



REPUBLIC OF KENYA



KENYA LAW
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**Mburu v Wainaina (Civil Appeal 143 of 2019)
[2025] KECA 181 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KECA 181 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 143 OF 2019
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
FEBRUARY 6, 2025**

BETWEEN

PETER WAINAINA MBURU APPELLANT

AND

JAMES KAMANDE WAINAINA RESPONDENT

*(Being an appeal from the Judgment of the Environment & Land Court at
Murang'a (Kemei, J) delivered on 2nd May 2019 in ELC No. 495 of 2017)*

JUDGMENT

1. To contextualize the dispute, a brief history will suffice. The matter revolves around 2 acres of land in Loc 17/Kamahuha/203, the suit property herein. It is the respondent's case that the parcel of land initially belonged to Njuguna Kimindiri (Kimindiri), a paternal uncle to both the appellant's father and the respondent. Kimindiri did not have any children, and he invited the appellant's father, Isaac Wainaina, and his two brothers Benson Njuguna Wainaina, and the respondent to live on the land. Kimindiri designated 2 acres of the suit property to the respondent to farm, another 2 acres to the Benson Njuguna, and allocated the remaining land to the appellant's father. The appellant's father, the eldest of the three (3), was registered on his behalf and that of his brothers. He later transferred Benson's share but did not transfer the respondent's share.
2. The respondent filed a case against the appellant's father in the Senior Principal Magistrate's Court at Murang'a, Civil Suit No. 267 of 2004, where he sought a declaration that the appellant's father held the suit property in trust for himself and the respondent; for the dissolution of the trust and to have the appellant's father transfer 2 acres of the same to him. An interim order maintaining the status quo was granted on 6th May 2005. However, the case remained unresolved as the appellant's father passed away on April 19, 2009, before he could give his testimony. Substitution of the appellant's father was not done, and the suit thus abated. Parties were advised to file a succession cause.



3. Unknown to the respondent, the appellant's mother, filed Succession Cause No. 201 of 2012 (formerly Succession Cause 965 of 2010-Nyeri). The respondent learnt of the same upon receiving a letter requesting him to remove the caution from the disputed land. He then applied for revocation of the grant on 26th October 2010, and as fate would have it the appellant's mother died, and the appellant was substituted in her place.
4. On 1st November 2017, the respondent filed a plaint against the appellant seeking a declaration that the appellant held 2 acres of the disputed parcel in trust for him, a further declaration that he acquired the 2 acres of the disputed land by way of adverse possession and costs of the suit having had possession since 1962.
5. In his defence dated 22nd June 2018, the appellant contended that he was wrongly sued as he is not the owner of the suit property; he is not a trustee; the suit was fatally defective; a court does not issue orders in vain or whose enforcement is impossible; further that the respondent had filed Civil Case No. 267 of 2004, which made the current suit res judicata; the respondent should have revived the said suit instead of filing multiple new suits; the respondent did not reside on the parcel of land; which meant the doctrine of adverse possession did not apply; the multiple suits regarding the same parcel of land, indicated that the respondent's alleged occupation could not have been continuous and uninterrupted; a claim of adverse possession should be initiated by originating summons; therefore, the claim was not properly before the court.
6. In its judgment, the trial court determined that the existence of a licensee's interest indicated permission to occupy the disputed property, which negated the claim for adverse possession.
7. The court noted that the suit property was registered in the name of the appellant's late father, who was the legal representative, having been substituted upon the demise of his mother. Therefore, the appellant was properly sued as the legal representative of his late father's estate.
8. The trial court was not persuaded that the appellant's father purchased the disputed parcel of land, as he claimed. Instead, the court found that the respondent's uncle, Kimindiri, initially owned it, which was not seriously disputed. It went further to find that the suit property was family land, where Kimindiri settled the three brothers. Further, the court believed the respondent's testimony that he had lived on the suit premises since 1962, had planted trees and coffee, and had built a house. Further, when the appellant's father had himself registered as the suit property owner in 1974, he also registered his name for the respondent's portion. In his testimony, the appellant admitted that he found the respondent living on the suit land as he grew up.
9. The trial court applied on the provision of section 28 of the [Land Registration Act](#) that all registered land shall be subject to such overriding interest as may for the time in question be subsisting and affecting the land without the necessity of the overriding interest being noted; customary trust being an overriding interest. Ultimately, the court found that the respondent had established a customary trust over the 2 acres of the suit property.
10. Aggrieved by the judgment, the appellant has raised 8 grounds of appeal in his memorandum of appeal dated 19th June 2019, stating that the learned judge erred in law in failing to find that the respondent had not proved that he was entitled to two acres out of the suit property; the respondent's suit filed against the deceased proprietor before his death had abated and no attempt was made to revive the suit; the suit in the superior court was time-barred; the appellant did not hold the suit property in trust for the respondent; the learned judge failed to pronounce herself on the claim for adverse possession yet the suit was incompetent, defective in law and an abuse of the process of the court; and failing to



appreciate that the orders issued were unenforceable as the appellant was not the registered owner of the suit property.

11. Learned counsel for the appellant filed submissions dated 31st October, 2022. He submitted that the respondent did not sufficiently demonstrate that he was entitled to the land and failed to prove, on a preponderance of probabilities, that the deceased held 2 acres of the disputed property as a trustee for the respondent. The suit was time-barred under the *Limitation of Actions Act* as more than 12 years had passed since the alleged cause of action arose, and it should have been dismissed solely based on this point. Additionally, the suit filed by the respondent against the appellant's father in the lower court had abated by operation of law, and the superior court should have acknowledged this and that the respondent did not take any steps to revive the suit.
12. Learned counsel submitted further that since the appellant was the deceased owner's son and not the land's registered owner, the suit in the High Court should have been dismissed. On the claim based on customary trust, learned counsel claimed that the alleged trust is not a continuing trust. That a customary trust ceased upon the deceased owner's death; further that no trust was recorded in the register.
13. Further learned counsel asserted that the respondent did not occupy the two acres of the disputed property. Even if it is assumed that he occupied the same, the appropriate legal action would have been to file a suit based on adverse possession rather than a suit based on customary trust, which the trial court did not consider in its judgment and which was detrimental to the respondent's case.
14. On his part, learned counsel for the respondent filed submissions dated 24th February 2023. He submitted that the respondent proved the existence of a customary trust; by providing the history of the suit property and how the same was family land. Learned counsel in support of this contention relied on the case of *Njenga Chogera vs. Maria Wanjira Kimani & 2 Others* [2005] eKLR, which quoted with approval the holding in the case of *Muthuita vs. Muthuita* [1982 – 88] 1KLR 42, where this Court held that customary law trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded.
15. On abatement of the suit, learned counsel submitted that the suit abated after the lapse of the set timeline for substitution upon the demise of a party, which delay was due to frustration by the appellant's family, who refused to substitute the deceased within the statutory time set, which led the suit to abate.
16. On the suit being time-barred, the respondent submits that the suit is based on trust with no time limit. Learned counsel in support quoted the case of *Macharia Kihari vs. Ngigi Kihari* [1994] eKLR, where the court held that the limitation prescribed in section 20(2) of the Limitations of Actions Act would not apply to a trust coming into existence under customary law and that under customary law, where the right of action has accrued, is held in trust for decades before any step is contemplated for a formal transfer or division.
17. Regarding the appellant's assertion that he was not the registered proprietor of the suit parcel, learned counsel contended that it did not matter that the appellant is not the registered owner, as he was sued as the legal representative of the person who held the trust.
18. On adverse possession, it was submitted that the learned judge found the existence of a trust as opposed to adverse possession, holding that the appellant was a licensee who took possession with the owner's permission, and therefore the doctrine of adverse possession is inapplicable.
19. On the appellant's assertion that the suit ought to have been struck off, it is argued that the issue was not raised at the pre- trial stage, and the matter thus proceeded to a hearing.



20. This is a first appeal. The duty of this Court, in addition to considering submissions by the appellants and the respondents, is to analyze and re-assess the evidence on record and reach an independent conclusion. This approach was adopted in *Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others* [2015] eKLR, where the court cited the case of *Selle vs. Associated Motor Boat Co.* [1968] EA 123 and held as follows; -

“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 demeanor of a witness is inconsistent with the evidence in the case generally.”

21. Having considered submissions by the rival parties, case law cited, and the law, we are of the view that the issues for our consideration are:

- i. Whether the appellant was wrongly sued.
- ii. Whether this matter falls for the application of the doctrine of adverse possession.
- iii. Whether the claim is time-barred; if not
- iv. Whether the court may invoke customary trust under the provision of section 28 of the [*Land Registration Act*](#) in the circumstances of the case.

22. In his grounds of appeal, the appellant complained that he was wrongly sued for not being the registered owner of the suit property. The appellant is currently the representative of his deceased father’s estate, and he is sued as such, a fact that he does not dispute. This ground is unfounded and must flop.

23. The appellant also faulted the trial court for failing to address the doctrine of adverse possession. In its determination, specifically in paragraphs 12 and 13, the trial court stated:

“12. The plaintiff has sought two prayers, firstly on trust and secondly on adverse possession. The mere fact of the licensee’s interest denotes permission.

13. Going by the reason underpinning the caution registered against the title on 7/6/2004 read together with the decision in the above case, the court holds that adverse possession is not tenable in the circumstances. A party is bound by his pleadings and his evidence placed before the court. The court is also bound by law by the very pleadings in determining the right of the parties in a suit.”

24. The grounds of appeal and submissions complaining that the trial court failed to consider the issue touching on the doctrine of adverse possession are misplaced. We say so because the trial court dedicated two paragraphs as set above to this subject. The ground fails.



25. The trial court went further in its judgment to refer to this Court’s decision of *Samuel Miki Waweru vs. Jane Njeri Richu, Civil Appeal No. 122 of 2001*, which we agree with where the court stated:

“It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. Further as the High Court correctly held in *Jandu vs. Kilpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been given.”

The respondent’s case is that his uncle Kimindiri invited him to the suit property. As we stated above, his entry was permissive and not adverse to the owner. This ground does not hold, and it must also fail.

26. Section 20 of the *Limitation of Actions Act*, Chapter 22 of the laws of Kenya provides that; -

1. None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action—
 - a. in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or
 - b. to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.

In the case of *Macharia Kihari vs. Ngigi Kihari* (supra) in a matter involving family land and where there was a claim that the matter was statute barred having not been filed within six

- (6) years this Court emphatically stated; -

“We are unable to accept Mr Thiongo’s contention that the suit was time-barred. The limitation prescribed in section 20(2) of the *Limitation of Actions Act* will not apply to a trust coming into existence under customary law. Under customary law, the land, even after the right of action has accrued, is held in trust even for decades before any step is contemplated for a formal transfer or division. The limitation does not apply in customary law. We reject this ground of appeal.”

We agree with the court’s sound reasoning and find that the ground has to fail.

27. Section 28 of the *Land Registration Act* Chapter 300 of the Laws of Kenya provides:

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) Trust including customary trust.

28. The Supreme Court of Kenya considered at length the issue of customary trust in the case of *Isack M’Inanga Kiebia vs. Isaya Theuri M’Lintari & Another* [2018] eKLR, and had this to say:

“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.
58. What are we to make of these changes? Several interpretations are plausible. It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register.

However, by retaining the proviso to Section 28 of the Registered *Land Act* (now repealed), in Section 25 of the *Land Registration Act*, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered *Land Act*, have now been subsumed in the “customary trusts” under Section 25 (b) of the *Land Registration Act*. Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land.”

29. We agree with the trial court's finding that the respondent and his brothers were invited by their paternal uncle, Kimindiri, who remained unmarried and had not sired any children to the suit property and which property he shared amongst his three nephews; this was family land. The respondent



explained that they each got their portion. Because of his age at the time, as was customary in this part of Kenya, which we take judicial notice of, the elder son, who was the appellant's father, would be registered in trust for his siblings. This history and the explanation given by the respondent persuaded the trial court.

We equally find that as opposed to the appellant's assertion that his father bought the suit property from his uncle, the respondent's version is a more plausible explanation. The appellant's allegation was unsubstantiated and not backed by any evidence. That being the case, the respondent's claim bears the elements in *Isack M'Inanga Kiebia vs. Isaya Theuri*

M'Lintari & Another (supra). The land subject matter was family land; the respondent belongs to the said family, a brother to the current registered owner, and he would have been registered as an owner of his two acres, but for his age and he has been in possession for over 60 years.

30. Ultimately, we find no fault in the trial court's findings. We are inclined to dismiss the appeal with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 6TH DAY OF FEBRUARY, 2025.

S. OLE KANTAI

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL ALI-ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

