



**Mbihane v Adagala (Environment and Land Appeal E005 of 2023)
[2024] KEELC 1793 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1793 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL E005 OF 2023**

E ASATI, J

MARCH 20, 2024

BETWEEN

JOTHAM IGADWA MBIHANE APPELLANT

AND

PHYLIS INZIANI ADAGALA DEFENDANT

*(being an appeal from the judgement in HAMISI
PMC EL NO 20 OF 2021 dated 30th June, 2023)*

JUDGMENT

1. The Appellant Jotham Igadwa Mbihane was the Plaintiff in Hamisi PMC ELC NO 20 of 2021 (the suit). He had sued the Respondent herein seeking for declaration, permanent injunction and vacant possession of land parcel known as North Maragoli/Mudete/1929 (the suit land herein). His claim in the suit was that he was at all material times the duly registered owner of the suit land. That the Defendant had trespassed onto and refused to vacate the suit land thereby depriving him of his enjoyment thereof. The Respondent vide the Defence dated 30th June 2022 denied the Appellant's claim and averred that she was on the suit land as of right as the widow of the Appellant's son.
2. The record of appeal shows that the suit was heard before the trial court which, vide its judgment delivered on 30th June 2023, found that the suit lacked merit in its totality and dismissed it and ordered each party to bear its own costs of the suit.
3. The Appellant being dissatisfied with the Judgment filed the appeal herein challenging the judgment on the grounds that;
 - a. The Learned Magistrate erred in law and fact in holding that the Appellant does not have exclusive and unimpeded rights to the suit property which finding was against the weight of the evidence.



- b. The Learning Magistrate erred in law and fact by ignoring the fact that the Appellant being the owner of the suit property is entitled to peaceful and quiet occupation.
 - c. The Learned Magistrate erred in law and fact by holding that the suit property is subject to an overriding interest of customary trust.
 - d. The Learned Magistrate erred in law and fact in holding that the Respondent is not a trespasser in the suit property by virtue of being the widow of the Appellant's late son which fact was not proven
 - e. The Learned Magistrate erred in law and fact by failing to uphold the rights of the Appellant as the owner of the suit property.
4. The Appellant in this appeal seeks for orders that the appeal be allowed, the judgement of the learned trial magistrate dated 30th June 2023 be set aside and costs of the appeal be borne by the Respondent.

Submissions

5. On 16th January 2024 directions were taken that the appeal be argued by way of written submissions. Consequently, written submissions dated 24th January 2024 were filed on behalf of the appellant by the firm of S.K Amani Advocate. Similarly, written submissions dated 7th February 2024 were filed by the firm of A.B.L Musiega and Company Advocates on behalf of the Respondent.

Issues for determination

6. Through their respective submissions, Counsel for both parties agreed that the issues for determination in this appeal are: -
- a. Whether or not there exists a customary trust;
 - b. whether or not the Respondent is a trespasser on the suit land.

The court adopts these as the issues for determination herein.

Analysis and determination

7. This being a first appeal, this court is under a duty to reconsider the evidence adduced and re-evaluate it so as to be able to reach its own independent conclusions and thus determine whether the conclusions reached by the trial court are consistent with the evidence and the applicable law. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR the Court held that:

“this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a 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.”

8. Guided accordingly, I proceed to reevaluate and re-examine the evidence as I determine the issues framed for determination.
9. The record of appeal shows that the evidence placed before the trial court on behalf of the Appellant comprised of the testimony of the Appellant and the exhibits he produced. He stated in his witness statement dated 17th August 2022 that the Respondent was his late son's workmate at Mudete Tea



Factory and also their neighbour living with her husband and children. That it came to his attention that the Respondent had an affair with his late son despite being a married woman. That sometime in the year 2014, the Respondent moved into his (Appellant's) compound with her children to live with his (Appellant's) late son without consent. That in the process they were blessed with a son. That he did not understand the capacity in which the Respondent was living with his late son yet she was still married to another man who is still alive to date. That the Respondent remained in his compound and frustrated him day after the other insisting that the Appellant should give her his son's inheritance. That the Respondent and his late son were not married. That the Respondent became very rude and violent and even reported him to the police. He produced title deed to the suit land as exhibit. He prayed that his claim be allowed.

10. The Respondent who testified as DW1 and adopted her witness statement dated 30th June 2022 as her evidence-in-chief stated that in October 2012 she got married to Oscar Jatula Igadwa in a customary marriage. That their marriage was blessed with one issue namely Bruce Lumasia. That they established a home on land parcel no North Maragoli/Mudete/1929. That she is a daughter-in-law to the appellant and has never been married elsewhere. That the appellant wants to chase her and her child and render them homeless
11. On Cross examination she stated that the Plaintiff had sub – divided the suit land and given a portion of thereof to her deceased husband and that is where she stays. That she had not filed any succession cause. That she wished to inherit the property of her husband and that she lived on the land from the year 2015 to the year 2022 when she was served with a court order to leave.
12. The first issue for determination herein is whether or not there exists a customary trust. Counsel for the appellant submitted that it was not in dispute that the Appellant is the absolute registered owner of the suit property, that the suit property was not ancestral land or inheritance and that therefore the appellant is not holding the land in trust for any member of his family. That all his children have moved out to start their own homes elsewhere. That the Respondent who is the mother of the Appellant's grandson cannot force her stay on the suit land. That the trial court blinded itself to the pertinent issues in the case. That the issue of customary trust was not pleaded or proved.
13. Counsel submitted further that no customary trust was created and the trial court erred in implying a customary trust where it does not exist. Relying on the case of *Isack Kieba M'inanga v Isaaya Theuri M'Linturi and Another*, Counsel submitted that the requirements of a customary trust as laid out by the Supreme Court are that;
 - a. the land in question was before registration, family, clan or group land.
 - b. the claimant belongs to such family, clan or group.
 - c. 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.
 - d. the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
 - e. the claim is directed against the registered proprietor who is a member of the family, clan or group.
14. Counsel further relied on the cases of *Ngugi Kamau and Another* (Environment and Land case no 36 of 2020) [2022] KEELC 2261 (KLR and *Juletabi African Adventure Limited and Another v Christopher Michael Lockley* [2017] eKLR where it was held that the burden of proof lay with the party



- relying on the existence of a trust to prove the existence thereof. That to discharge the burden of the existence of a customary trust the claimant must prove that;
- a. The suit property was ancestral or clan land.
 - b. During adjudication and consolidation one member of the family was designated to hold on behalf of the family.
 - c. The registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family.
15. On behalf of the Respondent, it was submitted that the Respondent had her matrimonial home with the deceased who was a son of the Appellant on the suit land. That the Respondent has not gotten married elsewhere after the deceased died. Counsel for the Respondent relied on the provisions of section 28(b) of the [Land Registration Act](#) to the effect that all registered land is subject to the overriding interest of trust including customary trust. Counsel relied on the case of [James Ndung'u Kiarie v Geoffrey Mwangi Kinuthia and another](#) [2012] eKLR where it was held that what is essential is the nature of the holding of the land and intention of the parties and if the said holding is for the benefit of other members of the family then customary trust is created. That the Respondent does not have any other place to go to with her son. That her husband, the Appellant's son died and left the Respondent on the suit land.
16. The appellant faults the court for the finding "that the suit property was subject to the overruling interest by way of customary trust of the Defendant's son who is also a grandson of the plaintiff."
17. Perusal of the pleadings in the suit and the evidence placed before the trial court shows that customary trust was neither pleaded in the Defence dated 30th June 2022 nor mentioned in the defendant's evidence. It was not proved. The record shows that the issue of customary trust was first raised by the Respondent in her written submission before the trial court wherein it was submitted on her behalf that
- "the Defendant has lived with the plaintiff's son (deceased) and has since established a relationship with the plaintiff's family that qualifies her to have and continue staying on the portion of the suit land where she lived with the plaintiff's deceased son in trust of their child as a customary right."
18. It was therefore erroneous for the trial court to hold that a customary trust existed in favour of the Respondent over the suit land. However, the appellant's suit was based on the tort of trespass and whether or not the suit was to succeed depended on whether or not the appellant proved that the Respondent was a trespasser on the suit land.
19. The second issue for determination is whether the Respondent was a trespasser on the suit property. In section 3 of the [Trespass Act](#), Cap 294 Laws of Kenya, trespass to land is stated to happen when:
- "Any person who without reasonable excuse enters, is or remains upon or erects any structure on or cultivates or tills or grazes stock or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offence."



Winfield and Jolowicz on Tort 12th edition at page 359 states that:

“trespass to land is the name given to that form of trespass which is constituted by unjustifiable interference with possession of land it consists of interference with possession.”

20. Under the provisions of sections 107 and 108 of the *Evidence Act*, the burden to prove to the required standard the tort of trespass rested with the appellant who was the plaintiff in the suit. It was upon him to prove on a balance of probabilities that the Respondent unjustifiably intruded with his occupation of his land. That the Respondent entered his land without his permission.
21. The record shows that the appellant had pleaded in paragraph 4 of the plaint that the Respondent had denied him peaceful possession of the suit premises and in particular the Respondent had trespassed and refused to vacate from the suit property. He testified, as narrated herein above, as to how the Respondent entered the suit land.
22. The appellant faulted the trial court for its finding that the Respondent was not a trespasser on the land. The appellant contended that as he is the absolute owner of the suit property, the Respondent cannot forcefully remain thereon without his consent. Counsel for the appellant relied on the case of *Ochako Obindu v Zachary Oyoti Nyamongo* [2018] eKLR to support the submission. Counsel submitted that the Appellant has the right to decide what to do with his property.
23. Counsel for the Respondent relied on the definition of trespass in section 3(1) of the *Trespass Act* Cap 249 and submitted that the Respondent is not a trespasser on the suit property. That it is through her marriage to the appellant's son that they established a matrimonial home on a portion of the suit land. That the Respondent lived with the Appellant's son on that portion of the suit land as husband and wife together with their son. That the Respondent has become helpless after the Appellant recently brought down the matrimonial house after delivery of the judgment of the trial court.
24. I have considered the pleadings, evidence and submissions on this issue. I find no evidence that the appellant ever complained when the Respondent entered the suit land as a wife and/or partner of his deceased son. He claimed that the Respondent is married elsewhere but no evidence was produced to that effect. The evidence placed before the trial court was that the Respondent came onto the suit land as a wife to the deceased. She lived there on with the deceased and together they had a child. When the deceased died she participated in the burial as the widow and thereafter lived on the land for 6 years before the suit was filed. She cannot therefore be said to have entered or remained the suit land without justifiable cause or unlawfully. The appellant has not stated at what point the Respondent became a trespasser. In any event if she had become a trespasser or unlawful occupant of private land, the appellant ought to have served her with eviction notice under the *Land Act*.
25. I find that the appellant did not prove that the Respondent was a trespasser on his land. I further find that the trial court was justified to so find. I find no reason to interfere with the judgement of the trial court which I hereby uphold.
26. For the foregoing reasons I find that the appeal lacks merit. The appeal is hereby dismissed. Each party to bear its own costs of the appeal and the suit.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 20TH DAY OF MARCH, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,



JUDGE.

In the presence of:

Ajevi: Court Assistant.

No appearance for the Appellant.

No appearance for the Respondent.

