



REPUBLIC OF KENYA



**Muganda v Muganda (Environment and Land Appeal 7 of 2022)  
[2024] KEELC 1432 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1432 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT AND LAND APPEAL 7 OF 2022**

**E ASATI, J**

**MARCH 14, 2024**

**BETWEEN**

**WYCLIFFE LUVISA MUGANDA ..... APPELLANT**

**AND**

**CHARLES KAMISI MUGANDA ..... RESPONDENT**

**JUDGMENT**

1. The appellant was the Plaintiff in Vihiga SPMC El Case No.153 OF 2018 wherein he had vide the amended Plaint dated 5<sup>th</sup> August, 2019 sued the Respondent for: -
  - a. A declaration that the Respondent held 3 acres of land parcel number N/maragoli/gavudiA/139 in trust for the appellant
  - b. An order for the sub-division of land parcel number N/maragoli/gavudia/139 and 3 acres thereof be transferred to the name of the appellant.
  - c. An order of sub-division of land parcel number N/maragoli/gavudia/1358 and 3 acres thereof declared as having been held in trust for the appellant.
  - d. An order transferring 3 acres from land parcel number N/maragoli/gavudia/1358 to the Plaintiff.
  - e. Costs of the suit.
  - f. Any other order.
2. The appellant's case before the trial court was that the Respondent is his elder brother. That land parcel number N/maragoli/gavudia/139 was, during adjudication of land in the area, registered in the name of the Respondent as the appellant was still young and in school. That the land belonged to the parties' father. That later in the year 1984, the parties' father apportioned the appellant 3 acres of the suit land.



- That the appellant took possession of the 3 acres of the suit land in the year 1984 to date. The appellant therefore sought the court's intervention to access the relief sought.
3. The record of appeal shows that the Respondent denied the appellant's claim vide the Defence and Counter claim dated 10<sup>th</sup> June, 2019 and sought for orders of permanent injunction and eviction.
  4. The record further shows that the suit was heard by the trial court which vide the judgement dated 30<sup>th</sup> June, 2022 found that the appellant had failed to prove his case and proceeded to dismiss the suit and allow part of the counter claim.
  5. Aggrieved by the judgement, the appellant preferred the present appeal seeking for orders that the appeal be allowed, the appellant's claim in the lower court be allowed and costs of the appeal be provided for.
  6. The grounds of the appeal as set out in the Memorandum of Appeal dated 27<sup>th</sup> July, 2022 were that;
    - a. the honourable court erred in law and in fact in holding that the appellant failed to prove on a balance of probabilities that the title of the Respondent in respect of 3 acres had not been extinguished by the [Limitation of Actions Act](#).
    - b. the honourable court made a judgement which was contrary to the weight of the evidence adduced before the court.
    - c. the honourable court failed to analyse the evidence before it and failed to take into account legal provisions of the law to the detriment of the appellant's case.
  7. The appeal was argued by way of written submissions pursuant to directions taken by consent on 9<sup>th</sup> October, 2023.
  8. It was submitted on behalf of the appellant vide the written submissions dated 8<sup>th</sup> December, 2023 filed by Momanyi Manyoni & Company Advocates for the appellant that the source of the suit land was the father of the parties. That the said father's testimony before the Land Disputes Tribunal as per the proceedings which had been produced as exhibit was that land parcel No. N/maragoli/gavudia/139 was bought by the parties' father. That it was clear that from exhibit 3 that part of the suit land was given to the appellant. That, that was the basis of the trust. That it was a constructive trust.
  9. That the intention of the father of the parties was executed by the father and his two sons by doing the following acts: -
    - a. The appellant was in possession of 3 acres from 1984, in accordance with their father's wish. Both parties respected that arrangement.
    - b. The appellant had constructed a permanent home on the land and stayed on the land. That the Respondent allowed this to happen without complaint.
    - c. The appellant was using the land for farming especially of the tea crop. This is a crop which cannot be planted without the consent of the registered proprietor.
  10. That it must be noted that the Respondent has never initiated any case to evict the appellant. That the Tribunal case was initiated by the appellant to get his 3 acres.
  11. Counsel submitted further that the counterclaim was time barred. That the court failed to take this Defence into account. Counsel referred to the facts of the case and the provisions of Section 7 of the [Limitation of Actions Act](#) to submit that after the long period of inaction the Respondent's right to claim the 3 acres was not alive. That it means that the court did not have jurisdiction to handle the



counterclaim unless the Respondent had obtained leave to file the same out of time. That hence the orders of eviction issued by the trial court were not justified. Counsel relied on the case of *Samuel Ndambo Ngugi v Anthony Muchina Kamau & Another* [2022]ELC 2261 (KLR) and urged the court to allow the appeal.

12. No submissions were filed by or on behalf of the Respondent. Affidavits of Service sworn on 23<sup>rd</sup> October 2023 and 11<sup>th</sup> January 2024 show that the Respondent was served with appropriate notice and the submissions by the appellant.

### **Issues for Determination**

13. From the record of appeal and the submissions made herein, the issues that arise for determination are;
  - a. whether or not the trial court erred in finding that trust had not been proved.
  - b. whether or not the trial court erred in allowing part of the counterclaim
  - c. whether or not the appeal has merit.
  - d. who pays the costs of the appeal?

### **Analysis and Determination**

14. This being an appellate court of first instance, the court has the duty to re-examine and re-analyse the evidence placed before the trial court.
15. The first issue for determination is whether or not the trial court erred in finding that the Plaintiff had not proved the existence of trust. The record shows that the appellant's claim before the trial court was substantially based on trust. He pleaded in paragraph 11 of the amended plaint that 3 acres of the land parcel number N/maragoli/gavudia/139 were held by the Respondent in trust for him (appellant). He pleaded the particulars of trust therein. Some of the particulars of trust pleaded were that the appellant and the Respondent are the only sons of the late Andrea Muganda Musilu – deceased. That Andrea Muganda Musilu, deceased, bought land parcel known as N/maragoli/gavudia/139 before land adjudication and when adjudication started, he registered the land in the names of the Respondent but gave rights of using 3 acres thereof to the Appellant. That the Appellant has used the portion since the year 1984 without interruption by the Respondent. That the Appellant filed a case at the Land Dispute Tribunal namely; Case No.48 of 2002 at Sabatia Land Dispute Tribunal where his ownership was approved but the Tribunal's judgement was set aside on account that the Tribunal did not have jurisdiction to declare a trust. That land parcel No.N/maragoli/gavudia/139 was later sub-divided into N/maragoli/gavudia/1358 measuring 3.13 Hectares and N/maragoli/gavudia/1359 measuring 0.4 Hectares.

That the Appellant's 3 acres are within N/maragoli/gavudia/1358.

16. Among the prayers in the amended plaint was a prayer for a declaration that the Respondent held 3 acres of land parcel N/maragoli/gavudia/139 in trust for the Appellant and an order for sub-division of land parcel No. N/maragoli/gavudia/1358 and 3 acres thereof be transferred to the Appellant.
17. The appellant who testified as PW1 stated, vide his earlier recorded witness statement which was adopted as his evidence in chief, that the Respondent was his elder brother. That their father one Andrea Muganda died in the year 2009. That their father purchased land parcel No. N/maragoli/gavudia/139 which he caused during land adjudication to be registered in the name of the Respondent. That in 1984 the father allocated him 3 acres of the land which he (appellant) uses to date. That the entire land was approximately 9 acres. That the Respondent was given 6 acres and the Appellant 3 acres



- thereof. That the reason why the appellant was given only 3 acres was because the father had already given him (appellant) a piece of land known as N/maragoli/gavudia/338 measuring approximately 3 acres so that each of them got 6 acres of land. That the Respondent respected the arrangement up to the time their father died in the year 2009. That to date, the Appellant was still using the 3 acres of the suit land and the Respondent the six (6) acres. That the Appellant filed a cause at Sabatia Land Disputes Tribunal in a bid to get the title to his portion. That the tribunal allowed his claim but the High Court overturned the judgement since the Tribunal did not have jurisdiction to declare a trust.
18. The record shows that the appellant produced exhibits namely; copy of Green Card for N/maragoli/gavudia/1359, copy of Green Card for N/maragoli/gavudia/139 and proceedings of the Land Disputes Tribunal.
  19. The record further shows that on cross-examination, the appellant stated that he has planted tea leaves and built a permanent house on the portion of land and that that is where he stays. That the land was given to him by his father.
  20. On his part, the Respondent vide his written statement of Defence and counterclaim dated 10<sup>th</sup> June, 2019 denied the appellant's claim. He pleaded vide the counterclaim that their father had only one piece of land known as N/maragoli/gavudia/338 which is solely registered in the name of the appellant without consent of the other beneficiaries and without Letters of Administration. That the suit land which is now illegally sub-divided into N/maragoli/gavudia/1358 and 1359 has always been in his (Respondent's) name since the year 1973 well before the death of their father. That the Appellant forcefully came to use the land when the Respondent was away in Mombasa. That the Respondent had given possession of the land to his father to use it. That the tea plantation is registered in the name of the Respondent and that the Respondent's father was plucking the tea so as to "earn some pocket change". That he does not hold the suit land in trust for the appellant. That he has from time to time served the appellant with notices of eviction and trespass but that the appellant has constantly remained adamant.
  21. The Defendant testified in court as DW1 and stated that the parties' parents were Andrea Muganda and Dorah Nyafuta. That the parents left parcel No. N/maragoli/gavudia/338 to his brother and No.139 was left to him. That parcel No.338 was registered in his father's name but No.139 was in his (Respondent's) name. That he had left his father to farm in parcel No.139 but that the father was not the owner. Vide his earlier recorded witness statement he stated that he has solely developed the suit land and planted on it approximately 10,000 tea stems, bananas, gum trees, maize and millet and the same has become his source of livelihood. That the Appellant came to use the land as an associate of his father when the Respondent was away in Mombasa. That the Appellant has never taken possession of the land. That the appellant is a trespasser on the land. That he had served the Appellant with eviction and trespass notices. That he has never held the suit land in trust for the appellant but that it is the appellant who holds land parcel No.338 in trust as it belonged to their father.
  22. The Respondent produced certificate of tea plantation and Notice of eviction as exhibits.
  23. On cross-examination, the Respondent stated that the appellant trespassed onto the suit land in a year he cannot remember. That the appellant continues to use the portion. That the appellant has trees on the portion and that he has built a house without the Respondent's permission.
  24. Taking into account the evidence as herein above narrated, the record shows that the trial court found that the appellant had failed to prove his case to declare a trust in his favour and proceeded to dismiss the suit.
  25. The appellant faults the trial court for this finding and decision. It was submitted in this appeal on behalf of the appellant that trust had been proved. No submissions were filed by the Respondent.



26. The law on trust under Section 28 of the *Land Registration Act*, trust including customary trust is an overriding interest to which registered land is subject.
27. The ingredients of a customary trust as stated by the Supreme Court in the case of *Isaac M'inanga Kiebia v Isaaya Theuri M'lintari & Another* (2018) eKLR are:

“Some of the elements that would qualify a claimant as a trustee are: the land in question was before registration, family, clan or group land; the claimant belongs to such family, clan, or group; 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; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; the claim is directed against the registered proprietor who is a member of the family, clan or group.”

28. The burden of prove that a trust existed rested with the appellant. I have keenly re-examined the evidence placed before the trial court as I am obligated to do. It is notable that while the appellant explained the origin or source of the suit land, the Respondent simply stated that the land had always been registered in his name.
29. I find that the explanation given by the appellant that the suit land initially belonged to the parties' father is believable. This is after taking into account; firstly, the evidence produced before Land Dispute Tribunals as seen from exhibit P.3 (the proceedings before the Land Disputes Tribunal).

It is not disputed that the parties' father testified in the tribunal. The record shows that the father stated that;

“I would like to reply to what my son Charles Hamisi has said:- I bought the land from three people and they are:- Baganda, Igunza and Injugu. The land did not belong to Hamisi's grandfather. My son should know that he has a brother who needs a share of my property. He should not grab the whole land for himself alone. I have already surrendered L.R. NO.338 to the Pl. Wycliffe Luvisia. I have to slash a piece from L.R. NO.139 for him because the one I have given him is small. That is all I have to state.”

30. The evidence showed that the suit land belonged to the family as it was bought by the parties' father and that the appellant was entitled to a share thereof.
31. Secondly, the fact that the appellant has been in occupation of the portion of the land wherein he has done development for a long time. The Appellant's case is that he has been on portion of 3 acres of the suit land since the year 1984. The Respondent stated that the appellant trespassed onto the land in a year he cannot remember when he (Respondent) was away in Mombasa before the year 2000. It was the Appellant's case that he has built a permanent house on the portion and that he resides thereon. The house seems to have been built before the year 2001 when the parties appeared before the Tribunal because as part of his testimony before the Tribunal, the appellant stated that he had built a permanent house on the land. The Respondent admitted on cross-examination that the Appellant had a house on the land but that he built it without the Respondent's permission.
32. Thirdly, there is no evidence that the Respondent has ever filed any suit to remove the Appellant from the land.
33. And fourthly, the Appellant explained that the land was registered in the name of the Respondent because as at the time of land adjudication, he (Appellant) was young and still in school.



34. I find that the ingredients of a trust were proved in this case through the evidence placed before the trial court. The finding by the trial court that trust had not been proved was therefore erroneous.
35. It is common ground that the original land parcel No. N/maragoli/gavudia /139 was subdivided so as to create parcel No.s N/maragoli Gavudia 1358 and 1359. The appellant's case was that his portion was in No. N/maragoli/gavudia/1358.
36. The second issue for determination is whether or not the trial court erred in allowing the counterclaim. The counterclaim was for orders of permanent injunction, eviction and that land parcel number 1358 and 1359 be reverted back to its original number N/maragoli/gavidia/139. The basis of the counterclaim as pleaded in the defence and counterclaim was that the Respondent was the registered owner of the suit land. That he had developed the land solely and that the Appellant was a trespasser thereon who was denying the Respondent the right to full enjoyment of his land.
37. The record shows that the trial court after considering the evidence found that the Respondent's claim to have the piece of land revert to the original parcel number failed because the land was registered in his (Respondent's) name. That the claim for eviction and permanent injunction succeeded. The court then proceeded to grant an order for permanent injunction against the Appellant restraining him from all that parcel of land known as North Maragoli/gavudia/1358 And 1359 and an order of eviction against the Appellant from all that piece of land known as North Maragoli/gavudia/1358 which eviction was to take effect after 6 months.
38. The Appellant faulted the court for this finding and decision and submits herein that the claim in the counterclaim was time-barred under the provisions of Section 7 of the *Limitation of Actions Act*.
39. I have considered the evidence in support of the counterclaim. Though the Respondent had pleaded that the Appellant had trespassed onto the suit land. He testified that the Appellant came into the land as an associate of the parties' father who had the Respondent's permission to work on the land and pluck the tea so as to "earn some pocket change". Again, the Respondent denied that the Appellant had possession of any portion of the suit land but at the same time admitted that the Appellant had some trees and had built a house on the portion of the land without the Respondent's permission.
40. Under Section 17 of the *Limitation of Actions Act*, the registered owner's title is extinguished by the trespasser's continuous and uninterrupted stay on the land to the expiry of the limitation period. Given the finding that the Respondent held the portion of the suit land in trust for the Appellant, the claim for trespass cannot not lie.
41. I find that the trial court erred in allowing the counterclaim. There was sufficient evidence placed before the court against the counterclaim.
42. The third issue for determination is whether the appeal has merit. On the strength of the court's findings on the first and second issues herein namely; that the Respondent held 3 acres of the suit land in trust for the appellant and that the trial court erred in allowing the counterclaim, I find that the appeal herein is merited.
43. On costs, although costs ought to ordinarily follow the event, for the reason that the parties herein are brothers it is in the interest of justice that each party bear own costs.
44. The appeal is hereby allowed it as follows: -
  - a. The judgement of the trial court is set aside and substituted with a judgement dismissing the counterclaim and allowing the Appellant's claim in the amended plaint as follows: -



- i. a declaration that the Respondent holds a portion measuring 3 acres of land parcel No. North Maragoli/gavudia/1358 as occupied by the Appellant on the ground in trust for the Appellant.
- ii. Transfer of 3 acres of land parcel No. North Maragoli/gavudia/1358 occupied by the appellant on the ground in favour of the Appellant forthwith in default the Deputy Registrar of the court to execute the requisite documents so as to effect transfer.
- iii. Each party to bear its own costs of both the suit and this appeal.

45 Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED VIRTUALLY THIS 14<sup>TH</sup> DAY OF MARCH, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.**

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**E. ASATI**

**JUDGE**

In the presence of:

Ajevi: Court Assistant.

Malanda for the Appellant.

No appearance for the Respondent.

