



**Tororei & another v Tororei & 2 others (Environment and Land Appeal E024 of 2022) [2024] KEELC 4192 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4192 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT AND LAND APPEAL E024 OF 2022**

**L WAITHAKA, J  
MAY 16, 2024**

**BETWEEN**

**MATHIAS TOROREI ..... 1<sup>ST</sup> APPELLANT**

**AUGUSTINE MAINA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOHN KIMUTAI TOROREI ..... 1<sup>ST</sup> RESPONDENT**

**CHARLES KURGAT ..... 2<sup>ND</sup> RESPONDENT**

**BERNARD KURGAT ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Judgment of Hon. Charles Kutwa SPM delivered on 2nd November 2022 in Iten MCELC No. E23 of 2021)*

**JUDGMENT**

**Introduction**

1. By a plaint dated 30<sup>th</sup> May 2021, the plaintiffs (now appellants) instituted a suit in the lower court to wit Iten SPMC ELC Case No E028 of 2021, seeking judgment against the defendants for a declaration that the parcel of land known as Itong/Mutei/154 (hereinafter known as the suit property) is ancestral land; that the registration of the 1<sup>st</sup> defendant as the proprietor of the suit property is subject of a trust in equal shares in their favour; a permanent injunction to restrain the defendants by themselves, their agents and/or any other person acting on the defendants' authority from interfering with the plaintiff's right of enjoyment, use and occupation of the plaintiffs' share of the suit property; general damages; interest and costs (prayers paraphrased).



2. The plaintiffs' claim/suit was premised on the ground that the suit property is ancestral land; that the registration of the 1<sup>st</sup> defendant as proprietor of the suit property is subject of a trust in the plaintiffs' favour.
3. The plaintiffs pleaded that the suit property belonged to their father, Tororei Maina, deceased; that they (the plaintiffs) were brought up in the suit property; that their parents were buried in the suit property and that the suit property is their only known home (plaintiffs' have no other place as home).
4. The defendants filed a statement of defence and counterclaim, dated 21<sup>st</sup> June 2021, denying the plaintiffs' allegation that the suit property is ancestral land and that registration of the 1<sup>st</sup> defendant as proprietor of the suit property is subject of a trust in favour of the plaintiffs.
5. According to the defendants, registration of the 1<sup>st</sup> defendant as proprietor of the suit property is absolute/not subject to any trust in favour of the plaintiffs as claimed by the plaintiffs. The defendants further pleaded/contended that their ancestral home was in Kapterik and not Irong.
6. Terming the plaintiffs' allegation that the suit property is their only known home misleading, the defendants pleaded that each of the sons of their father, the late Toronei Maina, got their share of their ancestral land in Kapterik.
7. The defendants acknowledged that the 1<sup>st</sup> plaintiff had been occupying a small portion of the suit property but contended that he had been doing so as a licensee of the 1<sup>st</sup> defendant and not as a bona fide owner thereof.
8. Stating that the licence pursuant to which the 1<sup>st</sup> plaintiff occupied a portion of the suit property had been terminated, by way of counterclaim, the defendants sought judgment against the plaintiffs for an order of eviction of the 1<sup>st</sup> plaintiff from the suit property; an order of permanent injunction to restrain the plaintiffs from interfering with the 1<sup>st</sup> defendant's ownership, possession, occupation and use of the suit property, cost of the suit.
9. When the suit came up for hearing the plaintiffs and defendants reiterated their pleaded cases.
10. Upon considering the case presented before him, the learned trial magistrate held/observed:-

“The plaintiff avers that the suit land is family land encumbered with a trust and has urged the court to determine the trust and allocate the land to the four siblings, the parties included. The 2<sup>nd</sup> plaintiff and 1<sup>st</sup> defendant on the other hand have led evidence that the 1<sup>st</sup> defendant was allocated the land and later registered it in his name in 1977...The 1<sup>st</sup> defendant produced a title deed registered under his name in 1977. The plaintiffs or any other person never raised any issues until 2021 when this suit was filed. The plaintiffs never raised any issue before and after adjudication. They have not produced any evidence to show the suit land was family land before it was registered in the 1<sup>st</sup> defendant's name....Trust including customary trust must however be proved....Thus the burden of proof befalls upon the plaintiffs to prove existence of a customary trust.

Going through the pleadings and the evidence, there are many conflicting statements as to how the 1<sup>st</sup> defendant came to own the property.

The 2<sup>nd</sup> plaintiff has denounced the existence of a trust. It was his evidence that the suit land belongs to the 1<sup>st</sup> defendant having acquired it as an individual. At the time the 1<sup>st</sup> defendant acquired the land their father, Toronei Maina, was still alive so was their mother.



The plaintiffs have not explained why their late father was not registered as the owner, if indeed it was family land.

In fact the plaintiffs were adults at the time the suit land was registered in the 1<sup>st</sup> defendant's name. At the time, they (plaintiffs) managed to acquire separate parcels of land under their individual names. It is clear the plaintiffs had capacity to be registered as land owners hence there was no reason to register the suit land in the 1<sup>st</sup> defendant's name....

It was not enough for the defendants to claim that the suit land was ancestral. They needed to avail tangible evidence to show that the suit land was actually ancestral land. the 3<sup>rd</sup> plaintiff contradicted the evidence of the other witnesses. It is his position that the suit land belonged to their late mother, Saniego. This was contrary to the position taken by the other witnesses who allege that the suit land belonged to their late father, Tororei Maina.

That said, going by the pleadings, the evidence analyzed, the law and the material placed before me the plaintiffs' suit does not succeed to the extent that they have not proven customary trust. In the premises, I dismiss the plaintiffs' suit and allow the defendants' counterclaim with costs."

11. Aggrieved by the decision of the lower court, the plaintiffs appealed to this court on 21 grounds which can be reduced to one broad ground namely that the learned trial magistrate erred by dismissing their case and allowing the defendants' defence and counterclaim.
12. Pursuant to directions given on 31<sup>st</sup> October 2023, the appeal was disposed off by way of written submissions.

## Submissions

### Appellant's Submissions

13. In their submissions filed on 11<sup>th</sup> February 2023, the appellants have identified the following as the issues for the court's determination:-
  - i. Whether or not the 1<sup>st</sup> respondent holds the suit property in trust for himself and his mother Sanieko (deceased) and his siblings;
  - ii. Whether the judgment delivered on 6<sup>th</sup> November 2022 should be set aside and a permanent injunction issued to restrain the respondents from interfering with the appellants' right to the suit property.
14. On Whether or not the 1<sup>st</sup> respondent holds the suit property in trust for himself and his mother, Sanieko (deceased) and his siblings, reference is made to the case of *Isack M'Inanga Kiebia v Isaaya Theuri M'Lintari & another* (2018) eKLR where the Supreme Court listed the elements that would qualify a registered owner of land as a customary trustee and submitted that in the circumstances of this case, where the parties are siblings, the plaintiffs/appellants proved that registration of the 1<sup>st</sup> defendant/respondent as the registered proprietor is subject of a customary trust in favour of the 1<sup>st</sup> defendant/respondent and other siblings.
15. According to the plaintiffs/appellants, the evidence they adduced to the effect that the parties lived in the suit property in their childhood (prior to independence) and that the suit property was adjudicated when the entire family lived in it, negates a determination that registration of the 1<sup>st</sup> defendant/respondent was intended at rendering the other family members homeless.



16. It is the plaintiffs/appellants' case that the 1<sup>st</sup> defendant/respondent was registered as proprietor of the suit property because it was not practicable to list all members in the adjudication record.
17. It is contended that the family gave the name of one of the family members to hold the land in trust for others as was the practice that time.
18. Further reference is made to the case of *Mukangu v Mukangu* (Environment & Land Case 88 of 2015) (2022) KEELC 14787 (KLR) and submitted that the plaintiffs/appellants have up a case for interference with the decision of the trial court.
19. As at the time of writing this judgement, the respondents had not filed submissions or if they had, the submissions were not placed in the court file.

### **Analysis and determination**

20. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard see the cases of *Selle & another v Associated Motor Boat Co. Ltd* (1968)E.A 123, *Mwanasokoni v Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga v Kiruga & another* (1988)KLR 348.
21. As pointed out herein above, a review of the pleadings and the evidence adduced before the lower court, which evidence is aptly summarized in the judgment of the lower court reproduced herein above, shows that the suit property was registered in the name of the 1<sup>st</sup> defendant/respondent in 1977; that at the time the property was registered in the name of the 1<sup>st</sup> defendant, the plaintiffs were adults; that the plaintiffs have land registered in their names elsewhere and that apart from the 1<sup>st</sup> plaintiff, the plaintiffs do not live in the suit property and have never lived there. The evidence further shows that the plaintiffs' ancestral land is in Kapterik and not Irong.
22. Contrary to the plaintiff's pleaded case that they have no land elsewhere, the evidence adduced before the lower court shows that the plaintiffs have their own parcels of land in Kapterik.
23. Augustine Maina, who testified as PW5, gave evidence which contradicted that of the other witnesses by informing the court that the suit property belonged to his mother. He explained that the 1<sup>st</sup> defendant was registered as the proprietor of the suit property because his mother had no title deed.
24. DW1, Charles Kurgat, admitted that their parents (plaintiffs' and defendants') were living in the suit property and that their parents are buried in the suit property but stated that the parents were buried in the suit property according to Keiyo customs (the 1<sup>st</sup> defendant was their parent's first born).
25. DW2, Benard Kurgat, informed the court that the 1<sup>st</sup> plaintiff had been living in the suit property with his family and that his grandmother was buried in the suit property before he (the 1<sup>st</sup> defendant) was born. DW2 informed the court that he accommodated the 1<sup>st</sup> plaintiff in the suit property because his marriage had issues.
26. DW3, Barnaba Maina, informed the court that the plaintiffs are his brothers; that they had disputes before the chief over ownership of the suit property; that they did not agree. He further informed the court that the suit property belongs to the 1<sup>st</sup> defendant.
27. DW4, David Lemiso, informed the court that he knows the parties' family very well, they are his neighbours. Concerning the suit property, he stated that it belongs to the 1<sup>st</sup> defendant.



28. Arising from the pleadings filed in the lower court, the evidence and the grounds of appeal taken up by the plaintiffs/appellants, I find the sole issue for the court's determination to be whether the plaintiffs/appellants have made up a case for interference with the decision of the lower court.
29. As pointed out herein above, the plaintiffs/appellants premised their case on the ground that registration of the 1<sup>st</sup> defendant/respondent as the proprietor of the suit property is subject to a trust in their favour. Although the plaintiffs/appellants did not plead the exact type of trust claimed, from their pleadings, evidence and submissions it is clear that the plaintiff/appellants' claim is based on customary trust. This can be inferred from their claim that the suit property is ancestral land.
30. From the evidence adduced before the lower court, it is not in dispute that the suit property was at some point used as family land. It is common ground that the parties parents lived in the suit property and that upon the death of the parties' parents, the parents were buried in the suit property.
31. There is evidence that at the time the 1<sup>st</sup> defendant/ respondent was registered as the proprietor of the suit property, all the plaintiffs were of majority age and that the suit property is not the parties' ancestral home. According to the evidence adduced before the lower court, the parties ancestral home is Kapterik and not Irong.
32. Apart from proving that the suit property was, at some point in time occupied by their parents and that their parents are buried there, the plaintiffs did not prove that registration of the 1<sup>st</sup> defendant as the proprietor of the suit property was/ is subject to any trust in their favour.
33. I note that apart from the 1<sup>st</sup> plaintiff, none of the other plaintiffs or siblings of the 1<sup>st</sup> defendant ever laid a claim to the suit property. From the conduct of the parties, regarding possession and use of the suit property, I have no reason for buying the plaintiffs' claim that they are entitled to an equal share of the suit property on account of the pleaded trust. The only person who proved sufficient interest in the suit property, on account of his use and possession of a portion of the suit property is the 1st plaintiff. That use and possession, though, is not proof that the suit property is subject of any trust in his favour. The 1<sup>st</sup> defendant pleaded that his use and possession of the suit property was on account of permission or licence given to him by the 1<sup>st</sup> defendant.
34. Trust being a question of fact, it behooved the plaintiffs to not only plead it but also prove it by production of evidence.
35. The plaintiffs pleaded that they have no land elsewhere. The evidence adduced before the court proved otherwise. The evidence showed that the plaintiffs have land elsewhere given to them by their father.
36. Upon review of the evidence adduced in the lower court, I agree with the trial court that the evidence is incapable of proving the plaintiffs' pleaded case, on a balance of probabilities. I hasten to point out that the plaintiffs, through the testimony of PW5, and their submissions, attempted to depart from their pleaded case, by leading evidence to the effect that the suit property belongs to their mother, yet they had, in their pleadings pleaded that the suit property belongs to their father. That kind of evidence could not avail the plaintiffs the orders sought as parties are bound by their pleadings. In that regard see the case of *Raila Amollo Odinga & another v Independent Electoral & Boundaries Commission & 2 others* (2017) eKLR the Supreme Court stated:-

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised



and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”

37. Also see Order 2 Rule 6(1) of the *Civil Procedure Rules* which provides as follows:-

“No party may in any pleading make any allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.”

38. The upshot of the foregoing is that the appeal has no merits. Consequently, I dismiss it with costs to the defendants/respondents.

39. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 16<sup>TH</sup> DAY OF MAY, 2024.**

**L. N. WAITHAKA**

**JUDGE**

Judgment delivered electronically in the presence of:-

Ms. Mutai holding brief for Mr. Cheruiyot for the appellant

Ms. Chelogoi holding brief for Mr. Kenei for the respondent

Court Asst.: Christine Towett

