



THE JUDICIARY



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A
ELCLA E042 OF 2024

RICHARD MAINA NJOROGEAPPELLANT
VERSUS
SUSAN WANJIRA MUIRAMI.....1ST RESPONDENT
THE LAND REGISTRAR MURANG'A.....2ND RESPONDENT

(Being an Appeal from the ruling of the Chief Magistrates Court at Murang'a ; ELC E011 of 2022 delivered on the 18th day of September 2024 by Hon. Susan N. Mwangi, Senior Resident Magistrate)

JUDGMENT

(1)The Appellant seeks the following reliefs against the Respondents.

- (i) That this appeal be allowed in its entirety.
- (ii) That the ruling delivered on 18-9-2024 by the Chief Magistrate's Court at Murang'a in MCELC No. E011 of 2022 be set aside.
- (iii) That the judgment delivered on 7-12-2022 in the same suit as in (ii) above be set aside.
- (iv) That the court be pleased to order a fresh trial to be conducted.
- (v) Any other reliefs this Court considers fit and just.

This is as per the Memorandum of Appeal dated 3-10-2024.

(2)There are seventeen (17) grounds of appeal.

That the learned Senior Resident Magistrate erred in law and in fact-

- (i) in dismissing the Appellant's application dated 19-4-2024 seeking a review of the judgment delivered on 7-12-2022;
- (ii) in failing to consider the Appellant's application and the evidence adduced thereof;

- (iii) in failing to recognize the error apparent on the face of the record wherein the Honourable court made a determination on the issues of constructive trust and presumption of marriage in clear violation of the legal principle that parties are bound by their pleadings;**
- (iv) in allowing the Respondents to fully dispossess the Appellant of his valuable property on the grounds of unproven trust;**
- (v) in failing to consider the error on the face of the record, to wit, the suit property is adjudicated as a matrimonial property despite the same having not pleaded as such and subsequently no evidence tendered in support of the same;**
- (vi) in failing to consider the error on the face of the record wherein its decision completely dispossessed the Appellant and his family of their only property;**
- (vii) in failing to consider the interest of the Appellant, his legal wife and their children in the suit property by finding that the Appellant held the suit land in trust of the Respondent and their alleged son (John Brian Muinami) divesting them of their lawful interest in the suit land;**
- (viii) in failing to recognize her error in locking out the Appellant's legal wife and children from the suit property on the basis of an alleged presumed marriage and disputed paternity creating a trust in the land for strangers;**
- (ix) in failing to consider the error on the face of record wherein the Honourable court misapplied the legal principles and requisite elements for limitation of the right to property and in particular land;**
- (x) in failing to consider that the paternity of the alleged Son (John Brian Muinami) was disputed by the Appellant and made an unsafe decision of vesting the subject property on strangers;**
- (xi) in failing to decipher the obvious ganging up of the Appellant of his land,**
- (xii) in failing to detect that the Respondents and their witnesses had a fraudulent nexus calculated at taking the land from the reach of the Appellant only because he could not afford to sustain legal battles to protect his possessions;**
- (xiii) in failing to order for the DNA of the alleged Son (John Brian Muinami) to ascertain his paternity after the Appellant discovered that he had not fathered him;**

- (xiv) **in failing to consider the consequences of excluding the Appellant, his wife and Children in the erroneously court created constructive trust resulting in rendering the Appellant destitute;**
- (xv) **in misapprehending the law in the matter of creating a constructive trust for the benefit of a person whose paternity was disputed, to the exclusion of the acknowledged family and children of the Appellant;**
- (xvi) **in finding that the Appellant had a family but failed to provide for them and providing for the estranged alleged wife and adult of unknown paternity thereby resulting in gross miscarriage of justice and**
- (xvii) **in failing to appreciate that her conclusion in the decision sought to be reviewed were grounded on the wrong premises face of the record and gravely prejudiced the Appellant.**

(3)The facts of the case according to the Appellant are as follows.

Firstly, he is the registered owner of the suit land Loc. 20/Mirira/4800, the suit land. Secondly, on 28-9-2012, the first Respondent caused the second Respondent to register a caution against the suit land claiming beneficial interest without proof of the same. Thirdly, the 2nd Respondent held a hearing on 14-6-2016 and after hearing both sides, he was unable to establish whether the 1st Respondent was a wife to the Appellant and whether she had a beneficial interest over the suit land. The dispute was referred to Court for determination. Fourthly, the Appellant filed a suit vide a plaint dated 31-1-2022 seeking the removal of the caution over the suit land. Fifthly, it was the Appellant's case that he never married the 1st Respondent and he had no child with her. Consequently, the 1st Respondent had no registrable interest over the suit land. The Appellant concluded by saying that he had only one wife, Mercy Wanjiru Maina.

(4)The facts of the case according to the 1st Respondent are as follows. One, in 1983, she got married to the Appellant under Kikuyu Customary Law and together they were blessed with a son by the name of John Brian Muinami.Maina. The Appellant introduced the 1st Respondent to his mother and siblings as his wife soon after the marriage, the Appellant and the first Respondent were hosted by the Appellant's sister Nancy Wanjiku at her residence in Mirira for a long time. In the year 1987, the Appellant paid dowry for 1st Respondent as per the customs and requirements under Kikuyu Customary Law. In the year 1997, the couple

were blessed with their son John Brian Muinami Maina. Earlier in the year 1985, they had lost their first child at Thika Nursing Home where the 1st Respondent had gone to deliver. Two, on 28-9-2012, the 1st Respondent caused a caution to be registered over the suit land after the Appellant attempted to sell it in a clandestine manner. The Appellant filed a case in Nyeri being ELC No. 5 of 2013, **Maina Njoroge vs. Susan Wanjira Muinami** where he was seeking orders for the removal of the caution. The case is still pending in Nyeri because the Appellant has never prosecuted it. Three, in the year 2016, the Appellant sought the removal of the caution by the 2nd Respondent. The failure by the 2nd Respondent to resolve the dispute culminated in the lower court suit. Four, the Appellant has already sold 3 acres of the suit land and remains with 6 acres. If the caution is lifted, he will sell the remainder of the land.

(5) In her Judgment dated 7-12-2022, the learned trial magistrate found that the Appellant holds the suit land in trust for the 1st Respondent and her son, John Brian Muinami Maina, and although the caution could be removed, he continues to be bound as the trustee for the 1st Respondent and her son.

(6) On 18-9-2024, the learned trial magistrate dismissed an application by the Appellant dated 29-4-2024 which sought review and set aside the judgment dated 7-12-2022 on grounds quite similar to the seventeen (17) grounds of appeal herein. The dismissal was on the ground that the review did not meet the criteria in **Order 45** of the **Civil Procedure Rules**.

(7) Counsel for the parties filed written submissions dated 20-11-2025 and 13-2-2026 respectively. The issues framed by first Respondent were two.

(i) Whether the trial court properly found that the matter was ripe for an appeal and not review.

(ii) Whether the doctrine of constructive trust and presumption of marriage were erroneously applied.

On the other hand, the Appellant identified five issues for determination.

(a) Whether the learned trial magistrate erred in making a determination on issues of constructive trust and presumption of marriage in clear violation of the legal principle that parties are bound by their pleadings.

- (b) Whether the trial court erred in law and in fact in holding that the Appellant held the land in trust of the 1st Respondent and the alleged child despite the same not having been pleaded.
- (c) Whether the learned magistrate erred in law and in fact in failing to consider the error on the face of the record wherein the honourable court misapplied the legal principles and requisite elements for limitation of the right to property and in particular land.
- (d) Whether the learned trial magistrate erred in law and in fact in failing to consider the interest of the Appellant, his legal wife and their two children in the suit property wherein the finding that the Appellant held the suit land in trust of the Respondent and their alleged son, divested them of their absolute right in the suit land.
- (e) Whether the trial court erred in law and fact in dismissing the Appellants application dated 19-4-2024 seeking review of the judgment delivered on 7-12-2022.

(8)I have carefully considered the appeal in its entirety including the memorandum, the record, the written submissions by both sides, the issues raised therein and the law cited.

This being a first appeal, this Court is not bound to follow the trial court's findings of fact and has a duty to re-evaluate and reconsider the evidence afresh, while bearing in mind that it did not see or hear the witnesses and make allowance for that. See Selle vs Motor Boat Co.Ltd [1968] EA.123.

I find that the issues as identified by the learned counsel for the parties will resolve the dispute. I simply and shorten the issues as follows.

- (i) Whether the doctrine of constructive trust was erroneously applied by the trial court.
- (ii) Whether a registered owner can be compelled by a Court of law to subdivide his land among his dependants.
- (iii) Whether the trial court should have allowed the application for review.

(9) Regarding the first issue, I find that the doctrine of constructive trust did not apply in this case. What could have applied was the doctrine of a customary trust.

“ A constructive trust is an equitable remedy imposed by the Court against one who has acquired property by wrong doing.”

This was the holding by the Court of Appeal in the case of Twalib Hatayan and another vs. Said Saggat Ahmed Al Heidy and Others. Civil Appeal No. 51 of 2014, Mombasa.

In this case, the Appellant did not acquire the suit property by wrong doing. He did not defraud the 1st Respondent or her son. He acquired the suit land from his own father.

On the other hand a customary trust arises where family or clan land is registered in one person's name but is held for the benefit of others and the claimant proves the recognized elements. The key ingredients of a customary trust include ancestral, family or clan land. The claimant must belong to that family, clan or group and the relationship must be close and not remote. See the case of Mbui Mukangu vs Gerald Mutwiri Mbui Civil Appeal No. 281 of 2000 Nyeri.

Since the 1st Respondent was claiming as a wife first and her son as a son of the Appellant, it was a customary trust that was appropriate. For the 1st Respondent's son to qualify to be a dependant, it was crucial that the issue of whether the Appellant was his biological father be resolved by the trial court. Before the court could make a determination of his entitlement to the suit land as a son of the Appellant, the dispute of paternity should have been resolved by the trial court first.

The trial Court had the discretion to order for a paternity test to be carried out and the Appellant and his current spouse were ready for that. In the proceedings of 24-8-2022, the Appellant while under cross-examination by the 1st Respondent's counsel said,

“ If DNA is conducted and he is found to be my child, I will raise him as mine.”

Mercy Wanjiru Maina in cross-examination said,

“If the Child's DNA is taken and confirmed he is Maina's Child, I would have no problem”.

The trial court should have ordered that a paternity test be carried out so that the trial would be seen to be fair to the Appellant.

(10) As for the second issue, I find that a registered owner of land cannot be compelled to subdivide his land in his lifetime amongst his dependants. This was the *ratio decidendi* in the

case of Muriuki Maingi and Richard Marigi Muriuki Civil Appeal No 189 of 1996 Nyeri. The Court of Appeal held in part.

“...The Appellant as the registered owner of the suit property is still alive. His property is not yet available for subdivision and distribution among his wives and children except if he personally on his own free will decides to subdivide and distribute it among them. He may not be urged, directed or ordered to do it against his own will.

In the result and for the foregoing reasons, to the extent that the Respondents wanted the superior court to compel the Appellant to share the suit property during his lifetime in a particular manner and is designated shares, they did not have a cause of action in law respecting which the court would aid them to enforce...”

The Court of Appeal was interpreting **Sections 27 (a) and 28** of the **Registered Land Act (Cap 300, now repealed)** which is equivalent to **Sections 24(a) and 25 (1) of the Land Registration Act**. The holding in the case of Muriuki Marigi (Supra) is good law. The Appellant could not be compelled to subdivide and distribute his land in his lifetime unless he did so out of his own volition.

- (11) Finally on the issue of review, I find that the trial magistrate ought to have allowed review because there was an error apparent on the face of the record. The 1st Respondent had not filed any counterclaim. All that she wanted was her caution over the suit land to remain. She got more than she bargained for when the court gave her a share of the suit land. This was not proper because parties are bound by their pleadings.

Order 2 rule 6 of the **Civil Procedure Rules** provides,

“No party may in any pleading make an allegation of fact or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.”

In the case of IEBC and another vs Stephen Mutinda Mule an 3 Others, Civil Appeal No. 219 of 2013, the Court of Appeal held that parties are bound by their pleadings, the Court itself is bound by those pleadings and should not make any findings on matters not pleaded.

- (12) For the above stated reasons, I find **merit** in the Appellants appeal and I **allow** it in the following terms.

- (i) The appeal is allowed in its entirety.
- (ii) The ruling delivered on 18-9-2024 in Murang'a CM's Court case No MCELC No. E011 of 2022 is hereby set aside.
- (iii) The judgment delivered in MCELC No. E011 of 2022 is set aside.
- (iv) A fresh trial to be conducted and the question of the paternity of John Brian Muinami Maina to be determined scientifically, if possible.
- (v) Each party to bear its own costs in this appeal.

It is so ordered.

Dated, Signed and Delivered virtually at Murang'a this 15^h day of April, 2026.

M.N. GICHERU
JUDGE.

Delivered online in the presence of; -

Court Assistant – Jackline

Appellant's Counsel – Miss Kariuki holding brief

1st Respondent's Counsel – Mr. Ndegwa