



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 28 OF 2017**

**DOMINIC MAILU .....APPELLANT**

**VERSUS**

**JOSEPH MAILU MUKWEKWE .....1<sup>ST</sup> RESPONDENT**

**KAMWETHYA MUKWEKWE .....2<sup>ND</sup> RESPONDENT**

***(Being an appeal from the Judgment of Kitui Senior Resident***

***Magistrate's Court in Civil Case No. 77 of 1989 delivered***

***on 12<sup>th</sup> March, 1993 by Hon. N.A.K Njeru – SRM)***

**JUDGMENT**

1. The appeal proceeded by way of written submissions. The Appellant's advocate submitted that the claim in the lower court concerned occupation and ownership of the suit land which was registered in favour of the Appellant. Counsel submitted that the Respondent and the Appellant occupied the suit land jointly and that the Appellant sought to have the Respondents evicted from the land.
2. Counsel submitted that the 1<sup>st</sup> Respondent was a son of the 2<sup>nd</sup> Respondent; that the 2<sup>nd</sup> Respondent was the Appellant's sister-in-law whose husband died in 1962 and that the Appellant had cohabited with the 2<sup>nd</sup> Respondent and had two children with her. When the Appellant married, it was submitted that he had to separate the two families and offered to move the Respondents to a different parcel of land.
3. Counsel submitted that although the learned Magistrate ordered for the sub-division of the suit land into two portions, there was no such prayer and that none of the parties had sought for the sub-division of the land. Counsel submitted that it is the Appellant who was registered as the proprietor of the suit land and that the law did not recognize customary rights over registered land.
4. The Respondents' counsel submitted that the Respondents were on the suit land under the same ancestral rights as the Appellant; that the land was registered in favour of the Appellant as a trustee of the Respondents and that the Respondents had been on the land since 1965 as family members of the 2<sup>nd</sup> Respondent's late husband.
5. Counsel admitted that both the land that the Respondents were living on and the one that the Appellant had offered the Respondents were administered as ancestral family land; that both parties are entitled to an equal share of the land and that the 2<sup>nd</sup> Respondent's home is on the suit land. Counsel submitted that the Judgment of the lower court should be upheld.
6. This being a first appeal, the court is obliged to re-evaluate the evidence that was tendered in the lower court before coming to its own independent conclusion.
7. The Appellant commenced the suit in the lower court vide a Complaint dated 22<sup>nd</sup> August, 1989. In the Complaint, he averred that he is the registered proprietor of parcel of land known as Kyangwithya/Misewani/725; that the Respondents have been tenants on the said land until when he ordered them to vacate the land and that they should be evicted from the land.
8. The 2<sup>nd</sup> Respondent filed a Defence in which she averred that the homestead of her late husband is situated on the suit land; that she buried her late husband on the suit land and that the Appellant is holding the title to the suit land in trust for her and her children.
9. The Appellant told the trial court that the 1<sup>st</sup> Respondent was his nephew (*his brother's son*) and the son of the 2<sup>nd</sup> Respondent; that the

2<sup>nd</sup> Respondent's husband (*his brother*) died in 1962 and that according to Kamba customary law, he took care of the 2<sup>nd</sup> Respondent after the death of her husband.

10. It was the evidence of the Appellant that the adjudication process in the area commenced in 1966 and that they had land belonging to their mother; that the parcel number 765 was registered in favour of his mother and was later transferred to him and that he has constructed his four (4) bed roomed house on the suit land which measures ½ an acre.

11. According to the Appellant, he had allowed the Respondents to settle on portion number 765; that he has a wife and eight (8) children and that they can't all fit on the suit land.

12. The 2<sup>nd</sup> Respondent informed the trial court that he was married to the Appellant's brother in 1956; that the Appellant does not have another living brother and that when her husband died, she started cohabiting with the Appellant.

13. According to the 2<sup>nd</sup> Respondent, they have always lived on parcel number 725 and that parcel number 765 was cursed by her grandfather-in-law. According to the 2<sup>nd</sup> Respondent, all the family land should be divided equally. It was the evidence of the 2<sup>nd</sup> Respondent that she has been living on the suit land since she was married.

14. In his Judgment, the learned Magistrate found that it is very cruel for the court to order the Defendant to vacate the home she had lived for over thirty (30) years. The court ordered the Appellant to sub-divide the suit land in two equal parts.

15. The Appellant admitted in his evidence that her late brother who died in 1966 used to live on parcel number 725. When he died, the Appellant remarried the widow under the Kamba customary law. According to the Appellant, when the adjudication process commenced, he was registered as the proprietor of the suit land, including parcel number 765.

16. The evidence that was tendered before the lower court shows that parcel of land number 725 and 765 was family land. The Appellant, being the only male person in the family was registered as the proprietor of the land. By the time the adjudication process commenced, the 2<sup>nd</sup> Respondent had lived on the land for more than ten (10) years with her late husband. She continued living on the land with the Appellant as his wife.

17. The suit land is registered under the Registered Land Act (*repealed*). The Appellant admitted that he inherited the suit land from his late father. To the extent that he was not registered as the proprietor of the suit pursuant to succession proceedings, and having admitted that he was the only surviving male child of his father during the adjudication process, it follows that the Appellant held the suit land, together with parcel number 765, in trust for his family and that the 2<sup>nd</sup> Respondent's family. When the land was registered in favour of the Appellant, it was so registered subject to customary or resulting trust by virtue of the provision of Section 28 of the Registered Land Act. The principle of customary trust was applied in the case of *Mbui Mukangu v. Gerald Mutwiri Mbui [2004] eKLR*, where the Court of Appeal held as follows:

***"... We think it cannot be argued too strongly that the proper view of the qualification or proviso to Section 28 is that trusts arising from customary law claims are not excluded in the proviso. Such claims may stem from the possession and occupation of part of the registered land which although strictly it may not be an overriding interest under Section 30(g), it nevertheless gives rise to a trust which is capable of protection under this Act".***

18. The Court of Appeal in the above matter agreed with the decision of Khamoni J. in *Gathiba v. Gathiba (2001) 2 EA 342* in which the Judge held as follows:

***"...But since the same registration recognizes trusts in general terms as is done in the proviso to Section 28 and 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 judiciary capacity under any of the customary laws... such registration does not relieve a proprietor from any duty or obligation to which he is subject as a trustee".***

19. The scenario in the above two cases is what transpired in this matter. The 2<sup>nd</sup> Respondent was not only in long possession of the suit land, but was also the wife of the Appellant's late brother. The suit property having being family land, the Appellant held a portion thereof on behalf of his late brother and his family. He cannot purport to evict his brother's family just because he has another wife, when all along he has lived with the 2<sup>nd</sup> Respondent on the same land. If anything, and having married another wife, he should move on the bigger portion of land which is parcel number 765.

20. In the circumstances, I find that the trial Magistrate did not err when he found that it would be unfair for the court to evict the Respondents from the suit land. Just like parcel number 765, the suit land should be divided into two equal portions between the two families.

21. For those reasons, I find the Appeal to be unmeritorious and dismiss it with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20<sup>TH</sup> DAY OF JULY, 2018.**

**O.A. ANGOTE**

JUDGE