



REPUBLIC OF KENYA



KENYA LAW
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**Mbogo v Mbogo (Environment and Land Appeal 17 of 2021)
[2025] KEELC 940 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 940 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL 17 OF 2021
JM MUTUNGI, J
FEBRUARY 27, 2025**

BETWEEN

BIBIANA NJERI MBOGO APPELLANT

AND

NANCY WAMIRU MBOGO RESPONDENT

(Being an appeal from the Judgement of the learned magistrate Hon. L.W Kabaria dated 13th August 2021 in Gichugu E.L.C Case No. 14 of 2020)

JUDGMENT

1. The Appellant commenced the suit in the trial court vide a plaint seeking the following orders;
 - a. A declaration that the parcel No. Baragwi/Kariru/2617 is registered to the Defendant to hold in trust for her; and
 - b. An order compelling the Defendant to subdivide the land into two equal portions with one registered to the Plaintiff.
2. The claim was based on the assertion that the Appellant is the stepdaughter of the Respondent, stemming from her father's marriage to the Respondent following her mother's passing away. The Appellant contended that land parcel number Baragwi/Kariru/2617 (suit land) was jointly registered in the names of the Respondent and her late father, James Mbogo Sebastiano, to hold in trust for themselves and the Appellant.
3. The Appellant alleged that after her father's death, the Respondent unjustly transferred the land into her own name as the sole proprietor without notifying other family members, intending to sell the property to a third party and evict the Appellant. The Appellant argued that she had occupied and utilized half of the land even during her father's lifetime, and she believed both parties were entitled to equal shares of the property. Consequently, she urged the Court to affirm that the Respondent



and James Mbogo Sebastiano held the land in trust for themselves and the Appellant and to order the subdivision of the land into equal shares.

4. The Respondent filed her defence and counterclaim on 20th July 2020, denying the allegations made in the plaint. She affirmed that she married James Mbogo Sebastiano in a church ceremony in 2005 and stated that he was the sole proprietor of land parcel number Baragwi/Kariru/180, measuring 7.8 acres.
5. She stated that in 2012, the late James Mbogo Sebastiano, after consulting with his family, decided to subdivide the original land into eight portions. Of the ten children from the first family, the late James Mbogo gifted his sons and four daughters seven portions: Baragwi/Kariru/2616, 2628, 2619, 2620, 2621, 2622, and 2623. The remaining portion, Baragwi/Kariru/2617, measuring 0.54 hectares, was jointly registered in the names of the Respondent and her late husband and they lived on this land exclusively until his death on 26th February 2020.
6. Following the death of her husband, the title was changed to reflect only her name. The Respondent contended that the Appellant, who is a Catholic Nun, resided in Church Institutions, which rendered the claim of actual occupation of the suit land untrue. The Respondent asserted that she received the land as a gift inter vivos, similar to the children of the first wife, and owned the same it absolutely, not in trust for anyone other than her two children.
7. The Respondent contended that if the Appellant had any legitimate claim to the land, she should have contested the division during her father's lifetime. In her Counterclaim, the Respondent reiterated her position as the absolute and indefeasible owner of the suit land. She asserted that the caution placed against the title of the suit land on 20th March 2020 was unlawful. She prayed in the Counterclaim for orders:-
 1. A declaration that the defendant is the absolute owner of land parcel number Baragwi/Kariru/2617.
 2. An order that the caution registered against the title of land parcel number Baragwi/Kariru/2617.
 3. Costs of the counterclaim and interests.
8. The Trial Court after hearing evidence from the Appellant and one witness in support of the Appellant's case and the Respondent in support of the Respondent's defence and Counterclaim delivered the impugned Judgment on 13th August 2021. By the Judgment the Learned Trial Magistrate dismissed the Appellant's suit holding that the Appellant had not proved the existence of a trust in her favour. The Learned Trial Magistrate further allowed the Respondent's Counterclaim and decreed the Respondent was the absolute owner of the suit property and ordered the removal of the caution registered against the title by the Appellant.
9. Dissatisfied with the judgment of the trial court, the Appellant lodged an appeal to this Court vide a Memorandum of Appeal dated 20th August 2021. In the Appeal, the Appellant contends that the trial magistrate made errors in both law and fact by dismissing the Appellant's case and has set out the following grounds that:-
 - a. She failed to appreciate that, there was constructive trust for her interests when her deceased father was registered as owners of L.R Title No. Baragwi/Kariru/2617 when he was alive together with the Respondent who is a step-mother to the Appellant.
 - b. She failed to appreciate that, even when the Appellant's mother was alive, the Appellant's deceased father had constructed a permanent three-bedroom stone house on L.R Title No.



Baragwi/Kariru/2617 wherein the Appellant lives in to date and that after the death of the Appellant's mother, the Appellant's father constructed an extension room of the house from where the Appellant used to take care of the father before he remarried the Respondent as a wife.

- c. She failed to appreciate that, even after remarrying the Respondent the deceased Appellant's father constructed a semi-permanent house for the Respondent and another one for the Respondent's son where the Appellant's father started living with the Respondent until his death and that at no time has the Respondent entered the Appellant's mother's three-bedroom permanent stone house where the Appellant lives to date and which house stands on L.R Title No. Baragwi/Kariru/2617.
 - d. She failed to appreciate that, after subdivisions of L.R Title No. Baragwi/Kariru/180, all brothers and sisters of the Appellant were registered as owners of their respective parcels and it was only the Appellant who did not get her portion because she was the one to be taking care of their father who in turn got registered jointly with the Respondent so as to confer the Appellant's interest (the constructive trust). If it were not so, since all the subdivisions were done once, there was nothing to stop L.R Title No. Baragwi/Kariru/2617 being equally registered solely in the name of the Respondent.
 - e. She failed to appreciate that, notwithstanding that the Appellant's mother's three-bedroomed permanent house to date is on L.R Title No. Baragwi/Kariru/2617 wherein the Appellant lives and that the Respondent has never entered the house to date, the Appellant's mother as well as father are all buried on L.R Title No. Baragwi/Kariru/2617 and incase the Respondent sells, the land will go together with the house and the graves to a 3rd party and the Respondent has never controverted the fact that she wants to sell the land.
 - f. She failed to appreciate that, the Respondent could have without the knowledge of the Appellant influenced the joint registration of L.R Title No. Baragwi/Kariru/2617 in a way to solely benefit the Respondent in case of death of the deceased father which is exactly what happened after the death of the Appellant's father and the land now is registered solely in the name of the Respondent as the sole proprietor notwithstanding the interests of the Appellant.
 - g. She failed to appreciate that, the cautioning of L.R Title No. Baragwi/Kariru/2617 by the Appellant was in order to protect her clear interests and with the Judgement/Decree ordering the removal of the caution lodged by the Appellant, the Appellant stands to suffer irreparably incase the Respondent sells the land.
10. The Appellant prayed for orders that;
- a. The appeal be allowed and the Judgement of the trial magistrate dated 13th August 2021 be set aside.
 - b. This Honourable Court be pleased to find that there was constructive trust for the interests of the Appellant and that the Appellant is entitled to a share of L.R Title No. Baragwi/Kariru/2617.
 - c. Costs of the appeal.
11. The Appeal was canvassed by way of written submissions. The Appellant filed her written submissions dated 19th April 2024, and inter alia submitted that during the subdivision of the original land, she was the only family member not registered in any subdivision, despite being the firstborn daughter. She emphasized that she had a close relationship with her deceased father and explained that she and her



other unmarried sisters frequently visited the family homestead where their parents had constructed a three bedroomed house which their deceased father lived in with the mother before marrying their stepmother.

12. The Appellant argued that her father constructed another semi permanent house for the Respondent when he married her and that the three bedroomed bungalow remained their family house where she and any of the other sisters used to stay whenever they visited. The Appellant submitted that her deceased father having subdivided his land and distributed the land to all his children except her, could not have intended to leave her landless and without any inheritance. She stated that it was her father's intention that the land he left for himself and which he eventually registered jointly with the Respondent when he married her was the land which she (the Appellant) was supposed to get a share of. The Appellant argued upon registration of her deceased father and the Respondent as joint owners of land parcel No. Baragwi/Kariru/2617 a constructive trust resulted in her favour. She asserted the land remained family land and her right to inherit her father being the first born child could not be denied. The Appellant argued the graves of both of their parents were on the parcel of land and the Respondent could sell off the land which explained why she (the Appellant) lodged a caution against the land. The Appellant in support of her submissions that a customary trust existed in her favour relied on the Supreme Court decision in the Case of Isack M'Inanga Kiebia –vs- Isaya Theuri M'linturi & Another (2018) eKLR.
13. The Respondent in her submissions dated 30th April 2024 in opposition to the Appeal submitted that the Appellant's deceased father during his lifetime consciously subdivided his land parcel No. Baragwe/Kariru/180 into 8 portions and distributed the land to all his children other than the Appellant who was a trained Teacher and a Catholic Nun attached to Assumption Sisters of Nairobi since 1990. The Appellant affirmed that Nuns are dedicated to the Church until death and are buried by the Church once they die. The Respondent argued there was no intention to create a trust in favour of the Appellant in regard to land parcel No. Baragwe/Kariru/2617 which her deceased husband transferred into his name and her name jointly in 2013. The Respondent submitted the Appellant and all the other family members were aware when the deceased caused the subdivisions and attended the Land Control Board for consent in 2012 to enable transfers to be effected and there was no objection raised by the Appellant or any other family member at the Board.
14. The Appellant further submitted that when apparently one of the family members (a son) raised issue concerning the joint registration of the suit land in the joint names of the Respondent and their father (now deceased). The father wrote the letter dated 18th January 2013 explaining his decision to subdivide his land and to have his portion title No. Baragwe/Kariru/2617 registered jointly in his and his wife's names.
15. The Respondent thus submitted the Appellant had not adduced evidence to prove that there was a trust created in her favour and contended the Learned Trial Magistrate correctly held the Appellant had failed to prove her case and rightly dismissed the same.
16. In a first appeal like this one, the Court must consider and re-evaluate all the evidence and draw its own conclusions regarding the facts. The Court however must be conscious that it never had the advantage of hearing and seeing the witnesses testify and should make that allowance. This principle was well articulated in *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123:

“That this Court is not bound necessarily to accept the findings of fact by the court below. 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 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 or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”

17. The singular issue on which this Appeal turns is whether the Appellant's deceased father in having land parcel Number Baragwe/Kariru/2617 registered jointly in his name and in the Respondent's name intended that they would hold the land in trust for themselves and in trust for the Appellant.
18. It is not disputed that the deceased James Mbogo Sebastiano was married to Jecinta Wangigi Mbogo (also deceased) and that they had 10 children who included the Appellant. Equally it is admitted that Jecinta Wangigi Mbogo died in 2002. It is also not in dispute that James Mbogo Sebastiano got remarried to Nancy Wamiru Mbogo the Respondent, in 2005 through a Church wedding. Additionally, the deceased James Mbogo Sebastiano caused the subdivision of his land parcel Baragwe/Kariru/180 into 8 portions in the year 2012 whereby he transferred 5 portions (all equal in size) to his 5 sons, one portion to his unmarried daughter and one portion to 3 of his unmarried daughters. In regard to the remaining portion, he had the same transferred to his name and his wife's name jointly. As per the evidence of the Appellant's brother, Linus Muthike Mbogo, who gave evidence on behalf of the Appellant, all the family members attended the Land Control Board and were aware of the intentions of the deceased.
19. It would appear to clear any doubt as to his intentions the deceased James Mbogo, wrote to the District Commissioner Kirinyaga East (as chair of the Board) on 18th January 2013 explaining the basis of subdividing and distributing his land. The content of the letter is set out hereunder:-

James Mbogo

Box 15,

Kianyaga

18/1/2013

The District Commissioner

Kirinyaga East

My distributed land to my children through gichugu landboard

Dear Sir/Madam,

I have about 7.8 Acres of land. After a discussion with my children, I sub-divided my land to the following children through Land Board in 2012.

1. Mark Muchira Mbogo 2616 - Baragwi Kariru
2. Domenic Kariuki Mbogo 2618 - “ “
3. Zackary Wanjohi Mbogo 2619 - “ “
4. Linus Muthike Mbogo 2620 - “ “
5. Francis Maina Mbogo 2621 - “ “
6. Paulina Muthoni Mbogo 2622 - “ “



7. The Joint names in one Title as follows:-

1. My Regina Mary Muthoni Mbogo
2. Emma Wamawua Mbogo No. 2623 Baragwi/Kariru
3. Rebecca Wanja Mbogo

I and my wife decided to have our piece of the land jointly registered for security purpose and our decision was accepted by the Land Board and passed in 28th November 2012 so our number is 2617 Baragwi Kariru. After a few days we learnt that one of son went to Land Office at Kerugoya and blocked our portion of land parents without our knowledge. By this letter and events we are requesting your office through the Gichugu District Office to intervene in this matter so that we can have out Title deed processed as soon as possible.

Yours Faithfully,

James Mbogo & Nancy Mbogo

gichogo ID No. 02XXXX76

20. The Appellant contends that her deceased father and the Respondent when they were registered joint owners of the suit property were to hold the land in trust for themselves and herself. The general principle is that he who alleges and wishes to rely on the existence of such trust has the burden to prove the existence of such trust by evidence. In the case of Peter Ndungu Njenga –vs- Sophia Watiri Ndungu (2000) eKLR, the Court held thus:-

“The concept of trust is not new. In case of absolute necessity but only in case of absolute necessity the Court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

21. The Court of Appeal in the case of Juletabi African Adventure Ltd & Another –vs- Christopher Michael Lockely (2017) eKLR succinctly stated thus:-

“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.”

22. In the Supreme Court decision in the case of Isack Kiebia M’inangu –vs- Isaaya Theuri M’linturi & Another (supra) the Court held:-

“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 Kairie –vs- Kinuthia, that what is essential is the nature of the holding 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 have been created in favour of such other members, whether or not they are in occupation of the land -----“.

23. In the instant case it is evident that the deceased determined to subdivide and distribute his land during his lifetime and with the participation of his family members. No doubt it must have been in recognition of the fact that following the death of his first wife, he had remarried and the new wife he brought into his life, had 2 children who did not belong to him. His decision may have been intended to forestall any disputes if he died as if that happened and he had not settled the family, that would have been a recipe for squabbles particularly because he had acquired another family. There is evidence that the deceased involved all the family members and even the Appellant was aware the deceased had opted to have the suit land registered jointly with his new wife.
24. The deceased in the letter dated 18th January 2013 referred to earlier in this Judgment clearly explained himself. There can be no doubt that he never intended that the suit land was to be held in trust for anybody else. He deliberately chose joint registration as under Section 91(4)(b) of the Land Registration Act 2012 no succession proceedings under the Law of Succession were required upon the death of a joint proprietor as the doctrine of survivorship was applicable.
- Section 91(4)(b) of the Land Registration Act, 2012 provides as follows:-
- 91(4)(b) on the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly.
25. Following the death of her husband and upon proof of the death by the Respondent, the Land Registrar acted properly in deleting the name of the deceased joint tenant and consequently the Respondent became the absolute and indefeasible owner of the suit property. The registration of the Respondent as the absolute owner of the suit property was not secretive as the Appellant alleged and was in accordance with the law. The Appellant did not adduce any evidence to prove there was a trust created in her favour and the Learned Trial Magistrate cannot be faulted for reaching the decision that she did.
26. The Appeal is without merit and is dismissed. The Parties shall bear their own costs of the appeal bearing in mind, it is daughter and mother involved in this appeal.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 27TH DAY OF FEBRUARY 2025.

J. M. MUTUNGI

ELC - JUDGE

