



M’rinyiru v Mbui (Civil Appeal 50 of 2020) [2024] KECA 695 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 695 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 50 OF 2020
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
JUNE 21, 2024

BETWEEN

JACKSON MWITI M’RINYIRU APPELLANT

AND

SILAS M’RINYIRU MBUI RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court of Kenya at Meru (Mbugua, J.) dated 29th January, 2020 in E.L.C. No. 47 of 2019)

JUDGMENT

1. Silas M’Rinyiru Mbui, the respondent herein, instituted a suit against his son, the appellant, before the Chief Magistrate’s Court at Nkubu, vide Civil Suit *No. 9 of 2012*. By a plaint dated 7th February 2012, the respondent alleged that he is the registered owner of Land Parcels Nos. Abogeta/U- Kiringa/1283 and Abogeta/L-Kiungone/809 (hereinafter ‘suit land’). It was the respondent’s case that the appellant entered the suit land, damaged his property and chased away his servants working on the said suit land, without his permission or authority.
2. The respondent averred that he gave land parcel number 1283 to the appellant, and that he has made several reports to the Chief’s office to have the appellant vacate the suit land, and move to the said Parcel Number 1283; that the appellant proceeded to put up temporary structures on the suit land, which interfered with the respondent’s right to enjoy his property. The respondent asserted that he was aged and ailing. He, together with his other dependants, relied entirely on the suit land. The respondent sought eviction orders against the appellant from the suit land. He prayed to be awarded costs of the suit.
3. The appellant filed a statement of defence dated 2nd March 2012. It was the appellant’s case that the suit land is family land which the respondent inherited from his grandfather, and that he holds the same in trust for the appellant and other family members. He averred that he was born and brought up on the suit land, and that he has been in occupation of his portion of the suit land peacefully, without



any let or hindrance from the respondent. He stated that the respondent's attempt to evict him from the suit land was in breach of trust, particulars of which were pleaded in the statement of defence. He urged the trial court to dismiss the respondent's suit with costs.

4. The case was heard by the parties adducing viva voce evidence.

The respondent adopted his written statement as his evidence in chief. In his statement, the respondent stated that he purchased the suit land on or about the year 1942, and that he has lived on the said parcel of land ever since. He denied the appellant's allegation that he inherited the suit land from his father. He asserted that the appellant, being his son, was raised on the suit land, but that in January 2012, the appellant began evicting the respondent's employees working at the coffee farm in the suit land. That due to this, the respondent gifted parcel number 1283 to the appellant to live and cultivate. He stated that the respondent refused to take occupation of parcel number 1283, and continued to interfere with the respondent's occupation of the suit land. PW2, Francis Kiambi, was one of the casual workers who was employed by the respondent to tend to the suit land. His evidence was to the effect that the appellant caused him to be arrested by the area assistant chief, after making a false report that he had uprooted the appellant's banana trees. PW2 informed the assistant chief that he had been instructed to do so by the respondent.

5. The appellant, on his part, testified that he has lived on the suit land since he was born in 1958. He stated that his father, the respondent, did not purchase the suit land, but rather he inherited it from his grandfather. In his statement which was adopted by the trial court, the appellant explained that he has developed his portion of the suit property where he has built a semi-permanent house and keeps various livestock. He maintained that the suit land was trust land. He recalled a meeting held by clan elders on 18th January 2012, before the assistant chief, in which it was decided that the respondent had no authority to uproot the appellant's banana trees.
6. DW2, Ashford Nyamu and DW3, Stephen Muriungi, stated that they knew both parties to the suit. They were members of the same clan. They adduced similar evidence to that of the appellant, and reiterated that the appellant has lived on his portion of the suit land and developed the same.
7. After hearing the parties, the learned trial magistrate, in a judgment delivered on 6th February 2019, found that the suit land belonged to the respondent, and that the respondent did not hold the same in trust for anyone. The learned trial magistrate ordered the appellant to vacate the suit land within sixty days of the court's decision.
8. The appellant, aggrieved by this decision, lodged an appeal before the Environment and Land Court (ELC) at Meru. He complained that the learned trial magistrate erred in law and fact: by finding that the appellant failed to demonstrate how he acquired part of the suit land despite his evidence that the suit land was ancestral land; by finding that the appellant was not entitled to a share of the suit land against the principle of intergenerational equity, where ancestral land benefits succeeding generations; by finding that the appellant was entitled to a share of the suit land like his siblings who resided on the suit land; by finding that the appellant made it impossible for his family to live on the suit land, and that he chased away the respondent's employees, without evidence in support thereof; by finding that the respondent did not hold the suit land in trust for anyone; and lastly, in failing to consider the appellant's submissions and authorities cited, thereby arriving at the wrong decision.
9. The appeal was heard by way of written submissions. After a re-evaluation of the evidence tendered before the trial court, the ELC (L. N. Mbugua, J.), in a judgment dated 29th January 2020, determined that the appellant failed to avail evidence to prove his claim that the suit land was subject to customary trust, or that it was his grandfather, and not his father, that gathered the 22 acres comprised of the suit land. The learned Judge dismissed the appellant's claim for adverse possession on the basis that it was a



fresh claim that was not anchored in his pleadings before the trial magistrate. The appeal was dismissed for lack of merit.

10. The appellant is now before us on a second appeal. He has proffered seven grounds of appeal. The gist of his appeal is that he faults the learned appellate Judge for failing to find that the suit land is ancestral land, and that the appellant, being the respondent's son, and having lived on the suit land all his life, was entitled to his share of the same. He was aggrieved that the learned appellate Judge failed to find that he had proved that a customary trust existed, and that it amounted to an overriding interest with respect to the suit land. He was of the view that the learned appellate Judge erred by failing to find that the appellant was entitled to the trust land on application of the concept of intergenerational equity. He urged that the decision of the ELC was against the weight of the evidence. In the premises, the appellant urged the court to allow his appeal as prayed.
11. The appeal was canvassed by way of written submissions. The firm of Kiogora Ariithi & Associates was on record for the appellant. Counsel for the appellant submitted that the suit land is trust land as it was gathered by the appellant's grandfather, and later consolidated by his father, the respondent herein. Counsel explained that the history of the suit land evidenced that the respondent became a registered owner of the suit land, having inherited from his father, after consolidation. Counsel submitted that the appellant adduced evidence to the effect that he has lived on the suit land all his life, and that he has no other home, and as such, his occupation of the trust land forms an overriding interest that falls within the ambit of Section 39(g) of the now repealed Registered *Land Act*. In the circumstances, the appellant's counsel invited the court to allow the appeal.
12. The respondent did not file any written submissions in response to the submission file by the appellant. During the hearing of the appeal, counsel for the respondent informed the court that the respondent had since sold the suit land to a third party.
13. We are alive to our mandate as a second appellate court to resist the temptation of delving into matters of facts, and confine ourselves to matters of law, unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See the decisions of this Court in Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR; and Stanley N Muriithi & another v Bernard Munene Ithiga [2016] eKLR).
14. It is evident that the appellant's claim to the suit land in the present appeal was based on customary trust. His claim was based on grounds that: he was born and brought up on the suit land; he has been in occupation of the suit land all his life, and has developments thereon; and that the suit land is ancestral land, which belonged to the appellant's grandfather, and which the respondent held in trust for him and his siblings.
15. The import of Section 28 (b) of the *Land Registration Act*, with respect to overriding interests, is to the effect that, unless the contrary is expressed in the register, all registered land shall be subject to trust including customary trusts.
16. This Court in the case of Juletabi African Adventure Limited & Another v Christopher Michael Lockley [2017] eKLR held thus:

“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That 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 intention 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.”

17. The Supreme Court in *Isack M’inanga Kiebia v Isaaya Theuri M’Lintari & Another* [2018] eKLR set out some of the elements that would qualify a claimant as a trustee in regards to land held under customary trust to include:
- i. “The land in question was before registration, family, clan or group land;
 - ii. the claimant belongs to such family, clan, or group;
 - iii. 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;
 - iv. the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and
 - v. the claim is directed against the registered proprietor who is a member of the family, clan or group.”
18. It was common ground that the respondent is the registered owner of the suit land, and that he has raised his family on the said property, including the appellant, who is his son. The burden of proving that the suit land was ancestral land, and that the respondent was registered as a proprietor of the suit land in trust for among others the appellant, lay squarely on the appellant. It was the concurrent finding of fact by the two courts below that the respondent was able to prove, from the ownership documents produced before the trial court, that he gathered the suit land in the 1940s, by purchasing several parcels of land, which he later consolidated and was registered as the owner in 2010.
19. The appellant did not adduce any evidence before the trial court to establish his claim that the respondent inherited the 22 acres of the suit land from his grandfather. His witness, DW2, told the court that he was not born when the respondent acquired the suit property, and that he only heard that the respondent had inherited the suit land from his father. In the absence of any evidence from the appellant to buttress his claim of existence of a customary trust, we find no reason to fault the finding of the concurrent findings of the trial magistrate and the learned appellate Judge made in favour of the respondent. It has not been shown by the appellant that the two courts below considered matters they should not have considered, or failed to consider matters they should have considered.
20. The appeal is devoid of merit. We accordingly dismiss it with no orders as to costs.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF JUNE, 2024.

JAMILA MOHAMMED

JUDGE OF APPEAL

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L. KIMARU

JUDGE OF APPEAL

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A. O. MUCHELULE

JUDGE OF APPEAL



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

Signed

DEPUTY REGISTRAR

