



**Ndungu v Macua (Environment and Land Appeal E060 of 2021)
[2024] KEELC 3550 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3550 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E060 OF 2021**

JG KEMEI, J

APRIL 25, 2024

BETWEEN

MORRIS GITAGIA NDUNGI APPELLANT

AND

ALICE WAKANYI MACUA RESPONDENT

JUDGMENT

1. The Appellant was the Defendant while the Respondent was the Plaintiff in the trial Court. It was the Plaintiff's case that the Defendant is the registered owner of the suit land Kiambaa/Kihara/1198 and that he holds it in trust for her. The Plaintiff and the Defendant are siblings being the children of the late Annabell Nguti Ndungu and Ndungu Kiroge. The Plaintiff sought the following orders:-
 - a. A declaration do issue that the Plaintiff is the legal beneficiary in her share in the suit land.
 - b. Delivery of the rightful share of the suit property to the Plaintiff.
 - c. An order stopping the Defendant from carrying out any further sale premise namely Kiambaa/Kihara/1198, pending the hearing and determination of this suit.
 - d. Costs of this suit with interest.
 - e. Any other relief this Honourable Court may deem fit to grant.
2. The Defendant denied the Plaintiff's claim in particular he denied that he holds the land in trust for the Plaintiff. That the Plaintiff has lodged an illegal caution on the land.
3. Upon hearing the case the Court found for the Plaintiff in its Judgment delivered on 15/6/2021. This is the Judgment that has triggered this Appeal.
4. The Appellant vide a Memorandum of Appeal dated 12/7/2021 filed the Appeal on the following grounds:-



- a. That the learned Magistrate erred in law and fact by deciding that the Plaintiff was entitled to a share of the suit property.
 - b. That the learned Magistrate misdirected herself by wrongfully proceeding to declare that a trust had existed and that the Defendant held the Plaintiff's share in trust.
5. The Appellant sought orders that the decision of the lower Court be set aside with costs.
 6. On the 7/3/2024 directions were taken to canvass the appeal by way of written submissions.
 7. The Appellant filed written submissions dated 21/3/2024 while the Respondent failed to comply.
 8. It was submitted by the Appellant that the Respondent's allegation that the suit land was originally registered in the name of her father Ndungi Kiroge is not supported by evidence. That the green card in respect to the suit land was issued in 1981. It indicates that it is a subdivision of parcel 952. It measures 1.2Ha. That according to the copy of the green card on page 16 of the Record of Appeal the suit land was registered in the name of the Appellant on 28/6/2018 and the approximate area remains 1.2Ha.
 9. The Appellant rejected the Respondent's allegation that the Appellant gave out some of the land to his brothers leaving out the Respondent in view of which the Appellant has remained the owner since 1981. The trial Court was faulted for failing to answer the question as to which land was the Appellant holding in trust for his siblings.
 10. Further the trial Court was faulted for failing to properly evaluate the evidence of DW2 – which was critical in determining the land that was encumbered with trust. DW2 stated that he got parcel No. 1200, an averment that was not contested by the Respondent. The Appellant concluded that the land that the Appellant held in trust is not the suit property as the same has been demonstrated to be intact since 1981 and even prior to the filing of the suit in the lower Court.
 11. It was submitted that it is the other lands that emanated from the subdivision of parcel 952 that were encumbered by a trust which lands were eventually transferred to the younger siblings. That it was the evidence of the Appellant that he held the land absolutely. That the land that should have been claimed by the Respondent through customary trust ought to have been parcel 1200 and any other portion arising from subdivision of parcel 952.

Analysis and determination

12. Having considered the appeal and all the material placed before the Court, the following issues are for determination:-
 - a. Whether trust in favour of the Respondent was proven;
 - b. Whether the Respondent is entitled to a share of the property.
13. The Respondent's claim is that the suit land is family land registered in the name of the Appellant to hold in trust for his siblings. That the Appellant subsequently shared portions of the land to 3 of his younger brothers upon attaining the age of majority. That the Appellant retained the resultant portion of land being the suit land and measuring 3 acres. That the Respondent demanded her share of the land in vain. That she occupied and cultivated the land from 1960 to 1985 when she was chased away. Subsequently, she moved to her husband's land at Karura where she was buried.
14. The Appellant on the other hand averred that he was to share the land only with his male siblings which he did, to Leonard, Fredrick and Peter Hinga according to the wishes of his late father. That his



father never gave land to any daughter but only sons. That none of the daughters from the 3 houses have demanded for land except the Respondent.

15. It is not in dispute that the parties are related. The Appellant is the brother of the late Alice Wakanyi Macua and the uncle of the Respondent who was substituted upon the death of Alice.
16. Evidence was led that the late Mzee Ndungi Kiroge had 3 wives namely Annabel Nguti, Hannah Njoki and Gakunga Ndungi. The parties to the suit are children of Annabel Nguti Ndungi.
17. Customary trust is one of the ways of acquisition of land in Kenya. It is a concept of law that fosters intergenerational trust as set out under Article 60 of *the Constitution* of Kenya.
18. I refer to the decision of Supreme Court of Kenya in Isack Kieba M'inanga Vs. Isaaya Theuri M'Lintari & Another [2018] eKLR where the 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 Vs. Kinuthia, that what is essential is the nature of the holding of the land and 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. 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.”

19. The Appellant has argued that no evidence was received by the Court in support of customary trust. That the suit land was not encumbered by customary trust and if there was any customary trust it could have been on parcel 1200 or other lands.
20. The evidence of the Appellant on trial is key in answering this question. He stated as follows in evidence:-

“ The land the subject of this suit belonged to my father. He shared Kiambaa/Kihara/1198 as my share and that is where I live. (Being referred to paragraph 11 of his statement dated 5/11/2018). Yes, I held the land in trust for my male siblings. This is because my grandfather used to drink alcohol and neighbours came and told me to hold the land in trust for my siblings because my father wanted to sell the land. All daughters were married and that is why I never gave them land. None of my father's daughter came to demand her share of land from me. It is only Alice Wakanyi my sister who is demanding her share from me. She is not demanding land from my brothers or rather, my father's sons.”



21. From the green card for parcel 1198, it shows the land was a resultant subdivision of 952. From the preceding parcels it is clear that the suit land held by the Appellant was encumbered by trust in favour of himself and his siblings.
22. DW2 led evidence that the land was family land registered in the name of the Appellant but held in trust. He demonstrated to the Court that he received his share of the family land that was the result of the subdivision of the mother title.
23. From the above am persuaded that customary trust was proven.
24. With respect to the question of whether the Respondent was entitled to the suit land, there is no evidence in support that the late Ndungi only wanted the land to go to his male children. It has not been disputed that the Respondent was not a daughter of Ndungi. The fact that other daughters have not claimed the land does not mean that the Respondent is not entitled. Moreover Article 27(1), (2) and (3) of *the Constitution* of Kenya outlaws discrimination on the basis of gender. It states as follows:-

“ Equality and freedom from discrimination.

27.

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

25. From the foregoing, I am satisfied that there are no grounds upon which I can interfere with the decision of trial Court. Consequently, the Appeal is found unmerited and accordingly dismissed.
26. Costs shall be in favour of the Respondent.
27. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 25TH DAY OF APRIL, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Applicant – Absent

Ogeno holding brief for Mosongo for Respondent

Court Assistants – Phyllis / Oliver

