



**Kituva v Kikului (Environment & Land Case E011 of 2023)
[2024] KEELC 984 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 984 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E011 OF 2023
TW MURIGI, J
FEBRUARY 21, 2024**

BETWEEN

SAMMY MAILU KITUVA PLAINTIFF

AND

JOHN KITUVA KIKULUI DEFENDANT

JUDGMENT

1. By a Plaint dated 10th March, 2023, the Plaintiff prays for judgment against the Defendant for;
 - a. A declaration that the Plaintiff is the owner of the undivided equal share within land parcel number Konza South/Konza South Block 5 (Konza) 2189 albeit his name not appearing in the title deed.
 - b. A declaration that the Defendant holds title in respect to the land parcel number Konza South/Konza South Block 5 (Konza) 2189 in trust for the Plaintiff and other siblings namely Kasuni Kituva, Sammy Mailu Kituva, Daniel Mutuku Kituva and Elizabeth Nduku Kituva.
 - c. An order of subdivision to subdivide the suit land into five (5) equal portions and transfer as per the siblings in default of which the Deputy Registrar of this honourable court to execute the transfer documents.
 - d. Cost & interest of this suit.
 - e. Any other relief that this honourable court may deem fit to grant.
2. Despite being served with Summons to Enter Appearance, the Defendant did not enter appearance or file a Defence. Interlocutory Judgment was entered against the Defendant on 25th April 2023.
3. The matter proceeded for formal proof on 17th May 2023.



Plaintiff's Case

4. At the trial, the Plaintiff called two witnesses in support of his case.
The Plaintiff (PW1) adopted his witness statement dated 10th March 2023 as his evidence in chief. He also produced the documents in the list of documents as PEX1-7 in support of his case.
5. The Plaintiff testified that the suit property is ancestral land as it originally belonged to their late father Kituva Kilului. He testified that the Defendant holds the suit property in trust for himself and for his brothers. He informed the court that the Defendant has refused to subdivide and share the suit property amongst his brothers who are also beneficiaries of the Estate of their late father.
6. He further testified that they had discovered that the Defendant had sold the suit property to one Abednego M Kimiyu and has procured consent to transfer the same. The Plaintiff pleaded particulars of illegality in paragraph 9 of the Plaintiff as follows:-
 - a. Registering the suit property in his name solely while knowing that the land was to be jointly registered with the Plaintiff alongside other brothers as co-proprietors.
 - b. An attempt to illegally defraud and/or deprive the Plaintiff his bona fide portion of land.
 - c. An attempt to transfer the said land to other parties.
7. The Plaintiff urged the court to grant the orders as sought in the plaintiff.
8. PW2 Elizabeth Nduku Kituva adopted her witness statement dated 10th March 2023 as her evidence in chief. She reiterated the evidence of PW1 and confirmed that the Defendant was holding the suit property in trust for the entire family.
9. After the close of the hearing, the Plaintiff filed written submissions dated 2nd November 2023, which I have duly considered.

Analysis and Determination.

10. Although the suit was undefended, the Plaintiff has a duty to formally prove his case on a balance of probabilities as required by the law.
11. In so finding, I am persuaded by the holding in the case of *Kirugi and Another Vs Kabiya & 3 Others* (1987) KLR 347 where the Court of Appeal held that:-

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”
12. Similarly, in the case of *Gichinga Kibutha Vs Caroline Nduku* (2018) eKLR the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”
13. Having considered the pleadings, the evidence on record and the submissions by the Plaintiff, the following issues arise for determination;
 - i. Whether the Defendant holds the suit property in trust for his siblings including the Plaintiff.



- ii. Whether the Plaintiff is entitled to the orders sought in the plaint.

Whether The Defendant Holds the Suit Property in Trust for his Siblings Including the Plaintiff

14. The Plaintiff testified that the Defendant holds the suit property in trust for himself and his siblings as it is ancestral land. According to Black's Law Dictionary 9th Edition, a trust is defined as follows:-

“The right enforceable solely in equity, the beneficial enjoyment to which another holds a legal title, a property interest held by one person (trustee) at the request of another (settler) for the benefit of a third party (beneficiary).”
15. A customary trust is a valid claim to land as noted under Section 28(b) of the *Land Registration Act, 2012* and being an overriding interest, it affects the rights of a proprietor of land under Section 25 (1) (b) thereof.
16. A customary trust falls within the ambit of the proviso to Section 28(b) of the *Land Registration Act* which provides as follows:-

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—

(b) trusts including customary trusts.
17. It is clear from the above provisions that the registration of a person as a proprietor of land does not automatically exclude any obligation to which such proprietor may be subject as a trustee. These are non-registrable rights which run with the land. The legal burden of proof in demonstrating that the suit property is trust land lies with the Plaintiff who wishes the Court to make a finding as to the existence of such trust.
18. Customary trust is a matter of evidence and not inference. It is an issue both of fact and law which requires serious demonstration through credible evidence. This was the holding by the Court of Appeal in the case of *Mbothu & Others Vs Waitimu & 11 Others*, (1980), K.L.R 171 cited in the Estate of the late Jonathan Kinyua Waititu (deceased) eKLR Succession Cause No. 488 of 2010 where it was held that:-

“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 intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.

Since the plaintiff's claim was based on trust, the law places the onus on her to prove the existence of such trust..... It is however clear from the evidence herein that the plaintiff has neither pleaded nor proved any of the particulars as to how the trust subject matter of this claim arose with respect to the suit land. There is really no evidence upon which this Court can make a finding that the defendant holds the suit land in trust for him.”
19. Similarly, in the case of *Salesio M'itonga v M'ithara & 3 others* (2015) eKLR the Court of Appeal held that:-

“It is trite law that trust is a question of fact and has to be proved by evidence.”



20. the issue for determination is whether the Plaintiff has demonstrated that the suit property is trust land. In the case of *Isack M'inanga Kiebia Vs Isaaya Theuri M'lintari & another* [2018] eKLR, the Supreme Court articulated the elements which a person must prove to demonstrate the existence of a trust as follows:-

“(52) Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered *Land Act*. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

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 is 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:

1. The land in question was before registration, family, clan or group land.
2. The claimant belongs to such family, clan, or group.
3. 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.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

21. In his evidence, the Plaintiff produced an official search from Konza Ranching & Farming Co-operative Society Limited dated 7th December 2021 in respect of the suit property as (PEX1). According to the official search, the title deed in respect of the suit property was issued to the Defendant to hold in trust for himself and for the other beneficiaries namely:- Kasuni Kituva Sammy Mailu Kituva and Daniel Mututku Kituvaa. He also produced a Consent/Authority in the matter of the Estate of the late Kituva Kikului member No. 193 Konza Ranching and Farming Co. Ltd. dated 23/09/2011(PEX3) The consent/authority clearly shows that Kasuli Kituva, Mailu Kituva and



Mutuku Kituva gave their consent to the Chairman of Konza Ranching and Farmers Co-operative Society authorising him to change the membership from that of their late father Kituva Kikului to that of John Kituva Kikului as the next of kin. The Plaintiff also produced an affidavit of John Kituva sworn on 26/11/2010(PEX4) authorising him to hold the suit property in trust for the other beneficiaries.

22. The Plaintiff produced a certificate of official search in respect of the suit property(PEX2) which clearly shows that the Defendant is the registered proprietor thereof. According to the certificate of official search, the Plaintiff registered a caution against the suit property on 3/11/ 2022 claiming a beneficial interest.
23. It was the Plaintiff testimony that the Defendant has sold the entire suit property to Abednego Kimuyu. He produced the application for consent and the consent to transfer the suit property as PEX 5 and 6 respectively.
24. There is evidence that the suit property originally belonged to Kituva Kikului their late father. There is also evidence that the suit property is registered in the name of the Defendant to hold in trust for himself and for the other beneficiaries. It is therefore undisputable that the suit property is ancestral land. All the above elements characterize ancestral land which in turn establishes a customary trust. I therefore find that the Plaintiff has demonstrated that the Defendant holds the suit property in trust for himself and for his siblings including the Plaintiff.

Whether the Plaintiff Is Entitled to the Orders Sought in the Plaint

25. Having established that the Defendant holds the suit property in trust for himself and for his siblings including the Plaintiff, this court finds and holds that the Plaintiff is entitled to the orders sought in the Plaint.
26. In the end, I find that the Plaintiff has proved his case against the Defendant on a balance of probabilities as required.
27. Consequently, I enter judgment for the Plaintiff against the Defendant in the following terms;
 - a. A declaration be and is hereby issued that the Plaintiff is the owner of the undivided equal share within land parcel number Konza South/Konza South Block 5 (Konza) 2189 albeit his name not appearing in the title deed.
 - b. A declaration be and is hereby issued that the Defendant holds title in respect to the land parcel number Konza South/Konza South Block 5 (Konza) in trust for the Plaintiff and other siblings namely Kasuni Kituva, Sammy Mailu Kituva, Daniel Mutuku Kituva And Elizabeth Nduku Kituva.
 - c. An order of subdivision is hereby issued to subdivide the suit land into five (5) equal portions and transfer as per the siblings in default of which the Deputy Registrar of this honourable court to execute the transfer documents.
 - d. Each party to bear its own costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAM THIS 21st DAY OF FEBRUARY, 2024.

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HON. T. MURIGI

JUDGE



IN THE PRESENCE OF: -

Court assistant – Mr. Kwemboi

Kithuka holding brief for Munyasya for the Plaintiff.

