



**Murisha & 2 others v Jepchirchir (Environment & Land Case
E003 of 2023) [2024] KEELC 1410 (KLR) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1410 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT & LAND CASE E003 OF 2023**

**L WAITHAKA, J
FEBRUARY 16, 2024**

BETWEEN

FLORA JESEREM MURISHA & 2 OTHERS PLAINTIFF

AND

CLARA JEPCHIRCHIR DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated 21st February 2023 and filed on 1st March 2023, the plaintiffs instituted this suit seeking judgment against the defendant for a declaration that the parcel of land known as Irong/Korkitony/64 registered in the name of Andrew Kibii Langat (deceased, herein after referred to as Andrew) is subject to a trust in their favour to the extent of 34.3 acres.
2. The suit is premised on the ground that the suit property measuring 40.0 acres belongs to the plaintiffs' father, Edward Chelagat Chebet (deceased, hereinafter after referred to as Edward); that their father died before land adjudication; that the suit property was registered in the name of Andrew Kibii Lagat alias Andrew Kibii Chebet during land adjudication but to hold in trust for them. Complaining that upon the demise of Andrew, the plaintiff through Eldoret High Court Cause P & A No. 287 of 2007 caused the suit property to be distributed without taking into account their beneficial interest in the suit property, the plaintiffs instituted the instant suit seeking the reliefs listed herein above.
3. The defendant filed a statement of defence dated 8th May 2023, denying the plaintiffs contention that the suit property is subject of a trust in their favour and contending that the plaintiffs' suit is *res judicata* Eldoret High Court P & A Cause No. 287 of 2007. It is the defendant's case that the suit is meant to circumvent the decision or order made in Eldoret High Court Succession P & A Cause No. 287 of 2007.



4. The plaintiffs filed a reply to defence dated 10th May 2023, reiterating their contention that the suit property is subject to a trust in their favour and denying the defendant's contention that the suit is *res judicata* Eldoret P & A Cause No. 287 of 2007.
5. It is the plaintiffs case that the succession court did not hear and determine the issue of the pleaded trust and that it lacked jurisdiction to hear and determine the issue of the pleaded trust.

Evidence

The Plaintiffs Case

6. When the suit came up for hearing, the plaintiffs availed five witnesses, themselves included. Flora Jeserem Murisha PW1, relied on her witness statement recorded and signed on 20th February 2023 after it was adopted as her evidence in chief. She stated that her father Edward had 7 children from three mothers all born and raised in Irong Korkitony land Parcel No. 64. The children were John Chelagat (deceased, hereinafter referred to as John), Andrew Kibii Lagat (deceased); Flora Jeserem Murisha, Salina Jerotich, Elizabeth Jemaiyo, Elizabeth Lagat, and Alphina Chelagat Kibeiyio. She informed the court that by the time their father passed on, land adjudication had not been done; that as a family, they agreed that Andrew would hold the suit property in trust for his other siblings but he and John died before subdivision was done. She stated that one of their sisters, Salina Jerotich had been keeping the title deed but surrendered it to the defendant who had been cultivating the land for a long period of time (17 years). She stated that although they do not currently reside in suit property, the court should find that the defendant holds the suit property in trust for Edward's children and that each be given 5.7 acres.
7. In cross-examination, PW1 stated that she is 77 years old, married to one Murisha and has 8 children; that there was a meeting between herself and her two elder deceased brothers after their father died and they agreed that Andrew should hold the family land in trust for the rest of the siblings as he was educated (he was a pilot working in the Air Force) to enable him educate their younger siblings. She stated that both Andrew and John had several parcels of land separate from the suit property. She admitted that they participated in the succession proceedings of Andrew's estate, but the matter was not concluded. She admitted that she never laid claim over the suit property between 1969 and 1983 when Andrew was alive and educating their siblings.
8. In re-examination, she affirmed that their father died before land adjudication was done and that the suit property was registered in the name of Andrew.
9. Abraham Kiplimo Kiptanui PW2, relied on his witness statement recorded and signed on 20th February 2023 after it was adopted as his evidence in chief. He testified that the first plaintiff is a sister to his deceased mother Elizabeth Kimaiyo, while the second plaintiff is a wife to his uncle John. He stated that his grandfather Edward, resided in Parcel Irong/Korkitony/64 and after his death, the family agreed that Andrew being the educated one in the family, be registered as owner of the suit property to hold it in trust for his other siblings.
10. In cross-examination, he stated that he was born in 1974; that his mother was a sister to Andrew and the suit property belonged to his grandfather who died in 1965.
11. Clara Talaa Kipkoech PW3, relied on her witness statement recorded and signed on 20th February, 2023 after it was adopted as her evidence in chief. She informed the court that she was the wife of John Kipkoech Langat (deceased) and a sister-in-law to the plaintiff; that the defendant is the wife to her husband's brother and that Edward was their father. She stated that her father-in-law lived in the suit



- property; that the suit property belonged to him and was only registered in Andrew's name to hold in trust for the other family members; that the land should be shared among Edward's children and not Andrew's children.
12. In cross-examination, she stated that she lives in her husband's land; that she got married in 1963 but never met her father in law as he died before she got married; that although her husband was the eldest in the family, he agreed that the suit property be registered in Andrew's name as the family had given him the responsibility to educate his younger siblings.
 13. In re-examination, she stated that by the time her father in law died, the suit property had not been adjudicated.
 14. Gideon Katam PW4, relied on his witness statement recorded and signed on 20th February 2023 after it was adopted as his evidence in chief. He testified that he was a neighbour and lived ½ Kilometre away from the plaintiffs. He stated that Edward was a chief while his father was a village elder. He informed the court that the defendant currently occupies the suit property; that Edward brought up his children on the suit property but died before land adjudication was done and that the family had agreed that since Andrew was the most educated, the land would be registered in his name to enable him educate his younger siblings.
 15. In cross-examination, he stated that he was born in 1944; that Edward died in 1965 thus he knew all of Edward's children.
 16. Phillip Kipkoech Chepkole PW5, relied on his witness statement dated 20th February 2023 after it was adopted as his evidence in chief.
 17. In cross-examination, he confirmed that the suit property belonged to Edward; that he was born in 1954; that Land adjudication took place in 1967 by which time Edward had died. He corroborated the other witnesses evidence that the family of Edward decided to have the land registered in Andrew's name to hold it in trust for the siblings and take care of them. He stated he was present at the meeting as a witness.
 18. In re-examination, he affirmed that Andrew held the land in trust and was to transfer it to his siblings but he died before he could do as agreed.

The Defendant's Case

19. The defendant, who testified as DW1, relied on her witness statement recorded and signed on 16th June 2023, after it was adopted as her evidence in chief. She produced the ruling delivered in Eldoret High Court P & A Cause No. 287 of 2007 as Dexbt 1. She informed the court that the suit property is registered in the name of her deceased husband, Andrew; that her deceased husband informed her that he was given the suit property by his father; that her deceased husband's brother, John (deceased), was also given land by his father; that the two parcels of land border each other; that John's family lives in parcel number 3; that the plaintiffs filed an objection in Succession Cause No. 287 of 2007 and that the court found in her favour (held the suit property belongs to Andrew).
20. In cross examination, she stated that her father-in-law gave his sons, John and Andrew land; that she was not present when that happened; that Edward had 7 children and that John and Andrew went to Tambach with witnesses after land adjudication to obtain title deeds (John for parcel no 3 and Andrew for parcel no 64).
21. She further stated that two of her late husband's elder sisters were married (1st and 2nd plaintiffs); that she brought up the 2 younger siblings, Elizabeth Lagat and Angela Kosgei and that the court in the



- succession cause had asked her to consider the two when sharing out land among her children which she intends to do.
22. She admitted that the suit property initially belonged to her father-in-law but could not tell whether her husband was given the suit property to hold in trust for his other siblings.
 23. She reiterated that her husband informed her that he was given the land by his father.
 24. In re-examination, she stated that Andrew died in 1983; that land adjudication was done in 1967 and that John died in 1988.
 25. She informed the court that in his life time, John did not lay a claim on the suit property and that she believes that the reason the court told her to be mindful of Elizabeth and Angela is because she brought them up as her own children.
 26. At close of hearing, parties filed submissions, which I have read and considered.

Analysis and Determination

27. From the pleadings, evidence and submissions, I find the issues for the court's determination to be:
 - i. Whether the suit is *res judicata* Eldoret High Court P & A Cause No. 287 of 2007;
 - ii. Whether the suit property is subject of a trust in favour of the plaintiffs;
 - iii. What order(s) should the court make?
28. On whether the suit is *res judicata* Eldoret High Court P & A Cause No. 287 of 2007, the defendant points out that the plaintiffs had filed objection proceedings in Eldoret High Court Succession Cause No. 287 of 2007 contending that the suit property, which was one of the listed assets of Andrew, did not belong to him but to Edward; that Edward had nominated Andrew to hold it in trust for the other family members; that the succession court heard the objection on merit, through viva voce evidence, and rendered its decision on 23rd December, 2023.
29. The court is said to have determined that the plaintiffs did not have anything to show that the deceased (Andrew) in the succession proceedings held the suit property in trust for the objectors.
30. It is pointed out that the plaintiffs did not appeal the said determination by the High Court. Instead the plaintiffs filed the instant suit re-introducing the issue of trust and submitted that the instant suit is *res judicata* the former. Reference is made to Section 7 of [Civil Procedure Act](#) and the case of [Independence Electoral Boundaries Commission v. Maina Kiai and 5 others](#) (2017) eKLR.
31. The plaintiffs through their submissions filed on 30th November 2023, have reiterated their contention that the succession court lacked jurisdiction to hear and determine the pleaded question of trust in the registration of the suit property. In that regard, reliance is placed on Articles 165(5)(b), 162 (2) of the [Constitution](#); Section 13 of the [Environment and Land Court](#) and the cases of in [Re Estate of Mbai Wainaina \(deceased\)](#) [2015] eKLR; [Joseph Koori Ngugi & another v Stephen Ndichu J. Mukima](#) [2017] eKLR.
32. It is the plaintiffs' case that the contested issue of ownership of the suit property is properly before this court as it was not heard and determined by a court of competent jurisdiction to hear and determine it.
33. It is further submitted/contended that the plaintiffs have never had a chance to tender evidence and/or prosecute their case before the High Court.



34. Regarding that issue, I have carefully considered the submissions and the law applicable. I have also read the decision of the High Court relied on by the defendant in support of her contention that the instant suit is *res judicata*, Eldoret High Court Succession P & A Cause No. 287 of 2007. I do find that the issue of the pleaded trust was indeed raised in the succession court but hasten to point out that on the strength of the persuasive authorities cited by the plaintiffs to the effect that a succession court is not the proper forum to hear and determine the question of trust in registered land, I decline to find that the instant suit is *res judicata* the former.
35. As to whether the suit property is subject of a trust in favour of the plaintiffs, the plaintiffs have made reference to the case of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR where the Supreme court inter alia stated: -
- “ ... 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” and submitted that from cross examination of the defendant and the testimony of the plaintiffs and their witnesses, it is not in dispute that the suit property belonged to Edward; that the suit property was first registered in the name of Andrew after his father had passed on and that Edward passed on before land adjudication took place. Further, that it is common ground that the claimants/ the plaintiffs belong to the family of Edward; that the relationship between the claimant and the late Edward is by blood hence not in any way remote as to render the plaintiffs claim idle or adventurous; that all the children of Edward would be entitled to be registered as proprietors of the suit property were it not for the reasons cited by the plaintiffs for registration of the suit property in the name of Andrew (that he was educated and the one educating his siblings); that the other son, John, was working and had another parcel of land and that the family members agreed that the suit property be registered in the name of Andrew to hold in trust for himself and his siblings.
36. It is pointed out that the plaintiff's claim is directed at Clara Jepchirchir Langat, a widow of Andrew, son of Edward and reiterated that the plaintiffs have made up a case for being granted the orders sought.
37. On her part, the defendant has reiterated her contention that the suit property was not being held in trust and submitted that the plaintiffs failed to prove the basic requirement of creation of a trust espoused in the case of *Alice Wairimu Macharia v Kirigo Philip Macharia* [2019] eKLR.
38. Based on the cases of *Peter Ndungu Njenga v Sophia Watiri* [2000] eKLR and *Juletabi African Adventure Limited & Another v Christopher Michael Lockley* [2017] eKLR, it is submitted that the burden was on the plaintiffs to lead evidence proving that indeed a constructive trust existed, or that the suit property was ancestral land that was vested in the deceased to hold in trust for the family, which they failed to do. A court is not obligated to imply existence of trust outside the express and clear intention of the parties like what the plaintiffs are trying to suggest.
39. I have read and considered the evidence adduced in this case that shows that the suit property is ancestral. I have also read and considered the explanation given by the plaintiffs concerning the circumstances on which the suit property was registered in the name of the defendant's deceased husband.
40. It is the considered view of this court that the reason offered by the plaintiffs for registration of the suit property in the defendant's deceased husband's name is not persuasive enough to infer any trust in favour of the plaintiffs' in the registration of the suit property in the name of the defendant's deceased husband. I do also find that the conduct of the parties does not reveal that registration of the suit



property in the name of the defendant's deceased husband was subject of a trust in favour of the plaintiffs. The plaintiffs have never at any time utilized to the suit property or any portion thereof as persons who had a claim thereto.

41. For the foregoing reasons, I find and hold that the plaintiffs have not proved their case on a balance of probabilities to warrant being granted the orders sought. Consequently, I dismiss their case.
42. On costs, this being a family dispute, I order that parties bear their own costs of the suit.
43. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 16TH DAY OF FEBRUARY, 2024.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Mr. Wainaina holding brief for Mr. Momanyi for the Plaintiffs

Mr. Wabomba for the Defendants

Court Asst.: Christine Towett

