



REPUBLIC OF KENYA



KENYA LAW
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**Tibiri v Mwaniki & 2 others (Civil Appeal E042 of 2019)
[2024] KECA 1037 (KLR) (2 February 2024) (Judgment)**

Neutral citation: [2024] KECA 1037 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL E042 OF 2019
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
FEBRUARY 2, 2024**

BETWEEN

KITHINJI TIBIRI APPELLANT

AND

KIRIAMBURI TIBIRI MWANIKI 1ST RESPONDENT

DAVID NJERU TIBIRI 2ND RESPONDENT

JAMES NDWIGA TIBIRI 3RD RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court of Kenya at Embu (Angima, J.) delivered on 20th December, 2018 in E. L. C. Case No. 28 of 2014)

JUDGMENT

1. The respondents filed a suit before the High Court in Civil Case No. 5 of 2005 which was later transferred to the Environment and Land Court (ELC) in 2014 and renumbered as ELC Case No. 28 of 2014. In their plaint, the respondents averred that they were, together with the appellant, children of Tiribi Yanubi (deceased). They state that in 1962, they joined together as family and purchased the parcel of land which was later registered as LR No. Ngandori/Kiriari/897 (the suit parcel of land), measuring 10.5 acres. The land was registered in the appellant's name to hold in trust for his brothers (the respondents).
2. When the respondents sought to have the suit parcel of land sub-divided and transferred to each one of them, the appellant demurred. This led to the respondents filing suit against the appellant in Embu Principal Magistrate's Court Civil Case No. 102 of 1986. The suit was later referred to the Embu Land Disputes Tribunal which found in the respondents' favour. The Tribunal ordered the suit parcel of land to be subdivided into four equal parts in an award dated 26th November, 2002.



3. Before the award was executed, and in a bid to frustrate them (according to the respondents), the appellant caused the suit parcel of land to be sub-divided in five unequal portions now registered as LR Nos. Ngandori/Kiriari/4100, 4101, 4202, 4103 and 4104. The respondents averred that the appellant did this in a bid to sell the said sub-divided portions of the suit property to third parties so as to frustrate their claim over the same.
4. This development forced the respondents to file the present suit seeking declaratory orders to the effect that the appellants held the suit parcels of land in trust for them and that the sub division done by the appellant be cancelled and the suit parcels of land be re-subdivided so that each one of them will get their entitlement of two and a half (2 ½) acres each.
5. The appellant filed a defence to the suit. He denied the allegations made by the respondents in their plaint that he held the suit parcels of land in trust for them. He reiterated that he was the sole owner of the suit parcel of land, having purchased the same from one Daniel Mwenda (deceased). The appellant averred that he had been the sole and absolute proprietor of the suit parcel of land since 23rd June, 1964. He denied the assertion by the respondents to the effect that they had participated or contributed in the purchase of the suit property or that any trust had arisen as a result of the said alleged joint purchase. The appellant urged the court to dismiss the suit with costs.
6. Upon hearing the parties in the suit, the ELC (Y. M. Angima, J.) found in favour of the respondents and declared that the appellant held the suit property in trust for the respondents. The learned Judge further ordered the suit parcel of land be sub-divided so that the appellant and the three respondents shall equally be registered as the owners thereof of a 2 ½ acres share of the suit parcel of land. There was no order as to costs. This decision has provoked the filing of the present appeal.
7. In his memorandum of appeal, the appellant raised several grounds of appeal which may be summarized thus; that the learned trial Judge had erred in not appreciating the fact that the respondents had not adduced any credible evidence to prove that the appellant held the suit parcel of land in their trust; that the trial court erred when it found that the respondent had established that they had contributed towards the purchase of the suit parcel of land; that he was aggrieved that the learned Judge had failed to find that he was registered as the owner of the suit parcel of land after he had solely purchased the same from the original owner; he faulted the trial Judge for shifting the burden of proof so that instead of the respondents establishing their case, the burden was placed on him to prove the respondents' case; he was aggrieved that the learned Judge of the ELC wrongly held that the suit parcel of land was clan land yet he was the one who had purchased it. He took issue with the fact that the judgment did not meet the legal threshold in that it was "clouded with contradictions, assumptions and conjectures". The appellant therefore asked the Court to allow the appeal, set aside the judgment of the ELC and instead make a judgment dismissing the respondents' suit with costs.
8. Both the appellant and the respondents' counsel filed written submissions in support of their respective opposing positions. The appellant's counsel also filed authorities in further support of his submissions. During the plenary hearing of the appeal, counsel informed the Court that they would be relying on their written submissions.
9. In his submissions, the appellant amplified his grounds of appeal by stating that he was the sole and absolute owner of the suit parcel of land having purchased the same using his own resources from the original owner. He asserted that the respondents had not adduced or produced any evidence to prove that they had contributed towards the purchase of the suit parcel of land. He reiterated that the trial Judge was wrong in finding that there existed a trust yet no such trust can legally be recognized as an encumbrance in the title of the suit parcel of land when it is registered in his name.



10. The appellant pointed out that all the registrable documents in respect of the suit parcel of land established that he was the legal owner of the land. He cited Sections 24 (a) and 26 (1) of the Land Registration Act 2012, in support of his assertion that he is the legal owner of the suit parcel of land. He observed that if indeed the respondents had a right or claim over the suit parcel of land, they should have established the same by adducing convincing and credible evidence.
11. The appellant asserted that the finding by the trial Judge that there existed a trust was erroneous because he had established on evidence that the suit parcel of land was purchased and was not ancestral land. He cited the Supreme Court case of Isaac Kiebi M’Inanga v Issaya Theuri M’Lintari & Anor [2018] eKLR in support of his submission regard to circumstances in which a customary trust may be presumed to exist. The appellant faulted the trial court for elevating the familial relationship he has with the respondents as a basis for finding that there existed a trust even after he had established to the required standard of proof that he had solely purchased the suit parcel of land.
12. The appellant submitted that no evidence was adduced by the respondents to support the finding reached by the trial Judge that the existence of a trust capable of being upheld by the Court. He cited the cases of Njenga Chogera v Maria Wanjira Kimani & 2 Others [2005] eKLR, Peter Ndungu Njenga v Sophia Watiri Ndungu [2000] eKLR, Juletabi African Adventure Ltd & Anor. v Christopher Michael Lockley [2017] eKLR and Samuel Kadivane Kisage v Patrick Musungu [2020] eKLR in support of his submission on the circumstances on which a trust may arise. He reiterated that from the evidence adduced by the respondents, no court of law, applying its mind to the facts of the case could have reached a conclusion that there existed a trust capable of being upheld by the Court.
13. The appellant therefore urged the Court to allow the appeal in its entirety, set aside the judgment of the ELC and substitute it with a judgment of this Court dismissing the respondents’ suit with costs.
14. On their part, the respondents urged the Court to uphold the decision of the trial Judge. The respondents explained the circumstances in which the suit parcel of land was purchased. The respondents stated that the entire family contributed towards the purchase of the land. After the said purchase, they moved into the land and started cultivating and have resided on the land ever since. Their mother was buried on the land. 15. The respondents asserted that although the appellant was registered as the owner of the suit parcel of land, the family understood that he was so registered and was holding the same in their trust. It was the agreed consensus that the appellant would cause the suit parcel of land to be sub-divided so that each of them would have his portion of land registered in their respect names.
16. The respondents submitted that contrary to this agreement and expectation, the appellant refused to sub-divide the land and was sued by them to have the sub-division and transfer realized. The respondents reiterated that they have a legal right over the suit parcel of land which the trial court correctly and rightly upheld. They pointed out that the appellant had done all that he could to frustrate them from realizing their quest to have the suit parcel of land sub-divided so that each one of them can be registered as the owner of the portion of land that they are entitled to.
17. The respondents urged the Court to dismiss the appeal, as, in their view, the appeal lacks merit. There was no legal basis put forward by the appellant upon which the judgment of the trial court be interfered with, they argued.
18. This is a first appeal. As the first appellate court, this Court has a duty to reconsider and to re-evaluate the evidence adduced before the trial court, in light of the pleadings and the submissions made, and the grounds of appeal put forth by the appellant, and reach its own independent determination, but of course, bearing in mind that it did not have the advantage of hearing or seeing the witnesses as they



testified, and therefore give due regard to that fact. (See *Selle & Anor v Associated Motor Boat Co Ltd & Others* [1968] EA 123).

19. In the present appeal, there are essentially three issues that confront us for determination:
 - I) Under what circumstances was the appellant registered as the owner of the suit parcel of land?
 - II) Was there a trust in existence to entitle the learned Judge of the ELC to uphold the same?
 - III) What orders should issue upon determination of the above two issues?
20. With regard to the first issue, certain facts are not in dispute. It is not disputed that the appellant was registered as the owner of L.R No. Ngandori/Kiriari/897 (the suit parcel of land) on 23rd June, 1964. The appellant was so registered after the same had been purchased from one Daniel Mwenda (deceased). The suit parcel of land is approximately ten (10) acres in size. It is further not disputed that upon the purchase of the suit parcel of land in 1962 (before its registration), the appellant and the respondents moved into, and have continued to reside on the suit parcel of land. Their mother too moved with them into the suit parcel of land. It is further not disputed that upon the death of their mother, she was buried on the suit parcel of land.
21. What is in dispute is who as between the appellant and the respondents is the legal owner of the suit parcel of land. According to the appellant, he is the sole and absolute owner of the suit land. He produced a paper trail in a bid to establish his ownership of the suit parcel of land. The appellant testified that he solely purchased the suit parcel of land without any assistance from the members of his family, especially his mother and siblings (the respondents).
22. On their part, the respondents adduce oral evidence to the effect that they jointly, as a family, purchased the suit parcel of land. The respondents explained that was the reason why they moved into the suit parcel of land accompanied by their mother without any resistance or objection by the appellant. 23. We have carefully re-evaluated the conflicting evidence adduced by the parties herein in that regard. We agree with the appellant that he was registered as the owner of the suit parcel of land after the legal process had been followed. Indeed, evidence was adduced to the effect that he even attended the Land Control Board to enable the transfer to be effected accompanied by the respondents. However, on the basis of the evidence adduced by the respondents, we agree with the respondents that the appellant was so registered, on the understanding that he would later cause the suit parcel of land to be sub-divided so that each of them could be registered as the owner of their respective portions of land. We hold, on the basis of the evidence adduced, that the appellant was so registered to hold the title on behalf of the family, and especially the respondents. The registration of the appellant did not confer upon him exclusive proprietary rights to the exclusion of the respondents, who are his brothers.
24. Our re-evaluation of the evidence adduced in regard to the above issue leads us to conclude that indeed the respondents established to the required standard of proof on a balance of probabilities that the family contributed money towards the purchase of the suit parcel of land and entrusted the appellant to be so registered for convenience and on the understanding that he would later sub-divide and transfer the respective portions of the suit parcel of land to the respondents.
25. It is our further finding, while agreeing with the learned Judge of the ELC, that there is no other reasonable conclusion or explanation that can be reached by any Judge applying their mind to the facts of this appeal, that the reason why the respondents, accompanied by their mother moved into the suit parcel of land in 1962, without any objection or opposition by the appellant, was that they had a stake in the land; they had contributed in the purchase of the same. Theirs was not a moral claim for the land but a legal claim crystallized by their taking possession and occupation of part of the suit parcel of land which they reside in.



- 26. The appellant’s challenge on the respondents right of occupation over the suit parcel of land is therefore unmeritorious and without basis both in evidence and in law.
- 27. On the second issue, on whether the trial Judge erred when he held the existence of a trust as pleaded by the respondents, we agree with the holding of the Court in Peter Ndungu Njenga v Sophia Watiri Ndungu [2000] eKLR, where this Court held thus:
 - “The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume trust. But such presumption is not arrived at easily.
 - 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 trust must be clearly determined before a trust is implied. See Ayoub v Standard Bank of SA [1963] EA 619 at pp 622, 623”.
- 28. The Supreme Court in Isaac Kieba M’Inanga v Isaaya Theuri M’Lantari & Anor [2018] eKLR has elaborated the circumstances under which a claim over land under customary trust may be upheld by the Court.
- 29. In the present appeal, the issue before the ELC was not a customary trust where the claim made is over land which is alleged to have been ancestral land but rather land which was purchased and occupied by the entire family upon the purchase of the same. From the evidence adduced in this appeal, it was clear to us that when the suit parcel of land was purchased in 1962, it was the intention of the appellant, the respondents and their mother that they would all occupy and take possession of the same. The fact that the appellant was registered as the owner two years later did not lessen or diminish the respondents’ right of ownership over the suit parcel of land.
- 30. It is instructive, from the evidence, that for a period of over twenty-four (24) years between 1962 and 1986, the appellant and the respondents lived peacefully and harmoniously in the suit parcel of land. A dispute emerged when the respondents requested the appellant to cause the suit parcel of land to be sub-divided so that they could each get title to their respective portions of land. 36 years later, the parties are still in Court!
- 31. On our re-evaluation of the evidence adduced before the trial court, we are unable to disagree with the finding reached by the learned Judge of the ELC that a trust was indeed created in the circumstances of this case that compels the appellant to recognize the ownership rights of the respondents over the suit parcel of land. We hold that the respondents’ right over the suit parcel of land is an overriding interest as recognized under Section 28 of the Land Registration Act and Section 30 of the repealed Registered Land Act upon which the suit parcel of land was originally registered.
- 32. We have said enough. The appeal lacks merit and is hereby dismissed with costs to the respondents. The decision of the ELC is upheld.

It is so ordered.

DATED AND DELIVERED AT NYERI THIS 2ND DAY OF FEBRUARY, 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

