



**M’ikiara v Kiara & 2 others (Environment and Land Appeal
E066 of 2022) [2024] KEELC 3689 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 3689 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E066 OF 2022**

CK YANO, J

MARCH 7, 2024

BETWEEN

JULIUS KIAMBI M’IKIARA APPELLANT

AND

LOISE KIENDE KIARA 1ST RESPONDENT

JANE NTHANGA 2ND RESPONDENT

EVANGELINE KIRIGO IKIARA 3RD RESPONDENT

JUDGMENT

1. The appellant herein filed a suit in the Meru ELC being Meru ELC No 24 of 2016. The suit was transferred to Senior Principal Magistrates Court at Githongo and renamed ELC No 53 of 2018. By a plaint dated 12th April, 2016 which was amended on 24th July, 2019 and further amended on 7th October, 2019, the appellant prayed for an order compelling the 1st respondent to transfer to the Appellant land parcel LR No Nkuene/Uruku 1690, an order compelling the respondents to compensate the Appellant for the value of his developments in land parcels Nkuene/Uruku/1688, 1689 and 1690, costs of the suit with interest and any other relief that the court may deem fit and just to grant.
2. The Appellant pleaded that one M’ikiara Gaitirithia the Appellant’s father who was deceased had acquired the original land parcel Nkuene/Uruku/488 from his father and the Appellant’s grandfather, the late Gaitirithia Rubirangu and later subdivided the same into 4 portions; Nkuene/Uruku/1688, 1689, 1690 and 1691 and allowed the Appellant to make scattered developments on the said original land.
3. The Appellant further pleaded that the deceased having acquired the original land parcel Nkuene/Uruku/488 and its subsequent subdivisions 1688, 1689, 1690 and 1691 from his father, the late Gaitirithia Rubirangu he had automatically acquired the same by customary trust and was in turn



- expected to transfer the same to his children who have extensively developed the same and knows no other land or home and are in turn expected to pass the same to their children.
4. The Appellant enumerated particulars of trust as inheriting the land directly from father to son from generation to generation; allowing the Appellant to occupy and develop the land; inheriting the land from his father, and bearing and raising the plaintiff in the land.
 5. The Appellant averred that the deceased without any regard to the existing trust and developments by the Appellant in scattered portions of land measuring 2 acres in the suit land, subdivided the land parcel Nkuene/Uruku/488 and transferred the land parcels No Nkuene/Uruku/1688 to himself, Nkuene/Uruku/1689 to the 2nd respondent, Nkuene/Uruku/1690 to the 1st respondent and Nkuene/Uruku/1691 to the 3rd respondent leaving the Appellant landless in total abuse of the existing trust.
 6. The Appellant enumerated particulars of breach of trust as attempting to alienate the family land without regard to the Appellant's interest; failing to have regard to the existing trust, subdividing trust land without regard to all the trustees; treating trust land as private land and transferring the Appellant's developments.
 7. The Appellant averred that the respondents had without regard to the existing trust forcibly embarked on destruction of the Appellant's properties on the land and threatened to evict him so that they could utilize the same to the detriment of the Appellant. The Appellant further averred that he had extensively developed a portion of land measuring 2 acres scattered in the material parcel of lands and knew no other land as home and might be rendered homeless and landless if the suit is not allowed.
 8. The respondents filed a defence and counterclaim dated 23rd May 2016 and a defence to the further amended plaint dated 10th February 2021. The appellant's deceased father vehemently denied that he acquired LR No Nkuene/Uruku/488 from his father who is the appellant's grandfather and put the appellant to strict proof. The deceased, however, admitted subdividing the said land into four portions.
 9. The respondents averred that the appellant's suit is based on fraud, is an afterthought, is spurred by ill spite, malice and greed, is tainted with misrepresentation, unconscionable lies, concoctions, contradictions, is factually and legally baseless and tailored to hoodwink the court into granting underserved orders. The respondents' enumerated particulars of fraud and misrepresentation on the part of the appellant as swearing a false supporting and verifying affidavits, committing perjury or subordination of perjury, alleging that the suit lands are trust lands when he knows the same to be false and misleading; failing to disclose that he does not live on the suit lands and failing to disclose that he was to get LR Nkuene/Uruku/1690 but refused to pay for subdivision and transfer fees.
 10. In their counterclaim the respondents averred that they are the owners and registered proprietors of LR Nos. Nkuene/Uruku/1688,1689 and 1691 and have been issued with title deeds for the same. They further contended that they were in actual possession and cultivating their respective parcels which they have fenced and planted various items.
 11. The respondents averred that the appellant and his family members have been entering on the said respondents parcels of land and picking tea bushes, preventing the respondents from cultivating and committing other acts of waste which prompted the respondents to report him at Nkando Police Post. The respondent contended that the appellant's act of trespassing on their parcels of land was malicious, wrongful, illegal infringes on their constitutional rights to own property and amounts to the law of the jungle which should not be countenanced by the court. The respondents sought an order of permanent injunction restraining the appellant, his family members and anybody else claiming through him from trespassing on the said parcels of land or in any way interfering with the respondents quiet and peaceful possession and use, as well as costs and interests.



12. The respondents filed Githongo SRMC Civil Case No 77 of 2017 (ELC. No 13 of 2017) against the appellant and six others. Their case was that they were the owners of LR No Nkuene/Uruku/1688, 1689, and 1691 which were given to them by their father upon subdivision of LR Nkuene/Uruku/488 and that each of them had developed their respective portions. That the appellant who had built a semi-permanent structure on part of the original land and which structure fell under parcel 1688 was to relocate to Parcel 1690 which was his share, but later changed his mind and incited his children who were 3rd and 4th defendants and one John Bundi to occupy Parcel 1688. The respondents sought for an eviction order and injunction against the appellant and the other defendants' in that case. The defendants did not file any defence in the said suit.
13. The two suits were consolidated and ELC 53 of 2018 was made the lead file. Upon considering the matter the trial court (Hon S. Ndegwa – SPM) in a judgment delivered on 17//10/2022 dismissed the appellant's case being Githongo PMC ELC Case No 53 of 2018 and allowed the respondents claim in Civil Case No 77 of 2017 (ELC No 13 of 2017).
14. The appellant was aggrieved by that judgment and filed this appeal on the following grounds:-
 1. That the learned Senior Principal Magistrate erred in law and facts in finding that the appellant never proved his case on a balance of probabilities.
 2. That the learned Senior Principal magistrate erred in law and facts by failing to consider the court's executive officer's scene visit report over the appellants properties scattered in the lands now registered to the respondent.
 3. That the learned Senior Principal Magistrate erred on Law and in facts by failing to have regard to the executive officers scene visit report on the health status of the late M'ikiara Gaitirithia (deceased) the parties father, to have capacity to transact over the family lands.
 4. That the learned Senior Principal Magistrate erred in Law and in facts by disregarding the Agricultural officers report on the value of the appellants properties on the lands now registered to the respondents.
 5. That the learned Senior Principal Magistrate erred in Law and in facts by failing to have regarded that the respondents never tendered any report by an agricultural officer to challenge the appellant's report on the value of the appellant's developments.
 6. That the learned Senior Principal Magistrate erred in Law and in facts by failing to appreciate that the appellant has no land registered to him in the expansive family land where to move his house.
 7. That the learned Senior Principal Magistrate erred in Law and in fact by ordering the eviction of the appellant without any regard to the fact that the appellant had built his house on the family land before the same was transferred to the respondents without his knowledge or involvement.
 8. That the learned trial magistrate erred in Law and in facts by disregarding the appellants' evidence on a balance of probabilities.
 9. That the learned Senior Principal Magistrate decision was against the weight of the evidence and the Law.
 10. That the learned Senior Principal Magistrate erred in disregarding the evidence and testimony of the appellant and allowing that of the respondents.



15. The appellant prays that the appeal be allowed with costs.
16. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 18th December 2023 through the firm of Gichunge Muthuri & Co. Advocates while the respondents filed theirs dated 26th January 2024 through the firm of John Muthomi & Co. advocates.

Appellant's Submissions.

17. The Appellant gave brief facts of the case and proceeded to identify four issues for determination being whether or not the original parcel of land No Nkuene/Uruku/488 was customary trust land; whether or not the parties 'father(then alive)M'ikiara Gaitirithia had capacity to transact over the parcel of land as at the time of transfer, whether the appeal has merits and who bears the costs of the appeal and those of the trial court.
18. Regarding the first issue, it was submitted on behalf of the appellant that the original parcel of land No Nkuene/Uruku/488 initially belonged to the parties' grandfather, the late Gaitirithia Rubirangu, but the same was registered in the name of parties' father M'ikiara Gaitirithia (now deceased) to hold in trust for the parties herein and the coming generation. That the late M'ikiara Gaitirithia subdivided the land into four (4) portions namely Nkuene/Uruku/1688, 1689,1690 and 1691 and transferred to the 1st, 2nd and 3rd Respondents and retained one in his name.
19. Concerning proving customary trusts, the appellant's counsel relied on Supreme Court decision in the case of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR The appellant submitted that Customary trust is one of the overriding interests hinged on the land that is currently recognized in the *Land Registration Act*, 2012. The appellant submitted that the original suit property was registered under *Registered Land Act* Cap 300 (now repealed) and the provisions of Sections 27 & 28 of the repealed Act stated that the rights of a registered proprietor of registered land under the Act are absolute and indefeasible and only subject to rights and encumbrances noted on the register or overriding interests which are set out under section 30 of the said Act. The appellant further submitted that the provisions of Sections 27 & 28 are similar to the provisions set out in Sections 24, 25, 26 & 28 of the *Land Registration Act*, 2012. The appellant also cited Section 107 of the *Land Registered Act* (now repealed).
20. Learned Counsel for the appellant submitted that it is now accepted by the Courts in the country that Section 30(g) of *Registered Land Act* (now repealed) provided for customary trust and that Section 28 (b) of the *Land Registration Act*, 2012 specifically provides for overriding interests as may subsist on the land and affect it without it being noted on the register such as customary trusts and that it therefore follows that registration of a person as a proprietor of land does not preclude him from holding an interest in trust for another. The appellant's counsel submitted that Customary trust is an encumbrance on land and are non-registrable rights which run with the land. That they are overriding and subsist on the land. The Appellant's counsel relied on the cases of *Kanyi v Muthiora* (1984) KLR 712, *Gathiba v Gathiba* Nairobi HCCC No 1647/84 and *Mbui v Mukangu v Gerald Mutwiri Mbui* C.A No, 281 of 2000.
21. The Appellant's counsel submitted that from the evidence on record and the case laws cited hereinabove, it is clear that the Appellant has satisfied that the original parcel of land No Nkuene/Uruku/488 was customary/family land in which the parties' father (now deceased) was registered to hold in trust for the Appellant and Respondents all together.
22. The Appellant further submitted that no controversial evidence was produced before the trial Court to demonstrate that the Appellant and the Respondents were not siblings and that the original parcel



- of land No Nkuene/Uruku/488 was never a family land. The appellant also submitted that his occupation of the land was also not denied and/or controverted and that the Executive Officer's scene visit report confirms the Appellant's occupation. The appellants counsel submitted that the trial court failed to find and hold that the appellant is entitled to a share of parcel No 488 which was subdivided into four portions being customary trust land.
23. On whether or not the parties' father had capacity to transact over the parcel of land at the time of transfer, it was submitted on behalf of the appellant that when the Executive Officer visited the suit parcels of land, he noted that the parties' father could not have joined others since he was sick. It is the appellant's submissions that their father was not in a capacity to transact over the suit land because of his health condition. That the respondents acted mischievously in that they subdivided and transferred to themselves the respective portions of land to the detriment of the Appellant who has been living thereon and has carried out immense developments. The appellant contended that the fact that he has two wives does not mean that he is not entitled to a share of parcel of land No Nkuene/Uruku/488.
 24. It is the Appellant's submission that the Respondents did not tender any evidence to demonstrate that they have clean titles. The Appellant stated that he is not even certain that consent from Land Control Board to transfer was obtained and/or whether the required stamp duty was paid. The appellant contended that those are necessary documents that would have demonstrated that indeed their deceased father transferred the parcels of land himself to the respondents. The appellant further contended that the transfers of the aforesaid parcels of land were tainted with fraud and misrepresentations since their father had no capacity to transact over them due to his health status as he could not talk or move from his bed.
 25. The Appellant's counsel cited Section 26 of the Land Registration Act 2012 and submitted that fraudulent titles cannot be allowed to stand has been affirmed in a number of cases including but not limited to Arthi Highway Developers limited v West End Butchery Limited & others Court of Appeal Nairobi Civil Appeal No 246 of 2013 (2015)eKLR and Isaac Kipkemboi Chesire and four others v Joseph Kimitei Kwambai and others, ELC Eldoret case No 520 of 2012.
 26. It is the appellant's submission that the appeal has merits and should be allowed with costs.

Respondents' Submissions.

27. The respondents also gave brief facts of the case and submitted that the rendition by the trial is in consonance with the legal maxim "*Nemo Dat quod Non Habet.*" The respondents counsel relied on the case of Daniel v Kiprugut Maywa v Rebecca Chepkurgat Maina (2019)eKLR.
28. It was further submitted on behalf of the respondents that the appellant's prayer for their deceased father to be ordered to transfer LR No Nkuene/Uruku/1690 to him is an act of intermeddling with the estate of the deceased which is punishable under section 45 of the Law of Succession Act. The respondents counsel relied on the case of Njoki Gicheru Ndiuni v Dadson Githenji Wahome & 3 others [2016]eKLR.
29. With regard to the amount of compensation sought by the appellant, the respondents submitted that, the appellant could not claim compensation for any development which was not pleaded and on land which did not belong to him. Learned counsel for the respondents relied on the case Rowland Edwin, Nyaga Murithi v Nyaga Murua Mbario (2019)eKLR, Jane Awunor Ondiege & another v Ali Yusuf Matumbo & 4 others Rural Electrification Authority (Third party) [2020]eKLR and Waribu Chongo v Benson Maina Gathithi [2014] eKLR.



30. The respondents highlighted the trial court's analysis of the case and finding and submit that they support the judgment and decree of the trial court in its entirety, and urged the court to uphold the same and dismiss the appellants appeal with costs.

Analysis And Determination

31. I have perused the record of appeal and the grounds of appeal. I have also considered the submissions made and the authorities relied on. This being a first appeal, I am obliged to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusion reached by the learned trial Magistrate were justified on the basis of the evidence presented and the law. This was settled in the case of *Selle & another v Associated Motor Boat co. Ltd* (1968) EA 123.
32. The issues I find for determination are whether the decision of the trial court was against the weight of the evidence and the law, and whether this appeal is merited or not.
33. It is not in dispute that the parties are related by being children of M'ikiara Gaitirithia (Deceased). The deceased was the owner of the LR No Nkuene/Uruku/488 which he later subdivided into four portions being LR No Nkuene/Uruku/1688, 1689, 1690 and 1691.
34. The appellant's case was that the suit property was acquired by their late father from his father (and the parties' grandfather) and therefore held the same under customary trust and was expected to transfer the same to his children who in turn are expected to pass it to their children. The appellant's main complaint is that their late father subdivided the original land and gave out the resultant portions without having regard to the existing developments done by the appellant. The respondents on the other hand, argued that their deceased father subdivided the original land while he was still alive and gave each one of them, including the appellant, his/her own portion. That the appellant was given land parcel No 1690, but he refused to pay transfer fees to have the same registered in his name and instead has trespassed on the other portions belonging to the respondents.
35. From the evidence on record, it is clear that the deceased subdivided the original land parcel No Nkuene/Uruku/488 into four portions Nos. Nkuene/Uruku/1688, 1689, 1690 and 1691. The appellant is entitled to land parcel No Nkuene/Uruku/1690. In my view, the deceased was within his right as the registered owner of the original parcel of land Nkuene/Uruku/488 to subdivide the same and share it out among his children. Having been given parcel No Nkuene/Uruku/1690 which is a subdivision of the original land the appellant cannot turn around and claim that there was a breach of customary trust. The appellant is a beneficiary of the land parcel No 1690 having been set aside for him. In my view, the appellant ought to follow up the right procedure in order to have the portion given to him transferred into his name. In this regard, I am in agreement with the trial court's finding that the respondents could not be ordered to transfer the said land to the appellant because it is not in their names. The trial court rightly found that the appellant should move to the right court to have his land transferred to him. The respondents have no powers to transfer land in the name of a deceased person unless they are appointed as administrators of the estate of the deceased and a grant issued and confirmed.
36. I am also in agreement with the trial court finding that the appellant could not claim compensation of any development on the land since he developed it well aware that land was still in their father's name.
37. Similarly, the court finds that the appellant and other defendants in civil case No 77 of 2017 (ELC. 13 of 2017) had no interests in LR No Nkuene/Uruku /1688 and the trial court rightly granted orders barring them from interfering with the said land.



38. Having considered the material and evidence on record, I am satisfied that the findings and holdings of the learned trial magistrate were justified and well founded, and I find no reason to interfere with the same.

39. Consequently, I find no merit in this appeal and the same is dismissed with costs to the respondents.

40. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF MARCH, 2024

HON. C. YANO

ELC – JUDGE

In the presence of:-

Court Assistant: Tupet

John Muthomi for respondents

Ms Murugi holding brief for Gichunge for Appellant

