Muriuki v Muriuki & 2 others (Environment and Land Appeal 2 of 2017) [2024] KEELC 1338 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1338 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ENVIRONMENT AND LAND APPEAL 2 OF 2017

JM MUTUNGI, J

MARCH 14, 2024

BETWEEN

MERCY NJERI MURIUKI .... APPELLANT

AND

JANE WANGARI MURIUKI .... 1ST RESPONDENT

SARAH WAGATWE .... 2ND RESPONDENT

ROBERT NYAGA KIRUGI .... 3RD RESPONDENT

(Being an appeal against the Judgment delivered by Hon. Y.M. Barasa – RM in Kerugoya CMCC No. 214 of 2015 delivered on 21st March 2017)

JUDGMENT

1. The instant appeal is against the Judgment delivered by Hon. Y. M. Barasa Resident Magistrate in Kerugoya CMCC No. 214 of 2015 delivered on 21st March 2017. By the Judgment the Learned Trial Magistrate held that the Appellant who was the Plaintiff before the Subordinate Court had failed to prove her case on a balance of probability and ordered the suit dismissed with no orders as to costs.

2. In the suit before the Subordinate the Appellant vide the Plaint amended on 7th November 2016 pleaded that the 1st Respondent who was the sole Defendant before the 2nd and 3rd Respondents were joined as the 2nd and 3rd Defendant's vide the Amended Plaint. The Appellant in the suit before the lower court averred that the 1st Respondent who was a sister was registered as owner of plot number General Kiosk Githure which initially had been registered in the name of their deceased mother, Gladys Wandia (deceased) to hold intrust for herself and intrust for her other sisters who included the Appellant. The Appellant contended she had remained in occupation of the plot continuously from 1985 and averred she was entitled to ¼ share of the plot. She averred that the 1st Respondent fraudulently and without consent of the Appellant and other family members transferred the kiosk

to the 2nd and 3rd Respondents. She inter alia prayed for an order cancelling the registration of the 2nd and 3rd Respondents as the owners of the kiosk; a declaration that the 1st Respondent was registered as a trustee for herself and her sisters; and an order compelling the 1st Respondent to transfer ¼ share of the plot to her.

3. The 1st Respondent filed a defence and Counter claim dated 21st June 2016. She admitted her deceased mother transferred the plot to her during her lifetime and that the transfer was not on the basis she would hold the plot as a trustee. She averred she was the one who was paying the rent for the plot to the County Council and sought the eviction of the Appellant from the plot. The 2nd and 3rd Respondent filed a joint statement dated 17th January 2017 where they stated they were the duly registered owners of the plot. They averred the plot was sold to them by the 1st Respondent through a sale agreement dated 7th July 2014 and the transfer was approved by the relevant committee of the County Government. They averred the property had no encumbrances at the time of purchase. The record does not contain any formal defence filed by the 2nd and 3rd Respondents though, they, like the Appellant and 1st Respondent filed a bundle of documents.

4. The hearing of the suit before the lower Court proceed exparte on 17th March 2017 in the absence of the Respondent (Defendants). The Learned Trial Magistrate was satisfied the Respondents Advocates had been served with the hearing notice and consequently permitted the Appellant (Plaintiff) to proceed with the hearing exparte.

5. The Appellant (Plaintiff) testified as the sole witness in support of her case. In her brief testimony she affirmed the 1st Respondent was her sister while the 2nd and 3rd Respondents were family members. She adopted her witness statement recorded on 11/8/2015 as her evidence and further relied on the bundle of documents she had filed in support of her case. In her witness statement, the Appellant had reiterated that her mother Gladys Muriuki was the initial registered owner of the suit plot and that she transferred the plot to the 1st Respondent's name to hold in trust for herself and her other three (3) sisters who included the Appellant. The Appellant further stated she had been in continuous occupation of the plot since 1985 without interruption. She sought to be declared as entitled to ¼ Acre portion being her share of the plot.

6. Among the documents that the Appellant exhibited was an extract of the minutes of the County Council's Works Town Planning, Markets and Housing Committee meeting held on 28th January 1992 that approved the transfer of the General Kiosk, Githure from Gladys Wandia to Jane W. Muriuki. The Appellant also exhibited a Chief's letter dated 1/7/2015 which confirmed the Appellant and 1st Respondent were sisters and that the Appellant had occupied the plot since 1985. The death certificate exhibited showed Gladys Wandia, their mother died on 9th April 2004.

7. The Learned Trial Magistrate after analyzing and evaluating the evidence held that there was no evidence to prove that the 1st Respondent was registered to hold the suit property as a trustee. He held the Chief's letter was not sufficient to prove the existence of a trust. Further the Learned Trial Magistrate held that notwithstanding the Appellant had claimed to have been in continuous occupation of the suit plot since 1985 her claims could not be founded under the doctrine of adverse possession as the appropriate procedure for instituting an adverse possession claim had not been followed. The Learned Trial Magistrate thus dismissed the Appellant's suit on the basis that she had failed to prove the claim to the required standard.

8. The Appellant being dissatisfied and aggrieved by the decision has appealed against the decision and has by the Memorandum of Appeal set out 9 grounds of Appeal as follows:-

1. That the Learned Magistrate erred in law and fact by dismissing the Appellants suit in favour of the Respondent contrary to the evidence adduced in Court and which evidence was sufficient to grant the orders sought in the Plaint.

2. That the Learned Magistrate erred in law and fact by holding that the Appellant ought to have moved the Court by way of Originating Summons claiming adverse possession of the suit plot.

3. That the Learned Magistrate erred in law and fact by deciding the matter using facts that were not pleaded by either party.

4. That the Learned Magistrate erred in law and fact by holding that the 1st Respondent did not hold plot number General Kiosk Githure in trust for the Appellant having acquired it as a gift from their deceased mother.

5. That the Learned Magistrate erred in law and fact by basing his Judgment on extraneous matters not pleaded or evidenced by the parties hence made a Judgment not enhanced by the evidence or law as established.

6. That the Learned Magistrate erred in law and fact by holding that the Appellant ought to have moved the Court via Originating Summons under Order 37 Rule 7 of the *Civil Procedure Rule* 2010 and Section 38 of the *Limitations of Actions Act* Cap 22 Laws of Kenya.

7. That the Learned Magistrate erred in law and fact by not considering and appreciating fully the evidence by the Appellant hence delivering an unconsidered Judgment.

8. That the Learned Magistrate erred in law and fact by not considering the relationship between the Appellant and the 1st Respondent was very peculiar and could give rise to customary trust and was capable to impute any form of trust capable of being determined contrary to how honourabe Court held.

9. That the Learned Magistrate erred in law and fact by not making a finding that the Appellant is entitled to a ¼ share of plot number General Kiosk Githure yet the element and ingredients of trust were pleaded and sufficiently proven.

9. A close scrutiny of the grounds of Appeal reveals that the Appellant is principally challenging the Learned Trial Magistrate's evaluation of the evidence and the conclusions he came to. The Appellant additionally faults the Learned Trial Magistrate for considering matters and issues that were not pleaded by either of the parties and hence basing his Judgment on extraneous matters.

10. The Court directed the parties to canvass the appeal by way of written submissions. The Appellant filed her submissions dated 14th September 2023. The Respondent's Advocate Igati Mwai & Company Advocates inspite of being granted extended time to file the Respondents submissions, did not do so.

11. The Appellant in her submissions reiterated her evidence as contained in her witness statement and the documents she exhibited in support of her evidence. She maintained the suit property was to be shared equally among the 4 sisters. She submitted their mother was the registered owner before she transferred the plot to the 1st Respondent who was to hold the plot intrust for herself and the other three sisters. She submitted that the Learned Trial Magistrate failed to consider the relationship of the parties which would have enabled him to come to the correct finding that the 1st Respondent held the plot intrust.

12. The Appellant further submitted, that the plot formed part of ancestral land and hence customary trust would be applicable. In this regard the Appellant relied on the Supreme Court decision in the

Case of *Isaac M'Inanga Kiebia – v- Isaya Theuri M'Lintari & Another* (2018) eKLR to support her submission. In the Case the Court stated:-

> "----- to prove trust in land, one need not be in actual or physical occupation of the land. A customary trust falls within the ambit of Section 28 of the *Registered Land Act* while the rights of a person in possession of actual occupation are over-riding interests and fall within the meaning of Section 30(g) of the *Registered Land Act*."

13. This being a first appeal, this Court is obligated to re-consider and re-evaluate the evidence adduced before the lower Court to determine whether the decision the Learned Trial Magistrate was justified having regard to the evidence. The Court is not necessarily bound by the findings of the Trial Court and can make its own independent findings and come to its own conclusions. This is in keeping with the principle enunciated by the Court of Appeal in the case of *Selle & Another – v- Associated Motor Boat Co. Ltd & Others*(1968) EA 123 where the Court stated:-

> "------ this Court is not bound necessary to accept the finding of fact by the Court below. An Appeal to this Court is by way of retrial and the principles upon which this Court acts 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 not heard the witnesses and should make due allowance in this respect ----".

14. I have accordingly reconsidered and evaluated the evidence tendered by the parties before the trial Court. I take cognizance that it was only the Appellant who testified in support of her case and that was by way of relying on her witness statement and the documents that she had filed in support of her case. It was the Appellant's case that the 1st Respondent had the suit property transferred to her by their mother to hold in trust for herself and her sisters. The Appellant pleaded that the 1st Respondent in breach of the trust, fraudulently transferred the suit plot to the 2nd and 3rd Respondent.

15. In the matter before the Lower Court, the Appellant having pleaded trust, it was imperative for her to lead evidence to prove the trust. The legal burden to prove the existence of the trust lies on the person asserting the existence of a trust and in the instant matter the Appellant having asserted the existence of a trust had an obligation to prove the same by adducing evidence. A trust cannot be implied by the Court unless the intention to create a trust is established. In the Court of Appeal Case of *Peter Ndungu Njenga – v- Sophia Watiri Ndungu* (2000) eKLR the 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 a 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 a trust, must be clearly determined before a trust is implied."

The Court of Appeal further in the Case of *Julelabi African Adventure Ltd & Another – v- Michael Lockly* (2017) eKLR restated the position the Court held in the above case. The Court stated thus:-

25 "It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. This is because:-

"The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intentions of the parties to create a trust must be clearly determined before a trust will be implied."

See *Gichuki – v- Gichuki* (1982) KLR 285 and *Mbothu & 8 others – v- Waitimu & 11 Others* (1986) KLR 171."

16. In the instant case apart from the Appellant alleging the existence of a trust she led no evidence that could have established that a trust existed. The uncontroverted evidence was that the Appellants mother also mother to the 1st Respondent freely transferred the plot to the 1st Respondent in 1992. If she intended, the plot to be owned by all the daughters there was nothing that would have prevented her from transferring the same to all the four (4) daughters. There was no evidence led to prove that she intended that the plot was to be held in trust by the 1st Respondent. From 1992 to 2004 when the Appellants mother died, there is nothing manifested to show that there was an intention on the part of their mother that the 1st Respondent was to hold the plot in trust. In the premises I am satisfied that the Learned Trial Magistrate rightly held there was no evidence to prove trust and conversely the allegations that the 1st Respondent fraudulently transferred the plot to the 2nd and 3rd Respondents were not proved.

17. The Learned Trial Magistrate in his Judgment appeared to take the view that the Appellant was also making a claim under the doctrine of adverse possession in view of the fact that the Appellant had claimed to have occupied the plot since 1985 uninterrupted. The Learned Trial Magistrate had no basis to find that the Appellant was in effect making a claim under the doctrine of adverse possession since the Appellant had clearly predicated his claim under trust and was claiming 1/4 portion of the suit property which she claimed they were entitled to as the daughters of their deceased mother. A party cannot make a claim under trust and at the same time claim under the doctrine of adverse possession. The two concepts cannot be pleaded in the same matter. They are incompatible and it would either be a claim under trust or a claim under adverse possession. The ingredients required to be proved to establish trust are different from the ingredients required to be proved under a claim for adverse possession. It was therefore a misdirection on the part of the Learned Trial Magistrate to equate the Appellant's claim to a claim for adverse possession.

18. However, notwithstanding the misdirection, the Learned Trial Magistrate rightly held that the Appellant had not proved the 1st Respondent was registered to hold the suit plot/Kiosk as a trustee for herself and her sisters. This was sufficient to dispose of the suit, as the Appellant having failed to prove there was a trust created when the 1st Respondent was registered, there could be no fraud committed by the 1st Respondent when she transferred the plot. The Learned Trial Magistrate rightly dismissed the suit for want of proof.

19. This appeal is therefore without any merit and is ordered dismissed. The parties are family members and for that reason I make no order for costs. Parties to bear their own costs of the appeal.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH VIDEO LINK THIS 14TH DAY OF MARCH 2024.

J. M. MUTUNGI

ELC - JUDGE