



**Muriuki v Mugo & another (Environment and Land Appeal  
E005 of 2024) [2025] KEELC 960 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 960 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL E005 OF 2024  
JM MUTUNGI, J  
FEBRUARY 27, 2025**

**BETWEEN**

**PETER MURIITHI MURIUKI ..... APPELLANT**

**AND**

**VICTOR MUTHII MUGO ..... 1<sup>ST</sup> RESPONDENT**

**CHARLES MUNENE MUGO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree in ELC Case No. 062 of 2021 delivered  
at Wang'uru Law Courts by Hon. Martha Opanga – PM on 16th January 2024)*

**JUDGMENT**

1. This Appeal is against the Judgment delivered by Hon. Martha Opanga (PM) on 16<sup>th</sup> January 2024 in Wang'uru PM ELC No. E062 of 2021 whereby the Learned Principal Magistrate dismissed the Appellant's Case on the basis that the Appellant, who was the Plaintiff before the Lower Court, had not proved his case to the required standard.
2. The background to the suit is that the Appellant was the licensed licensee of Riceholding No. 2428 Thiba Section measuring 4 Acres. In October 2005 the Appellant agreed to transfer to his brother, one Josephat Mugo Muriuki, half portion of the Riceholding and he accordingly made an Affidavit surrendered 2 acres of his said Riceholding to his brother. The portion surrendered to the brother by the Appellant was designated as Riceholding No. 2428B. When the Appellant's brother died, the Riceholding 2428B was succeeded by the Respondents through their mother, Emily Ann Wanjiku as guardian.
3. The Appellant by a Plaint dated 28<sup>th</sup> July 2021 instituted suit against the Respondents alleging that the Respondents deceased father held the 2 Acres of Riceholding No. 2428 'B' that he (the Appellant) had surrendered to him in trust. The Appellant averred that the Respondents had breached the trust upon



which their late father held the Riceholding and the Appellant sought to have the trust determined and the Riceholding No. 2428B transferred back to him by the Respondents.

4. The Respondents vide a defence dated 11<sup>th</sup> August 2021 denied the averments contained in the Plaint and specifically denied the Riceholding was transferred to their late father to hold in trust. They contended that the transfer was pursuant to an agreement and denied the particulars of trust pleaded in the Plaint. The matter was heard before the Lower Court where the Appellant testified as the sole witness in support of his case and the 1<sup>st</sup> Respondent and his mother testified in defence. The Learned Trial Magistrate after considering and evaluating the evidence held that the Appellant had not proved his case to the required standard and dismissed the Appellant's case with costs.
5. The Appellant being dissatisfied and aggrieved by the Judgment of the Learned Trial Magistrate has appealed to this Court against the Judgment and through the Memorandum of Appeal dated 26<sup>th</sup> January 2024 has set out 7 grounds of Appeal as hereunder:-
  1. That the Learned Trial Magistrate erred in Law and facts in failing to appreciate that the Appellant still holds ownership documents and that the Appellant is the lawful registered licensee of National Irrigation Board Riceholding Number 2428 H2.
  2. That the Learned Trial Magistrate erred in Law and fact by not appreciating that the Appellant being the registered owner of Riceholding Number 2428 H2 that the Appellant acquired a clean and indefeasible license for Riceholding Number 2428 which rights are capable of any legal protection.
  3. That the Learned Trial Magistrate erred in Law and fact by not addressing herself to the legal principle in trust as the Appellant still holds the original Riceholding Number 2428 H2 and the license hence to transfer could have been effected and that the Learned Magistrate only relied on the Affidavit of surrender dated 28<sup>th</sup> October 2005 which the Appellant challenged.
  4. That the Learned Trial Magistrate erred in Law and fact by not recognizing that the Appellant had not secured any consent to transfer Riceholding 2428 H2 to the Respondents father from any relevant authority, hence if there is any transfer conducted was fraudulent illegal null and void.
  5. That the Learned Trial Magistrate erred in Law and fact by failing to recognize that in absence of consent to transfer 2 Acres from Riceholding 2428 H2 and failure by the Appellant to surrender the original license and the original card for 2428 H2 to the relevant authority the Appellant did not have the intention to transfer the 2 Acres to his brother Josphat Mugo Muriuki (deceased) rather he created a trust as indicated in the surroundings.
  6. That the Learned Trial Magistrate erred in Law and fact by not appreciating that resulting trust does not give rise to proprietary interest but only personal one.
  7. That the Learned Trial Magistrate erred in Law and fact by totally disregarding the Appellant pleadings and submissions, thereby arriving to a wrong conclusion.
6. The Appellant prays that the Judgment of the Lower Court be set aside and the transfer of the Riceholding 2428 B in favour of the Respondents be cancelled and the Appellant to be declared the legal owner of the Riceholding 2428 B. The Appellant further prays that the costs of the suit and of the appeal be paid by the Respondents.
7. The Appeal was canvassed by the parties by way of written submissions. The Appellant filed his submissions dated 15<sup>th</sup> July 2024 while the Respondents filed theirs dated 11<sup>th</sup> July 2024.



8. Having reviewed the grounds of Appeal, the Record of Appeal and the submissions made in support of and in opposition of the appeal, the issues that arise for determination in this appeal are as follows:-
  - i. Whether the surrender and transfer by the Appellant of 2 Acres of Riceholding No. 2428 to his brother, Josphat Mugo Muriuki (now deceased) was made subject to trust?
  - ii. Whether the registration of the Respondents as successors to their father of Riceholding No. 2428B was subject to trust in favour of the Appellant?
  - iii. Whether the Respondents ownership of Riceholding 2428 B should be cancelled?
  - iv. Who bears the costs of the Appeal?
9. This Court being a first Appellate Court has a duty and indeed an obligation to consider and re-evaluate the evidence adduced before the Lower Court to satisfy itself whether or not the decision reached by the Lower Court was justified. In doing so the Court is not bound by the findings of fact by the Trial Court and may make its own conclusion and findings based on the evidence but has to be cautious that it never had the opportunity of seeing the witness give evidence. This was in conformity with the principle as established in the Case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 where the Court stated as follows:-

“This Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court is by way of retrial and the principles upon which this Court act 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 conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect”.
10. The Appellant in his submissions contended that no good title could have been passed to the Respondents by their deceased father since he himself had not obtained a transfer of Riceholding 2428B to his name. The Appellant submitted that as at the time his brother Josphat Mugo died in 2010 the Riceholding had not been transferred to him and that the tenant card in the names of the Respondents dated 6<sup>th</sup> April 2011 produced in evidence could not be genuine.
11. The Appellant under paragraph 3, 4 and 5 of the Plaintiff pleaded as follows:-
  - (3). The Plaintiff avers that he was the Lawful licensee of the National Irrigation Board in respect of holding Number 2428 H2 measuring 4 Acres until 2005 when he surrendered 2 acres to his brother Joseph Mugo Muriuki, now deceased.
  - (4). The Plaintiff avers that the 2 acres were designated as Riceholding Number 2428 B.
  - (5). The Defendants are currently registered licensee of the said holding Number 2428 B having succeeded their late father Josphat Mugo Muriuki.
12. The Appellant further pleaded under Paragraph 6 of the Plaintiff that the Respondents had breached the trust bestowed on their late father on transfer of the 2 acres and itemized the alleged particulars of trust. The issue therefore is whether the transfer of the 2 acres Riceholding to the deceased was made by the Appellant subject to any trust.
13. The Appellant in his evidence adopted his witness statement and relied on his bundle of documents filed with the Plaintiff as his exhibits. He affirmed he gave his brother 2 acres to cultivate and according to him all was well until the Respondents started being hostile and violent from 2017 whereupon he opted to reclaim the land he had given to the Respondent’s father.



14. The 2<sup>nd</sup> Respondent in his evidence relied on his witness statement and the documents filed with the defence. The Respondents mother Emily Ann Wanjiku Mugo who testified as DW2 equally relied on her witness statement where she explained the Appellant surrendered 2 acres to her husband as he had redeemed a debt that the Appellant owed to a Third Party. She stated the Scheme Manager approved the surrender and her husband was registered as owner of Riceholding 2428 B and when he died in 2010 she applied for succession and the Scheme Manager accepted the changes and registered the Respondents who were then minors as successors under her guardianship. She averred she had been utilizing the Riceholding to support her children who were still in school. She denied the alleged acts of harassment and violence claimed by the Appellant.
15. The Appellant in the pleadings and evidence admitted he surrendered and transferred 2 acres of Riceholding number 2428 to his brother, Josphat Mugo Muriuki (now deceased). The Appellant exhibited the Affidavit of surrender dated 28<sup>th</sup> October 2005 that he made and which facilitated the Scheme Manager to effect changes in their records. Paragraph 5 of the Affidavit was in the following terms:-
  5. That I make this declaration as my authority to the Manager, National Irrigation Board to give out two (2) Acres of Riceholding No. 2428 Thiba Section and allocate the same to Joseph Mugo Muriuki ID/No. 2237, 2195.
15. The Appellant further exhibited a Farmers changes Holding Form in respect of Riceholding No. 2428 A dated 18<sup>th</sup> April 2013 which indicated that pursuant to consent Form of 14<sup>th</sup> September 2011 changes were effected in regard to Riceholding 2428 (A) and 2428 (B) and that as per the Form the Respondents were to hold 2 Acres Riceholding 2428 (B) under the guardianship of their mother Emily Ann Wanjiku Mugo. These documents were tendered in evidence by the Appellant and no evidence was led to contradict their contents. The Appellant in his evidence admitted that an agreement was prepared in a Lawyer's Office which they took to the Scheme Manager.
17. The Respondents tendered in evidence an agreement dated 27<sup>th</sup> October 2005 made between the Appellant and his deceased brother where the deceased agreed to pay a debt of Kshs 100,000/- owed by the Appellant to one Naomi W. Mbithi in consideration of the Appellant surrendering and transferring a portion of the Riceholding. The agreement was duly signed by the Appellant and his deceased brother at the offices of M/s A. P. Kariithi & Co. Advocates and was duly witnessed. Although the Appellant made no express admission of the agreement, it is my finding that indeed there was such an agreement and it was the prelude to the signing of the Affidavit of surrender of the 2 Acres portion of the Riceholding.
18. The Appellant has contended that he surrendered the two acres to his deceased brother on trust basis. He led no evidence to support the existence of a trust. The Affidavit of surrender was not conditional and the agreement entered into before the execution of the Affidavit of surrender never provided that the transfer would be subject of trust. The burden to prove the existence of trust rests on the person who alleges the existence of a trust. The Appellant adduced no evidence to prove his brother held or was to hold the two (2) acres Riceholding as a trustee on his behalf. As per the Affidavit of surrender and the agreement adduced in evidence, it is evident that the transfer to the Respondents deceased father was not conditional and was absolute and only subject to the terms of the license issued by the National Irrigation Board.
19. On the basis of the evidence and my evaluation of the same I am satisfied that the Learned Trial Magistrate was justified to hold that the Appellant had not proved there was a trust created when the Appellant surrendered the two (2) Acres Riceholding to the Respondent's deceased father. It follows therefore there was no trust that was breached and the registration of the Respondents as the successors



of their deceased father in regard to Riceholding 2428 'B' cannot be faulted. The holding and finding of the Learned Trial Magistrate cannot be faulted.

20. The Appeal is without merit and the same is ordered dismissed with costs to the Respondents.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 27<sup>TH</sup> DAY OF FEBRUARY 2025.**

**J. M. MUTUNGI**

**ELC - JUDGE**

