



Kageni & another v Mwaura & another (Sued as the Legal Representative of the Estate of Gabriel Mwaura Kageni, Deceased) (Environment and Land Appeal E074 of 2022) [2024] KEELC 962 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEELC 962 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E074 OF 2022
JG KEMEI, J
FEBRUARY 22, 2024**

BETWEEN

PETER KIMANI KAGENI 1ST APPELLANT

PATRICK NJOROGE GATUMBI 2ND APPELLANT

AND

JANE WAMBUI MWAURA 1ST RESPONDENT

MARGARET WANJIRU MWAURA 2ND RESPONDENT

**SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GABRIEL
MWAURA KAGENI, DECEASED**

*(Appeal from the judgment of Hon J A Agonda (PM) in
CMELC No 63 of 2021-Ruiru delivered on the 6/9/22)*

JUDGMENT

1. The Appellants and the Respondents were Plaintiffs and Defendants respectively in the trial Court.
2. The Plaintiffs averred that the suit lands were registered in the name of Gabriel Mwaura Kageni (Gabriel), their brother in trust for himself and the Appellants. However, upon the death of Gabriel the Respondents petitioned for succession in the estate of Gabriel and upon issuance of confirmation of grant the suit lands were divested to the 1st Respondent and her two daughters Joyce and Margaret to hold jointly (2407) while parcel 2406 was sold to a third party namely Prudential Capital Limited without their knowledge and contrary to the family agreement that the lands were to be held in trust for the three brothers. The Appellants sought orders as follows;
 - a. A declaration that parcel Number Ruiru/ruiru East Block2/2406 and Ruiru/ruiru East Block2/2407 were held by Gabriel Mwaura Kageni, deceased in trust for the Plaintiffs.



- b. A permanent injunction be issued against the administrators of Gabriel Mwaura deceased and or the beneficiaries from dealing transmitting and or alienating land parcel 2407
 - c. Costs of the suit
3. The Defendants denied the claim of the Plaintiffs and stated that the late Gabriel did not hold the suit lands in trust for the Plaintiffs. That the Plaintiffs encroached onto the lands after the demise of the Gabriel. In any event they argued that the Plaintiffs never claimed the land in the lifetime of Gabriel and viewed the suit as a way to illegally and fraudulently take away that which belongs to the Defendants by virtue of a confirmed grant (Succ. Cause No 117 of 2016) in the estate of the said Gabriel. That the Plaintiffs did not protest the issuance of the said Grant and now want to benefit from the Estate of Gabriel illegally. That the properties were registered in the name of Gabriel as a sole proprietor.
4. Upon hearing the suit the trial Court dismissed the suit on the 6/9/2022 in the following terms;

“In the foregoing premises and based on the reasons stated hereinabove, I find that the Plaintiffs have not proven their case on balance of probabilities. I proceed to dismiss the Plaintiffs’ case with no orders as to costs since the parties are related. The Plaintiffs be and are hereby ordered to grant vacant possession of the Ruiru/Ruiru East Block 2/2407 within 60 days from the date hereof. The caution placed on plot Ruiru/Ruiru East Block 2/2407 be discharged forthwith. Orders accordingly.”
5. Aggrieved by the said decision the Appellants quickly moved this Court and proffered an appeal on the following grounds;
 - a. The Learned Trial Magistrate erred in law and fact in dismissing the Appellants’ case against the weight of evidence on record.
 - b. The Learned Trial Magistrate erred in law and in fact by failing to consider the Appellants’ evidence in totality.
 - c. The Trial Magistrate misinterpreted the evidence adduced and did not fully evaluate it.
 - d. The Trial Magistrate allowed her opinion to overrule the provisions of the law and legal precedence.
 - e. The Trial Magistrate erred in law and in fact by failing to rely on the provisions of the law on declaration of customary trust on land and its requirements.
 - f. The Trial Magistrate erred in law and in fact by holding that the Appellants grant vacant possession of Plot No. Ruiru/Ruiru East Block 2/2407 whereas no party to the suit has sought the same.
6. Consequently, the Appellants sought the following orders;
 - a. The Appeal be allowed.
 - b. The entire Judgment of Honourable J. A. Agonda Principal Magistrate delivered on September 6, 2022 is set aside.
 - c. A declaration that the 1st and 2nd Respondent’s husband and father respectively the late Gabriel Mwaura Kagani held Plot No. Ruiru/Ruiru East Block 2/2406 and Plot No. Ruiru/Ruiru East Block 2/2407 in trust for the Appellants.



- d. An order of permanent injunction issued against the Respondents together with the beneficiaries of the Estate of Gabriel Mwaura Kageni (deceased), their agents and or servants from dealing, transmitting and or alienating LR Ruiru/Ruiru East Block 2/2407.
7. On the 23/5/2023 parties elected to canvass the appeal by way of written submissions which submissions I have carefully read and considered. The Court observes that the Appellants filed a List of Authorities without the submissions although on the 14/11/23 Learned Counsel Ms Muthii informed the Court that she had filed written submissions. It is trite that Counsel bears the responsibility to ensure that their pleadings are on record. The Respondents on the other hand filed written submissions dated the 27/10/2023.
8. Having considered the appeal, the grounds of appeal, the trial Court file, the written submissions and all the material placed before me the key issue is whether the appeal has merit. That is to say whether or not the suit lands were registered in the names of Gabriel Kageni deceased in trust for the Appellants.
9. Customary trust is a concept through which land may be acquired in Kenya. It is anchored in statute namely *Land Registration Act*. It is an overriding interest in land which need not be registered on the register. It subsists on and binds the land. Article 60 (1) (a) of the *Constitution* alludes to this concept when it refers to intergenerational and intra-generational equity. In the case of *Mbui vs Mukangu vs Gerald Mutwiri Mbui* CA No. 281 of 2000 the Court of appeal stated that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. ... If land was passed down from the family member to another, the presumption of trust subject to evidence is high.
10. Section 28 (b) of *Land Registration Act* provides as follows;
- “a. 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—
- (a)
- (b) trusts including customary trusts.”
11. Similarly in the case of *Peter Gitonga vs Francis Maingi M’ikiara Meru* HCCC No. 146 of 2000- 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 led 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.” (emphasis is mine).
12. Finally, the concept of customary trust has found firm approval in the Supreme Court of Kenya decision in the case of *Issack Kiebia M’Inanga vs Isaaya Theuri M’Linturi & Anor* Petition No 10 of 2015 (2018) eKLR where the Lord Justices of the Supreme Court 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 were 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: the land in question was before registration, family, clan or group land; the claimant belongs to such family, clan, or group; 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; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; the claim is directed against the registered proprietor who is a member of the family, clan or group.” (Emphasis mine).

13. The legal burden to prove the existence of customary trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must prove that the suit properties were ancestral/ clan land; that during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; that the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. See the case of *Issack Kiebia* (*supra*) above
14. It is commonly acknowledged that the parties in this appeal are related. The Appellants are the brothers in law and uncles of the 1st and 2nd Respondents, being the surviving brothers and siblings of the late Gabriel Mwaura Kageni. These three were the children of Margaret Wanjiru Kageni who passed on in 1982. Gabriel died in 2010 leaving behind the two siblings, Appellant, the 1st Respondent (widow) and 4 children.
15. It is not in dispute that the land traces its history to the family patriarch namely Wairimu Kageni who by all standards was a wealthy woman given some of the assets attributed to her name. Evidence was led that she bequeathed the Appellants the two suit lands in her lifetime but for their characters she directed that the land be registered in the name of Gabriel to hold in trust for the Appellants. It is this line of evidence that was attacked by the Respondents in the trial Court on account that the land was registered in the name of Gabriel solely and not in trust for the Appellants. That upon Gabriel's death in 2010 the Respondents petitioned for letters of administration which grant was confirmed in 2016. That she sold parcel 2406 to a third party and the remaining parcel 2407 is registered in the name of the 2nd Respondent together with her sister namely Joyce Wanjiru Mwaura.
16. Going by the *Kiebia Case* (*supra*), the Court finds that the land belonged to the family tracing its roots to the parties' grandmother. Although the green card denotes a figure of Kshs 250,000/- there was no evidence led to show that Gabriel purchased the land on his own from Wairimu Kageni (Wairimu) or such other third party. Such evidence would have been in form of a duly executed transfer form, Land control board consent, duly executed sale agreement and evidence of payment of the consideration. The probable presumption is that the Appellants' evidence that the land was bequeathed to them by their grandmother in 2009 in contemplation of death is not challenged. Unchallenged evidence in form of a Death Certificate was adduced that Wairimu died in 2017 at a prime age of 101 years. The lands were registered in the name of Gabriel in 2009 during the lifetime of Wairimu.
17. The irresistible conclusion therefore is that the suit lands were family lands.
18. Unchallenged evidence was led that the mother of the three sons died in 1982 long before Wairimu became registered as owner of the suit lands in 1992. PW1- PW5 led evidence and gave reasons why the lands were registered in the name of Gabriel. That Gabriel was better educated than the Appellants and in addition was of good character who was trusted with the affairs of her mothers' family. To the contrary the Appellants were described as drunkards and lived a carefree lifestyle and no wonder the old octogenarian being mindful not to create a circumstance in which they would sell the lands and remain destitute arranged for Gabriel to register the lands in his name. The Court finds that circumstances



of registration of the land in favour of the 1st Respondent's husband has been explained and that was to hold the land in trust for the Appellants. The Respondents have argued that the Appellants never claimed the land in the lifetime of Gabriel. The Appellants response is that there was no dispute as everyone in the family was aware of the circumstances in which Gabriel held the titles. That what prompted the dispute was the action of the Respondents who went behind the Appellants backs and obtained confirmed grants taking away the properties from the Appellants.

19. It is also borne of the confirmation of grant dated the 2/11/2016 that Gabriel held many other properties which the Appellants are not claiming. For starters unchallenged evidence was led that Gabriel and his family lived in Witeithie and not the suit lands. The Court has not been shown where the Appellants will be moved to if they are evicted from the land. the Constitution under Article 60 sets out the principles under which land in Kenya ought to be held used and managed. The supreme law decrees as follows;

“ 60. Land in Kenya shall be held, used and managed in a manner that is equitable,
(1) efficient, productive and sustainable, and in accordance with the following principles—

- a. equitable access to land;
- b. security of land rights;
- c. sustainable and productive management of land resources;
- d. transparent and cost effective administration of land;
- e. sound conservation and protection of ecologically sensitive areas;
- f. elimination of gender discrimination in law, customs and practices related to land and property in land; and
- g. encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.

(2) These principles shall be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.”

20. The Court agrees with the Appellants that holding otherwise will not be in line with the supreme law set out above.

21. Evidence was led by the Appellants that their grandmother moved them to the suit lands in 1989 where they reside todate. In a veiled attack by the Respondents they claim that the Appellants moved to the land in 2017, 7 years after the death of Gabriel. In other circumstances she led evidence that by the time Gabriel died the Appellants were already on the land. They claim to have been in cultivation of the land however no evidence was led by the Respondents to dislodge the claim of the Appellants. The Respondents contradicted themselves when they stated in evidence that the Appellants sought for the original title from her in 2015 for power connection to their residences. The import of this evidence is that the Appellants were on the suit lands way before the 2015. And if they were trespassers why did she hand over the title to them to connect power to the suit land/houses? The Court finds that the Respondents obtaining confirmation of grant was an afterthought intended to deprive the Appellants



of the family land. Moreover no evidence was led to show any steps that the Respondents did to drive out the alleged trespassers.

22. It is the law that possession is not the only ingredient necessary to proving customary trust but the fact that the person is in possession strengthens their claim. In this case the Appellants are deemed to have been on the land for over two decades.
23. The Court finds that there was no necessity of questioning the Estate of Wairimu because the land was transferred *intervivos* encumbered with a trust in favour of the Appellants. There was therefore an overriding interest as set out in Section 25 (1) of the *Land Registration Act* which states as follows;
 - “25. The rights of a proprietor whether acquired on first registration or (1) subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject.”
24. The 2nd Respondent stated that she was 5 years in 1998 and 17 years in 2010 and therefore the Court finds that her evidence was based on hearsay and therefore ought not to have been relied on entirely.
25. Costs shall be in favour of the Appellants both in the trial Court and in this appeal payable by the Respondents jointly and severally.
26. In conclusion the Court finds that customary trust has been proven. The appeal is merited and it is allowed in the following terms;
 - a. The entire Judgment of Honourable J. A. Agonda Principal Magistrate delivered on September 6, 2022 be and is hereby set aside.
 - b. The 1st and 2nd Respondent’s husband and father respectively the late Gabriel Mwaura Kageni held Plot No. Ruiru/Ruiru East Block 2/2406 and Plot No. Ruiru/Ruiru East Block 2/2407 in trust for the Appellants.
 - c. A permanent injunction be and is hereby issued against the Respondents together with the beneficiaries of the Estate of Gabriel Mwaura Kageni (deceased), their agents and or servants from dealing, transmitting and or alienating LR Ruiru/Ruiru East Block 2/2407.
 - d. Costs in favour of the Appellants.
27. Orders accordingly

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 22ND DAY OF FEBRUARY, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Muthii for 1st and 2nd Appellants

Onchiri for 1st and 2nd Respondents

Court Assistants – Phyllis/Oliver

