Machuke & 3 others v Ngare & 6 others (Civil Appeal E011 of 2021)
[2023] KECA 1574 (KLR) (8 December 2023) (Judgment)

Neutral citation: [2023] KECA 1574 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL E011 OF 2021

W KARANJA, J MOHAMMED & LK KIMARU, JJA

DECEMBER 8, 2023

BETWEEN

ERASTUS NDEGE MACHUKE ..... 1ST APPELLANT

JONATHAN NYAGA NJERUH ..... 2ND APPELLANT

BENSON NTHIGA MACHUKE ..... 3RD APPELLANT

JOHN MURIUKI MACHUKE ..... 4TH APPELLANT

AND

JOHN KIURA NGARE ..... 1ST RESPONDENT

JOHN NJIRU JULIUS ..... 2ND RESPONDENT

GISOVI WA MUNYI ..... 3RD RESPONDENT

EZEKIEL NYAGA ..... 4TH RESPONDENT

DAVID MWANIKI NGUKU ..... 5TH RESPONDENT

JACOB NJUE MUTEMBEI ..... 6TH RESPONDENT

JAMES NYAGA NGARI ..... 7TH RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court of Kenya at Embu (Angima, J.) dated and delivered on 18th December, 2020 in E.L.C. Case No. 240 of 2014)

JUDGMENT

1. This is a first appeal against the judgment of the Environment and Land Court (ELC) sitting at Embu (Angima, J.) delivered on 18th December, 2020, in ELC Case No. 240 of 2014.

2. The appellants instituted the suit before the ELC against the respondents. The properties in dispute are:

   i. Mbeere/Kirima/3683 and Mbeere/Kirima/3684, whose registered proprietor is the 1st respondent;

   ii. Mbeere/Kirima/3685, registered to the 2nd respondent;

   iii. Mbeere/Kirima/3686, registered to the 3rd respondent;

   iv. Mbeere/Kirima/3687, registered to the 4th respondent;

   v. Mbeere/Kirima/3697 and Mbeere/Kirima/3698, registered to the 5th respondent;

   vi. Mbeere/Kirima/3688 registered to the 6th respondent; and,

   vii. Mbeere/Kirima/3699, registered to the 7th respondent; (hereinafter referred to as 'the suit properties').

3. The appellants' case before the ELC was that the suit properties were excised from parcel number Mbeere/Kirima/3394. According to the appellants, parcel number 3394 was a subdivision of the original parcel of land registered as Land Reference No. Mbeere/Kirima/2244, measuring approximately 7000 acres, which was owned by seventeen (17) Mbeere clans. The appellants, who are siblings, averred that they are members of the Ikambi clan, while the respondents belonged to the Marigu clan. The appellants pleaded that their grandparents settled on the suit properties since 1912, and that the appellants and their families occupy the suit properties to date. The appellants contended that after the land adjudication process, it was agreed that Parcel Number 2244 would be sub-divided and shared out among the 17 clans that resided on it. However, the portion of land occupied by the appellants was allocated to the respondents' Marigu clan, contrary to the agreement amongst the clans.

4. The appellants urged that the 7th respondent, who was the Marigu clan chairman, went ahead and sub-divided the portion of land occupied by the appellants to each respondent, including himself. It was the appellants' case that they were not allocated any portion of land comprising of Parcel Number 2244, and that the respondents were allocated several other portions of land from Parcel Number 3394, other than the suit properties. The appellants urged the ELC to declare that the respondents held the suit properties in trust for the appellants, and order that the suit properties be registered in the appellants' names.

5. On their part, the respondents stated that Parcel Number 2244 belonged to 17 Mbeere Clans, and that prior to adjudication, the land was being held in trust for the said clans by the County Council of Embu. According to the respondents, the land was leased to one Meka Sisal Company in 1963. They deposed that the said company vacated the property in 1978 when the process of adjudication commenced. The respondents averred that each clan, including the Ikambi clan, was given a portion of land to be shared out among its clan members. They asserted that each clan member was directed to relocate to their respective clan land. That other than the 1st appellant who illegally occupies Plot Number 3683, none of the appellants reside on the suit properties, and that they occupy the land allocated to them by their clan.

6. The respondents stated that the 3rd and 6th respondents are not members of the Marigu clan, and that they purchased the said suit properties from clan members who were allocated the same. The 3rd to 6th respondents asserted that they were in exclusive possession of their respective suit properties, and that none of the appellants occupy their properties. They refuted the claim that they were holding the suit properties in trust for the appellants.

The 1st respondent, in a counter-claim, urged the ELC to issue an eviction order against the 1st appellant, who he alleged was in illegal occupation of Parcel Number 3683.

7. The case was heard by way of viva voce evidence. After hearing the parties, the learned Judge, in a judgment delivered on 18th December, 2020, found in favour of the respondents. The learned Judge determined that the appellants had failed to prove existence of a customary trust, or its breach thereof, by the respondents. He dismissed the appellants' suit with costs.

8. Aggrieved by the decision, the appellants lodged this appeal citing six grounds of appeal. The appellants stated that the learned Judge erred in failing to properly analyze the evidence on record, and as a result arrived at an erroneous decision. They faulted the learned Judge for finding that the respondents did not hold the suit properties in trust for the appellants. They were aggrieved that the learned Judge failed to consider the period of time the appellants had been in possession of the suit properties. They took issue with the fact that the learned Judge determined that the letter dated 19th October 2004, was merely a gentleman's agreement, and not legally binding. They were aggrieved that the learned Judge failed to appreciate that the appellants had not been allocated any other parcel of land within L.R. No. Mbeere/Kirima/2244. They faulted the learned Judge for overlooking the fact that the Ikambi Clan and Marigu Clan were both part of the group of clans that owned the original parcel of land L.R. No. Mbeere/Kirima/2244, which resulted in the suit properties after the adjudication process. In the premises, the appellants urged this Court to allow the appeal as prayed.

9. The appeal was canvassed by way of written submissions, which were duly filed by both sides. The appellants were represented by the firm of Rose W. Njeru & Company Advocates, while the firm of Duncan Muyodi & Company Advocates are on record for the 1st, 2nd, 5th and 7th respondents. The 3rd and 6th respondents did not participate in this appeal.

10. According to the appellants' counsel, the suit properties formed part of their ancestral land, as their grandparents were in occupation of the same as early as 1912. Counsel submitted that the appellants' kin moved from the suit properties in 1950s when the Colonial government declared a state of emergency. She submitted that the appellants' father moved back to the suit properties in 1969 and settled there, and that the 1st appellant joined him in 1970. They had been in occupation of the suit parcels of land since then. Counsel added that the 1st and 6th respondents, in their testimonies, told the court that the appellants' family has been in occupation of the suit properties since 1963 and 1976 respectively. Counsel urged that the respondents knew all along that the appellants were in occupation of the suit properties, even before the land adjudication process had been initiated.

11. Counsel for the appellants further submitted that when Parcel Number 2244 reverted to the 17 clans, it did not undergo the complete adjudication process as stipulated by the *Land Adjudication Act*, and that the 17 clans were each directed to lodge their respective appeals to the concerned Minister for allocation of a portion of Parcel Number 2244. Counsel explained that the appellants were denied a chance to make their claim in respect of the suit properties, which they occupy and contend is ancestral land, by virtue of Section 13 (1) of the *Land Adjudication Act*. Counsel was of the view that the registration of the suit properties in favour of the respondents was not absolute, but subject to the appellants' ancestral interest in the said properties. She stated that other than the fact that the respondents were part of Marigu clan, they had not demonstrated that they had any other special interest in regard to the specific parcels of land that comprise the suit properties. Counsel submitted that the appellants had proved the existence of customary trust, and cited the decision of the Supreme Court in Isack M'inanga Kiebia vs Isaaya Theuri M'lintari & Another [2018] eKLR. Counsel explained that the fact that some of the appellants were not in actual possession of the suit

properties, did not disentitle them to the same. She invited us to set aside the decision of the ELC, and allow the appeal as prayed.

12. On his part, counsel for the 1st, 2nd, 5th and 7th respondents opposed the appeal. He submitted that after the land adjudication process, the Marigu clan was settled on Parcel Number Mbeere/Kirima/3394, which was excised from the larger parcel of land known as Mbeere/Kirima/2244. Counsel explained that Parcel Number 3394 was subsequently sub-divided and allocated to the members of the Marigu clan, including the respondents, save for the 3rd and 6th respondents, who are purchasers for value from some members of the clan. Counsel stated that the appellants had not adduced any evidence to establish the existence of an express, constructive or resultant trust, in their favour. Counsel submitted that the appellants have failed to show any wrong doing on the part of the respondents in being registered as the proprietors of the suit properties. Counsel similarly relied on the case of Isack M'inanga Kiebia [2018] (supra), and submitted that the appellants' case fell short of the elements to establish customary trust that was affirmed in the said decision.

13. Counsel for the respondents further submitted that the length of time the appellants are alleged to have been in occupation of the suit properties is irrelevant in the determination of the existence of a trust, with respect to the suit properties. He explained that the document dated 19th October, 2004, was not a legally binding document, as it contained minutes of a meeting between the Chairman of the 17 clans of Mbeere and the then District Commissioner, detailing how Parcel Number 2244 ought to be distributed. Counsel added that the respondents were not party or privy to the said document, or its contents. Counsel maintained that the Ikambi clan, which the appellants belong to, was allocated their portion of Parcel Number 2244, and that the appellants' claim over the suit parcels of land which belong to another clan, if upheld, would amount to unjust enrichment on the part of the appellants. Counsel urged this Court to dismiss the appeal for lack of merit.

14. 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 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."

15. Having re-evaluated the record, as well as the arguments from both sides, the issue arising for our determination is whether the appellants established a case that the respondents held the suit properties in trust for them.

16. Although the respondents are the registered proprietors of their respective suit properties as outlined at the beginning of this judgment, the appellants have pleaded customary trust as the basis of their claim as it pertains to the suit properties. Customary trust, as was observed by the Supreme Court in the case of Isack M'inanga Kiebia [2018] (supra) cited by both parties, 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 to under the proviso to Section 28 of the Registered *Land Act* (now repealed) as well as the *Land Registration Act*. The apex court held that among the elements that would qualify a claimant to be considered as a trustee are that the land in question was before registration, family, clan or group land; and that the claimant belongs to such family, clan or group.

17. 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 vs. Gichuki [1982] KLR 285 and Mbothu & 8 Others vs. Waitimu & 11 Others [1986] KLR 171."

18. The appellants' case is that the suit properties form part of their ancestral land, as their grandparents were in occupation of the same, as early as 1912. The appellants stated that their father vacated the suit properties in the 1950s when the Colonial Government declared a state of emergency, but that he moved back to the suit properties in 1969, and settled there. It was also adduced in evidence that the 1st appellant joined his father in 1970, and has been in occupation of the suit properties from that time to date. The 2nd to 4th appellants stated that they do not reside on the suit properties but cultivate the same.

19. It is not disputed that Parcel Number Mbeere/Kirima 2244 was allocated to the 17 Mbeere clans, which included the appellants' Ikambi clan, and the respondents' Marigu clan. After the land adjudication process, the Marigu clan was allotted Parcel Number Mbeere/Kirima/3394, which was excised from the larger Parcel No. Mbeere/Kirima/2244. All the suit properties were excised from Parcel No. 3394 which assigned to the respondents' Marigu clan. Although none of the parties informed the Court the title number of the parcel of land allocated to Ikambi Clan, the appellants admitted that Ikambi clan was allocated a different parcel of land, which was also excised from Parcel Number 2244.

20. It is our considered view that the larger Parcel Number 2244, did in fact, constitute the appellants' clan land; but the said parcel also formed the respondents', as well as 15 other clans', clan land. All these clans were allocated their portion of land from Parcel No. 2244. As stated earlier, however, the suit properties were a subdivision of Parcel Number 3394 which was allocated to Marigu clan. The title document pertaining to Parcel Number 3394 adduced in evidence indicated that the said parcel of land belonged to Marigu clan. The appellants belong to Ikambi clan which was allocated their own parcel of land to distribute to its clan members. The appellants', not being members of the Marigu clan, can therefore not stake a claim of customary trust, with respect to the suit properties, as they do not belong to the said clan. From the evidence on record, the portion of land allocated to Marigu clan was intended for its clan members and not members of any other Mbeere clan.

21. The appellants are entitled to allocation of land from the portion assigned to Ikambi clan. Although they claim that they were not allocated any parcel of land by the Ikambi clan, the appellants admitted that there was an ongoing suit, before the Court of law, as pertains to the distribution of the Ikambi clan land. The 1st appellant, upon cross-examination, told the court that the appellants have lodged a suit against the Chairman of Ikambi clan. This fact was admitted by all the appellants in their testimonies before the ELC.

22. The appellants contend that they have been in continuous possession of the suit properties, even before demarcation as a result of the adjudication process. The appellants further pegged their claim on the contents of a letter drafted by the Chairmen of the 17 clans, and addressed to the District Commissioner of Mbeere, which detailed minutes of a meeting held by the 17 clans on 19th October 2004, addressing the proposed distribution of parcel number 2244, to the respective clans. According to the letter, it was agreed that "incase a clan member had a shamba in another clan's portion, his shamba was to be marked alongside those of that clan, as if he was a member of that clan". The

appellants faulted the learned Judge for finding that the said document was not a legal document. It is our considered opinion that even though the agreement intended to be legally binding, no legal steps were taken by the said clans to actualize it on the ground. It could not therefore form a basis to mount a legal suit for a claim of land by a non-member of a clan over another clan's parcel of land. The learned trial Judge therefore correctly found that none of the parties in this suit executed the agreement, and as such, the appellants had no locus standi to enforce the same, even if it was established that the agreement was enforceable.

23. Section 3 (1) of the *Law of Contract Act* stipulates as follows:

> "No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon which such suit is brought or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." (Emphasis ours.)

24. From the fore going, it is our considered view, and therefore our holding, that the appellants failed to discharge their burden of establishing that the respondents were registered as proprietors of the suit properties in trust for the appellants. We find no reason to fault the learned trial Judge's finding in that regard.

25. Before conclude, we have noted that the ELC did not make any orders with respect to the 1st respondent's counter-claim. Having dismissed the appellants' claim, the ELC ought to have allowed the 1st respondent's counterclaim, and issued an order of eviction against the 1st appellant from Land Parcel No. Mbeere/Kirima/3683.

26. We find no merit with the appeal. It is hereby dismissed with costs to the respondents. The 1st respondent's counter-claim, dated 15th February, 2016, is hereby allowed with costs as a result of which the 1st appellant shall be evicted from land Parcel No Mbeere/Kirima/ 3683 if he does not voluntarily vacate within ninety (90) days from the date of this judgment. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 8TH DAY OF DECEMBER, 2023.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR