identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the applicant's case as conducted in the trial court, not changing it into a totally different case; the matter must have been properly pleaded and the facts in support of the new point must have come out in the trial court; a new point which has not been pleaded or canvassed in the trial court should not be allowed to be taken on appeal, unless the evidence establishes beyond reasonable doubt that the facts before the trial court, if fully investigated, would support the point; where the question is one of law turning on the construction of a document, the new point may be allowed but only if the facts when fully investigated support the new plea.**

**49.** The Court of Appeal above upon reviewing various decisions on the subject further held thus;-

**'Turning to the matter at hand, it is common ground that the applicant's intended new ground of appeal was not pleaded before the High Court, no evidence was led on it, the parties did not address the court on the matter, and the learned judge did not pronounce himself on the issue. I think in light of that observation, the applicant is being less than candid when it claims that the new ground of**

**appeal is supported by the evidence on record and does not raise any dispute of fact. No evidence was on record before the learned judge on the status of the suit properties as agricultural lands and the respondent vehemently denies that those properties, being the grounds on which the Naivasha Country Club stands, are indeed agricultural lands within the meaning of the Land Control Act.**

**As I earlier stated, the dispute in the High Court was fought on the grounds whether the applicant had received the money secured by the equitable mortgage, whether the equitable mortgage was valid (on grounds other than lack of consent from the Land Control Board) and whether the originating summons was competent. The issue of consent from the land control board was never raised by any of the parties and was not considered by the learned judge. In a surprising submission, the applicant claims that the learned judge ought to have raised the issue of the land board consent on his own motion. It is however not lost to be me that since it is the applicant who claims that the transaction was contrary to the provisions of a statute; it was its duty under the rules of pleadings to specially plead the alleged illegality. It did not do so and as a result there is no evidence on record on**

**the basis of which this Court can decide whether the suit properties are commercial or agricultural.'**

**50.** In my view, the issue of the Respondent holding the suit land in trust appears to have been, and was, an afterthought as the same was not an issue for consideration in the trial court. The upshot of the decisions above is that the Appellants cannot now seek to have this court consider the issue on appeal. Furthermore, I have carefully considered the pleadings and the evidence before the trial court. I have also carefully analysed the reasoning and finding of the trial court. I find that he arrived at the correct conclusion.

**51.** In the premises, I find no reason to interfere with the decision of the trial court. In the premises, the Appeal is dismissed with no order as to costs to the respondents.

**52.** Orders accordingly.

**Judgment Dated, Signed and Delivered** virtually via the Teams Platform this **8<sup>TH</sup> day of December 2025.**

**HON. DR IUR NYAGAKA**

**JUDGE**

**From 14:28 hours in the presence of,**

Court Assistant: Lola

Mr. Kisia advocate for the appellants

Muniko advocate for the respondents (absent)