Nduto & another v Kombo & another (Sued as administrators of the Estate of Kombo Nduto - Deceased) (Civil Appeal 304 of 2019) [2024] KECA 1229 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1229 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 304 OF 2019

DK MUSINGA, MSA MAKHANDIA & JM MATIVO, JJA

SEPTEMBER 20, 2024

BETWEEN

MUSYIMI NDUTO ..... 1ST APPELLANT

MUKONYO KYOVE NDUTO ..... 2ND APPELLANT

AND

MATATA KOMBO ..... 1ST RESPONDENT

NZISA KOMBO ..... 2ND RESPONDENT

SUED AS ADMINISTRATORS OF THE ESTATE OF KOMBO NDUTO - DECEASED

(Sued as Administrators of the Estate of KOMBO NDUTO (Deceased) (An appeal from the Judgment of the Environment and Land Court at Makueni (Mbogo, J.) dated 3rd May 2019 in ELC Case No. 122 of 2017 (OS) originally Machakos HCC No. 360 of 2011)

JUDGMENT

1. This is a first appeal by Musyimi Nduto Mulaa and Mukonyo Kyove Nduto, ("the appellants"), against the judgment and decree of Mbogo, J. dated 3rd May 2019 issued in the Environment and Land Court ("the ELC") Case No. 122 of 2017 at Makueni. The appellants approached the court by way of Originating Summons ("OS") dated 28th November 2011. They sued Nzisa Kombo and Matata Kombo, ("the respondents"), as administrators of the estate of Kombo Nduto. They sought "a declaration that the property known as Makueni/Kyaluma/3 ("the suit property"), was ancestral land for the family of the late Nduto Mulaa hence the late Kombo Nduto held the title under Customary Trust; a declaration that the suit property should be shared among the children of the late Nduto Mulaa or their heirs namely:- Muendo Nduto (Deceased), Mulwa Nduto (deceased), Kyove Nduto (deceased) Musyimi Nduto and Kombo Nduto (deceased) unless the heirs expressly denounce their right; cancellation of the title issued to Nzisa Kombo, and all the other entries on the register; that

the Court be pleased to order the division of the suit property and apportionment of shares to all the beneficiaries; that the Court be pleased to issue an injunction against Nzisa Kombo, her agents and or servants from disposing, alienating or charging the suit property and from evicting Mukonyo Kyove, Monica Mutuku and all other beneficiaries until the hearing and determination of this originating summons; that the Court be pleased to grant such further or other relief as may be just in the circumstances and that in any event the respondents be condemned to pay the costs of the application."

2. The OS was premised on the grounds that the suit property had been acquired by the late Nduto Mulaa who had several children including Muendo Nduto (deceased), Mulwa Nduto (deceased), Kyove Nduto (deceased), Musyimi Nduto, Kombo Nduto (deceased), Naomi Nduto, Mbithe Nduto and Kalau Nduto. That the widow of the late Kombo Nduto, namely, Nzisa Kombo, the 1st respondent through succession cause No. 219 of 2007 caused the suit property to be registered in her name as an absolute owner. The appellants contended that during demarcation, the suit property was registered in the name of the 1st respondent's husband to hold it in trust for himself and the other children of Nduto Mulaa. The foregoing notwithstanding, the 1st respondent had threatened to evict all the other beneficiaries from the suit property by sending them eviction notices. The appellants thus prayed to the court to issue the orders already set out at the beginning of this judgment.

3. The OS was opposed by the respondents through the replying affidavit of the 1st respondent dated 23rd May 2012 in which she deposed that the 1st appellant was the brother to her deceased husband, while the 2nd appellant was the daughter of Kyove Nduto, deceased, an elder brother of her late husband. That the 2nd appellant's father had been settled in Kitui where his father, Nduto Mulaa, lived and was buried there and at no time did the 2nd respondent's father settle on the suit property. That during land adjudication, the suit property was demarcated, registered in the name of her late husband, and the title deed issued in his name. That there was no complaint from the 1st appellant's father who at the time was still alive regarding the registration. That no suit had been instituted against her late husband whilst he was alive claiming the suit property to be family land. The respondents further averred that the appellants were acting in bad faith. Thus the respondents prayed that the OS be dismissed.

4. The learned Judge after considering the OS and the viva voce evidence adduced, concluded thus:

> "I have read the evidence on record. I have also read the submissions that were filed. From the evidence on record, it is clear that both the 1st Plaintiff as well as the late Kombo who is the husband of the 1st Defendant moved from Kitui and settled in Kyaluma. The 1st Plaintiff in his own evidence told the Court that he moved out of the suit land and bought his own land elsewhere. There is no denial that the 2nd Plaintiff was born on the suit land and continues to reside on it. In my view, the ancestral land for the parties herein is in Kitui where the family hailed from before settling in Kyaluma. The Plaintiffs did not adduce evidence to show that at the time of adjudication and demarcation, the late Kombo was registered to hold the land in trust for himself as well as his siblings who include the father of the second Plaintiff. Even though the 2nd Plaintiff told the court that she filed objection in Machakos succession cause number 219 of 2007, to challenge the transmission of the suit land to the 1st Plaintiff, she did not tell the Court what was the outcome of the objection. It therefore seems to me that the Plaintiffs are out to appeal against the determination in Machakos succession number 219 of 2007 before this Court, an issue that this court will not entertain. The upshot of the above is that I agree with the Defendant's counsel that the Plaintiffs have not established on balance of probabilities that they have a cause of action against the Defendants. In the circumstances, I hereby dismiss the Originating Summons with costs to the Defendants."

5. Aggrieved by the judgment and decree of the ELC, the appellants have moved to this Court by way of an appeal on nine grounds, being that the ELC erred in law and in fact by; misguiding itself regarding the process of inheriting property under Kamba Customary Law; overlooking crucial material evidence which was placed before it by the appellants confirming that the suit property was a Customary Trust Land; basing its decision, on the uncorroborated evidence of the 1st respondent; ignoring their submissions; believing the false testimony of the 1st respondent and her witness; relying on the said testimony to dismiss the appellants' case; not taking into account the appellants' evidence that the 2nd appellant's parents and other two children were buried on the suit property, and that the 2nd appellant and her children were born and raised in the suit property; finding that the appellant did not tender evidence that as at the time of adjudication, the 1st respondent's husband was registered to hold the suit property as a trustee for other family members; failing to appreciate that the law provides that Customary Land Trust is an overriding interest in land and need not to be noted in the register.

6. The appeal was canvassed by way of written submissions with limited oral highlights. When the same came up for plenary hearing on our virtual platform on 15th July 2024, Ms. Muendo, learned counsel appeared for the appellants, whereas Mr. Francis Sila, learned counsel appeared for the respondents.

7. Counsel for the appellants submitted that the evidence adduced by the appellants was sufficient to prove that the suit property belonged to the family of the late Nduto Mulaa. That the 2nd appellant and the respondents reside on the suit property, and the appellants belong to the said family and have been in occupation for many years without any interruption by the respondents. Counsel submitted that the ELC failed to make a proper inquiry and to make a determination of the existence of a Constructive Trust arising from the fiduciary duty that the deceased had to his late brothers' children and siblings, and which obligation was binding on the 1st respondent as the administrators of the estate. That though the 1st respondent was registered as an absolute owner of the suit property, she continued to hold the suit property under the same terms and obligations that her late husband had to the other beneficiaries and or occupants of the suit property. Relying on the cases of *Alan Kiama v Ndia Mathunya & Others* (Civil Appeal No. 42 of 1978) and *Mbui Mukangu v Gerald Mutwiri Mbui* [2004] eKLR, the appellant submitted that even if they could not prove the existence of a Trust by virtue of their occupation, their claim became valid once the ELC acknowledged that the 2nd appellant was born and resides on the suit property. That it was not disputed that the 2nd appellant and her sister, Syokau Kyove, were born on the suit property.

8. Relying on the case of *Wageche Mariyu v Muturi Mariyu* [2013] (Nyeri Civil Appeal No. 135 of 2010 (UR), counsel submitted that the ELC did not interrogate the issues presented before it and the appellants' evidence led in support thereof. Moreover, the dismissive tone of the ELC in evaluating the appellants' evidence showed that the ELC did not consider the evidence, which would have led to a different determination if the court had properly considered the same. Counsel submitted that the ELC made a mistake by relying on the succession case which is yet to be determined to return a verdict against the appellants.

9. The appellants while relying on the case of *Kanyi Muthiora v Maritha Nyokabi Muthiora* (1984) eKLR 712, submitted that the 1st respondent's late husband had an obligation as a Trustee to the other family members. The obligation was neither extinguished by his being registered nor by his death. Citing the case of *Isack M'inanga Kiebia v Isaaya Theuri M'Lintari & Isack Ntongai M'Lintari* [2018] eKLR, counsel submitted that on matters Customary Trust, each case has to be determined on its own merits, quality of evidence, the nature of holding of the land and intention of the parties. That a Customary Trust can be presumed if the property is being held for the benefit of other members

of the family, whether they are or not in possession or actual occupation of the land. They therefore prayed for the appeal to be allowed with costs.

10. On his part, Mr. Koech, submitted that the suit property was not ancestral land as the ancestral land of Nduto Mulaa was in Kitui. This is where Nduto Mulaa, and his sons, Kyove Nduto, father to the 2nd appellant and Mulwa Nduto died and were buried. Thereafter, three family members namely, Kombo Nduto, Muendo Nduto and Musyimi Nduto migrated to Kyaluma in Makueni County and acquired their individual parcels of land. Kombo Nduto and Muendo Nduto acquired their separate parcels of land within Kako Area, while Musyimi Nduto acquired his land across Thwake River in Kalawa Area. The fact that the ancestral land of the late Nduto Mulaa was in Kitui was buttressed by the evidence of Haron Musyoki Mbindyo, which confirmed that part of Mulaa Family had relocated from Kitui to Makueni. He confirmed that Muendo Nduto has his own land as well as Musyimi Nduto who lives across Thwake River. The 1st appellant, who is a brother to the 1st respondent's late husband, testified that the land parcel was registered in his name in the 1970s and neither he nor his brother, Muendo Nduto, sought cancellation of the registration on the basis that the suit property was ancestral land. That the 1st appellant in cross-examination stated that he does not want a share of the suit property. The family of Muendo Nduto is also not claiming any share as well. Counsel submitted that the reason why the two families were not claiming any share of the suit property was because they were aware that the suit property was not ancestral land and that it belonged to the 1st respondent's husband. As for 2nd appellant, she was a daughter of Kyove Nduto who died and was buried on the ancestral land in Kitui. Since as a young wife of his late brother, she could not stay in Kitui alone, the 1st respondent's husband out of sympathy allowed her a portion of the suit property to cultivate so as to feed her family. That the 2nd appellant's mother subsequently purchased land at Kitise. Accordingly, the 2nd appellant should go and settle there.

11. The trial court was therefore correct in finding that the suit property was not ancestral land as the ancestral land of Nduto Mulaa was in Kitui. Consequently, there was no resulting Customary Trust in favour of the appellants. It was further submitted that the registration of the suit property in the name of the 1st respondent's husband was a first registration which is protected by section 24(a) and (b) of the *Land Registration Act*. That, upon the demise of her husband, the 1st respondent as his wife petitioned for a grant of Letters of Administration in Machakos High Court Succession Cause No. 219 of 2007. A certificate of confirmed grant was issued which enabled her to have the suit property transmitted to her. Though the 2nd appellant claimed to have filed objection proceedings, she was to tell the court the outcome of those proceedings. That what is certain is that the 1st respondent obtained a grant which enabled her to have the suit property transmitted to her, and as such the title deed obtained by the 1st respondent remains unchallenged and is protected by section 26(1) of the *Land Registration Act*. Ultimately, counsel submitted that the appellants did not prove on a balance of probabilities that the suit property was ancestral land held under Customary Trust by the 1st respondent's husband. For this proposition, counsel relied on the following authorities: *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & Another* [2018] eKLR; *Peter Ndungu Njenga v Sophia Watiri Ndungu* [2000] eKLR and *Uletabi African Adventure Limited & Another v Christopher Michael Lockley* [2017] eKLR.

12. We have considered the appeal, the respective submissions by both counsel, the authorities cited and the law applicable. A first appeal is by way of retrial and this Court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence tendered in the trial court and draw its own conclusions, of course, bearing in mind that it did not see witnesses testifying and therefore must give

due allowance for that. See the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, where this Court stated that:

> "[A]n 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."

13. In our view, the issues that fall for our determination are: whether customary trust was established by the appellants; and whether the respondents were the legal owners of the suit property.

14. The basic tenets of a trust were outlined by this Court in *Twalib Hatayan Twalib Hatayan & Anor v Said Saggar Ahmed Al- Heidy & Others* [2015] eKLR as follows:

> " According to the *Black's Law Dictionary*, 9th Edition; a trust is defined as:
>
> > "1.The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."
> >
> > Under the *Trustee Act*:
> >
> > > "...the expressions "trust" and "trustee" extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property..."
> > >
> > > ...
> > >
> > > Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (See Halsbury's Laws of England Vol. 16 Butterworths 1976 at para 1452).
> > >
> > > In this case, we have a definite property and beneficiary.
> > >
> > > ...
> > >
> > > Pursuant to Section 28 (b) of the *Land Registration Act*, all registered land is subject to overriding interests including customary trusts, unless the contrary is expressed in the register."

15. Whether a trust exists is a question of fact, which must be proved through evidence. The key considerations with regard to customary trusts are the nature of the holding of the land and the intention of the parties. In *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & Another* [2018] eKLR, the Supreme Court stated as follows:

> " Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v Kinuthia, that what is essential is the nature of the holding of the land and the intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land
2. The claimant belongs to such family, clan, or group
3. 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.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group."

16. Considering the above vis-à-vis the facts herein, it is clear that from the evidence tendered the ancestral land of the parties was in Kitui. This is where the patriarch of the family, Nduto Mulwa, was born and when he died, was buried thereat. Similarly, his two sons, Kyove Nduto, the father of the 2nd respondent and Mulwa Nduto, when they died were buried there. If indeed the suit property was family land as claimed by the appellant, why then were the deceased buried elsewhere other than on the suit property? There was uncontroverted evidence that three brothers of the family, including the 1st respondent's husband, emigrated to Makueni and obtained their separate parcels of land. It is also interesting that the 1st appellant indicated in his testimony that he had no interest in the suit property and yet his claim to the suit property is anchored on ancestral land. The same goes for the family of Muendo Nduto who was among the three brothers who moved to Makueni from Kitui. All these facts were not challenged at all or seriously contested by the appellants.

17. Again, the circumstances under which the appellants found themselves on the suit property were not seriously controverted.

    The ancestral land being in Kitui on which their parents and other siblings were buried, that is the parcel of land on which the customary claim would attach. The evidence clearly shows that the suit property was not before registration, family, clan or group land and that the appellants could not have been entitled to be registered as owners or other beneficiaries of the suit property but for some intervening circumstances. The suit property was registered in the name of the 1st respondent's husband in 1967. From the record, it is clear that their mother was still alive, and most of her deceased children, at the time of registration.

18. We agree with the respondent that indeed, if the suit property was intended to be family land to be held in trust, then the same ought to have been actualized during the lifetime of their mother and the 1st respondent's husband who had obtained a freehold title to the suit property. The 1st respondent only proceeded with what the law required her to do after the demise of her husband, that is, to initiate succession proceedings, obtain a grant of letters administration and thereafter, have the suit property transmitted to her. If the appellants had any claim over the suit property, this is where they should have pitched their tent. Indeed, from the evidence, such an attempt was made by the 2nd respondent and as already stated, we have no idea what the outcome was.

19. Finally, we agree with the ELC that the appellants had not adduced sufficient evidence to prove that the suit property was registered in the 1st respondent's husband's name to hold it in trust for the rest of the family members. We therefore find that Customary Trust was not established. This holding also resolves the second issue as to whether the suit property belongs to the 1st respondent. It does! Having said as much, the appeal collapses and is dismissed in its entirety. This being a family dispute, we order that each party bears its own costs.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR