



REPUBLIC OF KENYA



Maina v Maina & 2 others (Suing as Administrators of the Estate of Eston Maina Kimere - Deceased) (Civil Appeal 4 of 2020) [2024] KECA 1296 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KECA 1296 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 4 OF 2020
W KARANJA, J MOHAMMED & LK KIMARU, JJA
SEPTEMBER 27, 2024**

BETWEEN

DAMARIS WANJIRU MAINA APPELLANT

AND

FRANCIS KIHORO MAINA 1ST RESPONDENT

FRANCIS GICHUHI KAMAU MAINA 2ND RESPONDENT

PETER MAINGI MAINA 3RD RESPONDENT

**SUING AS ADMINISTRATORS OF THE ESTATE OF ESTON MAINA KIMERE
- DECEASED**

(Being an appeal from the judgment of the Environment and Land Court at Murang'a (Kemei, J.) dated 7th November, 2019 in ELC Case No. 4 of 2018)

JUDGMENT

1. The respondents instituted a suit against the appellant before the Environment and Land Court at Murang'a, vide an amended plaint filed on 19th February, 2019. The respondents asked the superior court to determine whether the appellant, who is the registered owner of L.R. No. Loc/19/Kiawambogo/204 (hereinafter 'suit property'), measuring 27.2 acres, held the property in trust for the estate of Eston Maina Kimere (deceased).
2. The respondents alleged that the late Eston Maina Kimere inherited the suit property from his father upon his demise in 1928. They averred that during the land demarcation and consolidation process in the 1960s, the suit property was registered in the name of Eston Maina Kimere's first wife, Hannah Wanjiru Maina, as Eston Maina worked and resided in Nairobi during that period. They averred that Eston Maina had four wives at the time, who all resided on the suit property with their children. Since Eston Maina was unavailable when the demarcation process began, a family meeting was held where



- they agreed that the first wife, Hannah Wanjiru, be registered as the proprietor of the suit property, in trust for the late Eston Maina and his family. The respondents asserted that the appellant is a granddaughter of the late Hannah Wanjiru. They contended that Hannah Wanjiru died in 2004, and that Eston Maina Kimere died before he could file succession proceedings with respect to the estate of Hannah Wanjiru.
3. Upon the demise of Eston Maina Kimere, the respondents were appointed as the administrators of his estate. The respondents averred that sometime in 2016, they placed a caution against the suit property as they were apprehensive that the appellant was up to mischief. They later discovered that the appellant had taken a grant of letters of administration with respect to the estate of Hannah Wanjiru Maina, which were confirmed *vide* Kangema Principal Magistrate's Court Succession Cause No. 21 of 2016, subsequent to which she caused the suit property to be registered in her name. The respondents averred that the appellant obtained title to the suit property by fraud, misrepresentation, and frustration of legitimate expectation, particulars of which were pleaded. They alleged that the appellant had since been disturbing the quiet possession and utilization of the suit property by the other members of the family. They averred that they had moved the High Court at Murang'a *vide* [Succession Cause No. 33 of 2017](#) to have the grant issued to the appellant revoked.
 4. The respondents sought orders declaring that: the late Hannah Wanjiru Maina held the suit property in trust for the late Eston Maina Kimere and his family; that the suit property belonged to the estate of Eston Maina Kimere (deceased); that the certificate of title issued to the appellant on 14th August 2017 be revoked; they also prayed for costs of the suit.
 5. The appellant filed a statement of defence and counterclaim dated 9th May 2018. She denied the contents of the plaint and averred that her late grandmother, Hannah Wanjiru, was a wealthy woman and that she purchased the suit property. She averred that L.R. No. Loc/19/Kiawambogo/211 was registered in name of the late Eston Maina Kimere around the same time the suit property was registered in Hannah Wanjiru's name, and, therefore, the assertion that the suit land was registered in Hannah Wanjiru's name since Eston Maina was away was false. The appellant contended that during his lifetime, the late Eston Maina made it known to the family members that the suit property belonged to her, having been the only grandchild of the late Hannah Wanjiru.
 6. In her counterclaim, the appellant averred that she is lawful owner of the suit property pursuant to a title deed issued on 14th August 2017, and that the suit property did not form part of the estate of her late grandfather Eston Maina Kimere, as it was acquired by her grandmother, Hannah Wanjiru. She averred that the only land which belonged to Eston Maina Kimere was Loc/19/Kiawambogo/540 and Loc/19/Kiawambogo/211. She contended that the respondents were aware that she had instituted the succession cause with respect to the estate of Hannah Wanjiru as prior to that, a family meeting with respect to the same was held at the Chief's office. She averred that the late Eston Maina had other wives, other than Hannah Wanjiru, and that the respondents had filed succession suits with respect to each household, to the exclusion of the appellant. She asserted that the respondents wrongfully entered and took possession of the suit property, and that they continue to trespass thereon. The appellant prayed for: a declaration that she is entitled to exclusive possession and occupation of the suit property; an order of permanent injunction restraining the respondents and their agents from interfering with the suit property; mense profits and general damages for trespass; and costs of the suit.
 7. The respondents filed a defence to the counterclaim dated 27th June, 2018. They maintained that the appellant did not notify them prior to instituting the succession cause with respect to the estate of Hannah Wanjiru. They reiterated that the suit property was registered to Hannah Wanjiru to hold in trust for the family of the late Eston Maina, and that members of the family of the late Eston Maina



- had been in occupation, and developed the suit property, way before the appellant obtained title to the suit property.
8. The case was heard by way of viva voce evidence. PW1 Francis Kihoro Maina, stated that the late Eston Maina Kimere was his father. It was his testimony that at the time of land consolidation and demarcation process, Eston Maina was working in Nairobi. He had four wives namely Hannah Wanjiru Maina, Beatrice Wangari, Gladwell Nyokabi and Susan Nyambura. Due to his absence, his parcels of land were consolidated and registered in the name of his first wife, Hannah Wanjiru. PW1 testified that Eston settled all his wives on the suit property, before the family later relocated to Nyahururu. It was PW1's evidence that Eston Maina inherited the suit property from his father. PW1 maintained that he grew up on the suit property, and that after they relocated to Nyahururu, all the wives of Eston Maina, other than Hannah Wanjiru, and their sons, continued to cultivate tea bushes on the suit property.
 9. PW2, Peter John Makira Kihoro, a grandson to the late Eston Maina stated that Hannah Wanjiru was registered as the owner of the suit property to hold in trust for the family of Eston Maina. He stated that Eston Maina settled his four wives on the suit property, and that when he relocated them to Nyahururu, three of the wives, other than Hannah Wanjiru continued to plant tea bushes on the suit property. PW3, Francis Kihoro Wanjau, stated that his parcel of land number 212 borders the suit property which to his knowledge was owned by Eston Maina. It was his evidence that Eston's wives cultivated the suit property.
 10. PW4 Eunice Wanjiru Gikuma testified that her husband was a brother to the late Eston Maina. It was her testimony that during the demarcation period, Eston Maina was away. Her husband held a meeting with Eston's four wives to discuss registration of Eston's land. She stated that she was present in this meeting. It was agreed that after consolidation, the suit property would be registered in the name of his first wife Hannah Wanjiru Maina, to hold in trust for Eston and his family. She stated that Eston settled all his wives on the suit property before they relocated to Nyahururu, after which they planted tea bushes on the suit property.
 11. PW5, Beatrice Wangari Maina, was the only surviving widow of the late Eston Maina. She was his second wife. It was her evidence that when she got married to Eston Maina in 1948, he was living on the suit property at Kiawambogo village with his siblings. At the time, the suit property belonged to his father, Kimere Maina. PW5 stated that during the land consolidation and demarcation process, Eston, who was working in Nairobi, was not able to come back to the village and therefore the family decided that the suit property be registered in the name of the first wife, Hannah Wanjiru, on behalf of the family of Eston Maina. PW5 stated that they lived harmoniously on the suit property until 1990s when Eston Maina moved all his wives to Laikipia County. PW5 testified that they continued to tend to tea bushes planted on the suit property. She stated that Hannah Wanjiru had one daughter, Elishiba Muthoni Maina (deceased), who was the appellant's mother.
 12. The appellant gave evidence as DW1. She stated that her grandmother, Hannah Wanjiru was a wealthy woman and that she had purchased the suit property. It was her testimony that if indeed the suit property belonged to Eston Maina, in the event of his absence, the suit property would have been registered in his eldest son's name, according to Kikuyu customs. She maintained that the parcels of land which belonged to Eston Maina are parcels number 540 and 211. The appellant stated that she had no proof that her grandmother acquired the suit property, other than the fact that her grandmother told her so. The appellant stated that she does not farm tea on the suit parcel of land.
 13. DW2, Stephen Gikonyo, asked the court to adopt his affidavit sworn on 13th September 2017, as his evidence in chief. In the affidavit, DW2 deponed that Eston Maina was his paternal uncle, and that



the suit property belonged to Hannah Wanjiru. He stated that Eston Maina owned parcel number Loc/19/Kiawambogo/540, which was situated next to the suit property. He deponed that sometime in 2016, the respondents' sisters attempted to share out the suit property amongst themselves. A meeting was held at the Chief's office where the Chief informed the respondents and their sisters that the suit property belonged to the appellant. The Chief also issued the appellant with a letter which enabled her to petition for grant of letters of administration, with respect to the estate of Hannah Wanjiru.

14. DW3, Paul Maina Kabeu, relied on his affidavit sworn on 13th September 2017, as his evidence in chief. In the affidavit, DW3 deponed that he hailed from Kiawambogo village, and that the family of Eston Maina was well known to him. He maintained that the suit property belonged Hannah Wanjiru, and that she was a well-known livestock farmer. He recalled that he was present at a meeting which was held at the Chief's office, where the respondents' sisters were in attendance, and where the Chief advised the parties that the suit property belonged to the appellant. Upon cross-examination, DW3 stated that he did not know how Hannah acquired the suit property.
15. After hearing the parties, the learned Judge in a judgment dated 7th November 2019, allowed the respondents' suit and dismissed the appellant's counterclaim. The learned Judge found that the Hannah Wanjiru Maina held the suit property in trust for the estate of the late Eston Maina Kimere. He directed that the title with respect to the suit property issued to the appellant be cancelled, and that the suit property reverts back to the estate of Hannah Wanjiru Maina.
16. Aggrieved by this decision, the appellant lodged this appeal citing nine grounds of appeal. In summary, the appellant faulted the learned Judge for finding in favour of the respondents, which finding was not supported by the evidence on record. She stated that the learned Judge erred in failing to find that the evidence by the respondents was contradictory, with respect to the whereabouts of the late Eston Maina, when the suit property was registered in the name of Hannah Wanjiru. The appellant was aggrieved that the learned Judge found that the absence of documentary evidence of purchase of the suit property by Hannah Wanjiru, was conclusive evidence that she did not own the suit property, and overlooked the fact that Hannah Wanjiru was the registered owner of the said property. She faulted the learned Judge for improperly shifting the burden of proof from the respondents to the appellant, and for disregarding her submissions. She took issue with the fact that the learned Judge failed to appreciate that the late Eston Maina, during his lifetime, failed to have the alleged trust determined. The appellant invited us to allow the appeal as prayed.
17. The appeal was canvassed by way of written submissions, which were duly filed by both parties. The appellant was represented by the firm of Muchiri Wa Gathoni & Company Advocates, while the firm of T. W. Murage & Company Advocates is on record for the respondent.
18. The appellant's counsel submitted that the suit property was registered to Hannah Wanjiru Maina in the 1960s. It was his submission that the respondents' contention that the suit property was registered in the name of Hannah Wanjiru at the time the late Eston Maina was residing in Nairobi was unfounded, as two other properties, that is, Land Reference Nos. Loc/19/Kiawambogo/211 and 540, were registered to Eston Maina during the same time the suit property was registered to Hannah Wanjiru. Counsel urged that the respondents' case fell short of the standard of proof required to establish the existence of a customary trust. He urged that the respondents failed to prove that the suit property was ancestral land. Counsel submitted that the evidence by the respondents was inconsistent as to whether they resided on the suit property or whether they only utilized the suit property to plant tea bushes.
19. Counsel for the appellant maintained that Eston Maina resided in Nyahururu with his four wives, and that the suit property did not qualify to be considered as ancestral land. It was his submission



that the letter obtained from the Chief indicated that the appellant was the only beneficiary of the estate of Hannah Wanjiru. He reiterated that all the wives of the late Eston Maina owned land, and it was therefore not peculiar that Hannah Wanjiru was registered as the owner of the suit property. Counsel submitted that the respondents did not avail any independent witnesses, to corroborate their claim that at the material time the family held a meeting, and decided that the suit property would be registered in the name of Hannah Wanjiru, in the absence of Eston Maina, to hold in trust for the family. He maintained that the appellant on her part availed three impartial witnesses who testified to the fact that the late Hannah Wanjiru owned a hotel, and livestock, and had the financial capacity to acquire the suit property. Counsel urged that the respondents failed to list the suit property among the assets of the late Eston Maina when they earlier petitioned the court to be issued with a grant letters of administration intestate in respect of his estate. In the premises, counsel urged that the appellant's appeal be allowed as it is merited.

20. In rebuttal, counsel for the respondents submitted that Beatrice Wangari Maina (PW5) was the only surviving widow of the late Eston Maina, and that she narrated to the court how Hannah Wanjiru came to be the registered owner of the suit property. It was his submission that evidence by PW1 established that Eston Maina inherited the suit property from his father, and that the same was registered in the name of Hannah Wanjiru since at the time, the late Eston Maina was in Nairobi, during the demarcation process. Counsel stated that the respondents had planted tea bushes on the vast suit property, and that the appellant in her testimony admitted that her late mother did not reside on the suit property, and neither did she plant any tea bushes.
21. Counsel explained that the evidence on record sufficiently proved the existence of a customary trust, with respect to the suit property, which trust qualified in law to be considered as an overriding interest. He asserted that the appellant failed to avail documentary evidence of the alleged purchase of the suit property by Hannah Wanjiru, and that none of her witnesses could attest to how the suit property was acquired by the late Hannah Wanjiru. He maintained that the appellant is a beneficiary of the estate of the late Eston Maina, in the same manner as the respondents. Counsel urged us to dismiss the appeal and uphold the decision of the learned trial Judge.
22. This being a first appeal, it is the duty of this Court to analyze and re-assess the evidence on record and reach its own independent conclusions. This duty was reiterated by this Court in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, where the Court observed thus;

“An appeal to this Court from a trial by the High Court is by way of 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 allowances in this respect.” See *Selle v. Associated Motor Boat Co.* [1968] EA 123.
23. Having re-evaluated the evidence on record, as well as the arguments from both sides, the issue arising for our determination is whether the appellant holds the suit property in trust for the respondents, in their capacity as beneficiaries of the estate of the Eston Maina (Deceased).
24. Although the appellant is the registered proprietor of the suit property, the respondents have pleaded customary trust as it pertains to the suit property. Customary trust, as was observed by the Supreme Court in the case of *Isack M'Inanga Kiebia v Isaaya Theuri M'Lintari & Another* [2018] eKLR, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered *Land Act* (now repealed) as well as the *Land Registration Act*. The apex Court observed that among the elements that would qualify a



claimant as a trustee are that the land in question was before registration, family, clan or group land; and the claimant belongs to such family, clan or group.

25. A party seeking a declaration of the existence of a trust bears the burden of placing before a court of law plausible, cogent evidence to underpin the prayer for such a declaration. This was the holding of this Court in the case of *Juletabi African Adventure Limited & Another v Christopher Michael Lockley* [2017] eKLR where the Court 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 vs. Gichuki* [1982] KLR 285 and *Mbothu & 8 Others vs. Waitimu & 11 Others* [1986] KLR 171.”

26. It is common ground that the appellant became the registered owner of the suit property vide the succession proceedings in Kangema Principal Magistrate’s Court Succession Cause No. 21 of 2016, with respect to estate of Hannah Wanjiru Maina (deceased). The appellant’s case was that her grandmother, Hannah Wanjiru Maina, purchased the suit property, which devolved to her by virtue of being the only heir to her estate. As was observed by the learned Judge, the appellant did not adduce any evidence to prove that Hannah Wanjiru purchased the suit property. It was her evidence that she only relied on the fact that the title to the suit property, which listed Hannah Wanjiru as the registered proprietor of the suit property. The appellant’s witnesses told the court that they were not aware of how Hannah Wanjiru acquired the suit property. There was therefore no evidence led by the appellant to sufficiently prove that her grandmother purchased the suit property and that the suit property was not family land.
27. The respondents, on the other hand, urged that Hannah Wanjiru was registered as the proprietor of the suit property, to hold in trust for her husband, Eston Maina, and his family. The respondents adduced evidence to the effect that the suit property was ancestral land, as Eston Maina inherited the suit parcel of land from his father. Eston Maina’s surviving widow testified that when she got married to Eston Maina in 1948, she moved into the suit property, where Eston Maina was residing with his siblings. After their father’s death, Eston Maina inherited a portion of his father’s parcel of land, which together with other consolidated fragments of land was eventually registered as the suit property after adjudication.
28. The evidence led by respondents established that Eston Maina settled his four wives and their children on the suit property. It was their testimony that during the land consolidation and demarcation process, Eston Maina worked in Nairobi and could not, at the time, avail himself physically at the suit property so as to be registered as the proprietor of the suit property. His family, led by his brothers, held a meeting where it was decided that in his absence, his first wife Hannah Wanjiru be registered as the proprietor of the suit property, to hold it in trust for her husband and members of his family. PW4 and PW5 were present at this meeting.
29. It is our finding, just like the learned trial Judge’s, that Hannah Wanjiru held the suit property in trust for her husband Eston Maina. We say so because Eston settled all his four wives on the said property. If the property was indeed purchased by Hannah Wanjiru exclusively, the other wives and their children would not have settled on the said property.



- 30. It is also common ground that Eston Maina later moved his entire family to Nyahururu, and that his wives and children planted tea bushes on the suit property, which they continue to maintain to up-to-date. The appellant is not in occupation of the suit property, and neither does she harvest the tea on the said property. These reasons, coupled with the fact that the appellant failed to provide prove to the required standard of proof that Hannah Wanjiru purchased the suit property, and the fact that the respondents sufficiently proved that the suit property was ancestral land, which Eston Maina inherited from his father, leads us to irresistible conclusion that Hannah Wanjiru held the suit property in trust for the late Eston Maina and his entire family as a whole.
- 31. After a re-evaluation of the totality of the evidence tendered before the superior court, we find no reason to depart from the finding of the learned trial Judge. We find no merit in the appeal lodged by the appellant. It is hereby dismissed. Each party will bear its own costs as this is a family dispute.
- 32. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

Signed

Deputy Registrar

