



**Gathua v Wainaina (Environment & Land Case E011 of 2023)
[2024] KEELC 4082 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4082 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E011 OF 2023**

LN GACHERU, J

MAY 9, 2024

BETWEEN

NICASIO WAINAINA GATHUA APPLICANT

AND

JOHN GATHUA WAINAINA RESPONDENT

JUDGMENT

1. Vide an Originating Summons dated 30th May, 2023, brought under Article 159 of *the Constitution* of Kenya, Order 37 Rule 7 of the Civil Procedure Rules, Sections 3 and 3A of the *Civil Procedure Act*, Section 28 and 68 of the *Land Registration Act*, the Applicant herein Nicasio Wainaina Gathua seeks the following reliefs:
 - i. That pending the inter-parties hearing and determination of the Originating Summons, the Court do issue Inhibitory Orders restraining the Respondent, his agents, servants and/or representatives from alienating, selling, disposing or interfering in whatsoever way with the parcel of land known as LOC.4/Muruka/1062.
 - ii. That pending the hearing and determination of the suit the court do issue Inhibitory Orders restraining the Respondent, his agents, servants and/or representatives from alienating or dealing in whatsoever way or disposing of the parcel of land known as LOC.4/Muruka/1062.
 - iii. That the Court be pleased to declare and issue a declaration that the Respondent holds in trust for the Applicant and his siblings ALL THAT parcel of land known as LOC.4/Muruka/1062, which the Respondent inherited from his father, the Applicant’s grandfather.
 - iv. That the costs of this application be provided for.”
2. The instant Originating Summons is supported by the grounds stated on its face, and on the Supporting Affidavit of the Applicant, Nicasio Wainaina Gathua sworn on 30th May, 2023.



3. The Applicant averred that he is a biological son of the Respondent, John Gathua Wainaina, who is the registered owner of the suit land herein, which he inherited from his father, the grandfather to the Applicant.
4. Therefore, it was his case that land parcel No. LOC.4/Muruka/1062 (the suit property), which is registered in the Respondent's name is family land. The Applicant further alleged that his paternal grandfather, who is the Respondent's father, is the original owner of the suit land, which land devolved to the Respondent following the demise of the original owner. He contended that the Respondent holds the suit property in trust for the Applicant and his siblings.
5. Further, it was his contention that the Respondent, who is his father has subdivided the suit land and he now wishes to dispose the said suit land to third parties thereby, disregarding the Applicant's interest in the suit property. He added that he has lived on the suit land since birth and has made substantial developments thereon which he stands to lose unless this Court grants the Orders sought.
6. The suit is resisted by the Respondent herein John Gathua Wainaina, through his Replying Affidavit sworn on 17th July, 2023. It is the Respondent's averment that as the registered owner, he holds indefeasible proprietorship rights over the suit land pursuant to Sections 24 and 25 of the [Land Registration Act](#) and is not holding the suit property in trust for his children.
7. Further, he contended that by his own choice, he allocated portions of the suit property to each of his sons including the Applicant. He denied having any intention of disposing the suit property to third parties.
8. The Respondent further argued that the obligation to establish the existence of a trust in respect of the suit property rests with the Applicant.
9. With the concurrence of the parties, the Court directed that the Originating Summons be canvassed by way of viva voce evidence.

Applicant's Case

10. PW1 Nicasio Wainaina Gathua testified in the Kikuyu language which was interpreted to English language by the Court Assistant, Joel Njonjo. The Applicant adopted his witness statement dated 30th May, 2023, together with his list of documents. He produced the list of documents as P Exhibit 1 to support his case.
11. Further, the Applicant stated that he comes from Muruka area and is a peasant farmer. On cross-examination by Mr. Nduati for the Respondent, he reiterated that the suit land is family land allocated to the Respondent by the Applicant's grandfather to hold it in trust for the Respondent's children.
12. It was his further testimony that the Respondent has declined to transfer portions of the suit land to the Applicant and his siblings and has rebuffed interventions by the area Chief in that regard. He admitted that the area Chief is not a witness in the suit.
13. The Applicant further testified that he has lived on the suit land since birth and has raised all his children on the said parcel of land. He admitted that he does not have any evidence to show that the suit property is subject to a registered trust.
14. It was the Applicant's further testimony that the Respondent occupies the position of a "Muramati" with respect to the suit property, which entails the Respondent's lack of authority to sell the suit land. He added that he did not understand the import of one being the holder of a title deed.



15. Further, he stated that he has never been chased away from the suit property. It was his testimony that he buried his wife on the suit land and the Respondent has threatened to exhume the remains of his departed wife from the property.
16. On re-examination, he testified that the suit land belonged to his paternal grandfather who allocated him a portion of the suit property, whereon he put up his house and in which he currently resides. The Applicant did not call any additional witness.

Respondent's Case

17. DW1 John Gathua Wainaina testified and adopted his Replying Affidavit dated 17th July, 2023. He stated that he is a peasant farmer and lives in Muruka village, and admitted that the Applicant is one of his sons.
18. It was his evidence that the suit herein is based on falsehoods, is misplaced and should be dismissed. He also confirmed that he is the registered proprietor of the suit land Loc 4/ Muruka/1062, which he acquired and was issued with title deed, and he is therefore the indefeasible proprietor of the suit land.
19. The Respondent denied that he is holding the suit land in trust for his children, the Applicant included. However, he confirmed to have subdivided the suit land in 2012, upon which he bequeathed each of his sons a portion thereon, the Applicant included, and he has developed his portion of land together with the other siblings.
20. It was his further testimony that none of his other children has registered dissatisfaction with the manner in which he had administered his property, and the Applicant is just on a frolic of his own.
21. He denied existence of any trust and stated that he allocated the Applicant a portion of his land out of good will as his son, but not due to existence of a trust. He claimed that the Applicant is just disgruntled and apprehensive for his own reasons, which reasons are not enough to warrant the court grant the Applicant the orders sought. He denied that he intends to sell the suit property to third parties and he urged the court to dismiss the Applicant's claim.
22. On cross-examination by Ms. Musyoka for the Applicant, it was his testimony that he has lived on the suit land his entire life with his children, including the Applicant. He added that the Applicant was allocated a portion of the suit property by the Respondent's father.
23. The Respondent further testified that he has not commenced any process of subdivision of the suit property. He also stated that he did not procure the consent of the Land Control Board to subdivide the suit land because he fell sick.
24. It was his further testimony that the title deed to the suit property bears his name. He added that he consulted the Applicant and his other children and wife sometimes in the past regarding subdivision of the suit property, but he did not finalize the process because he fell ill around the year 2012.
25. He also testified he allocated to the Applicant the portion of the suit property on which the latter currently resides. The Respondent further testified that he has allocated all his children an Acre of land each including the Applicant, who, he stated, is the beneficiary of a separate parcel of land measuring half an Acre. He disclaimed having any intention to dispose of the suit land. It was his testimony that he has shared the suit property among his children thereby, fulfilling the promise made to his father (the Applicant's grandfather).
26. After the viva voce evidence, parties filed their respective written submissions. The Applicant filed written submissions on 19th January, 2024 through the Law Firm of Kiarie Joshua & Company



- Advocates. It was submitted that pursuant to Section 28 of the *Land Registration Act*, a customary trust is one of the overriding interests, which is not stated in the register of registered land. It was the Applicant's further submission that the suit land is subject to a customary trust, and the same does not require registration.
27. The Applicant relied on the holding of the Supreme Court in the case of *Isack M'Inanga Kiebia Vs Isaaya Theuri M'Lintari* [2018] eKLR on the elements to be considered to prove existence of a customary trust. He stated that the Respondent confirmed that he inherited the suit land from his father (the Applicant's grandfather), which renders the suit property a family land. Further, it was submitted that during the trial, the Respondent admitted to having received the suit land from his father to hold in trust for the Respondent's children.
28. It was further submitted that the Applicant has demonstrated that he holds an interest in the suit land which the Respondent has disregarded by attempting to subdivide the suit property without the Applicant's consent.
29. The Respondent filed written submissions on 24th January, 2024, through the Law Firm of Mwangi Nduati & Co Advocates., wherein he identified two issues for determination by the Court as follows:
- “(a) Whether the Applicant has raised a reasonable cause of action?
(b) Who bears the costs of the Application?”
30. The Respondent cited the holding of the Court in the case of *DT Dobie & Co. (K) Ltd Vs Muchina* [1982] KLR, wherein the Court defined the term;
- “reasonable cause of action” to mean “an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim/prayer”.
31. It was further submitted that the Applicant failed to adduce evidence in support of his claim that the Respondent was engaged in the process of disposing off the suit property to third parties. He added that the third parties referred to by the Applicant as the purchasers of the suit land were not identified. It was further stated that none of the Applicant's siblings corroborated the allegations of selling the suit land.
32. The Respondent further submitted that he caused the subdivision of the suit property in year 2012, with the intention of procuring title deeds for each portion occupied by his children including the Applicant herein, who confirmed during the trial that he occupies his designated portion of the suit property.
33. The Respondent further submitted that the Applicant failed to discharge the obligation arising under Section 107 of the *Evidence Act* to prove that a customary trust exists in respect of the suit property. He cited the decision of the Court in the case of *Isack Kiebia M'Inanga vs Isaaya Theuri M'Lintari & Another* (supra), where the Supreme Court held;
- “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”
34. While the Respondent admitted that the suit property devolved to him through his father, he submitted that no evidence was led by the Applicant demonstrating that he was holding the suit land



for the Applicant and his siblings. He added that there are other remedies available to the Applicant having lived on the suit land for a period of more than 12 years.

35. On the issue of costs, he submitted that costs follow the event and the Applicant should bear the costs having failed to adduce evidence in support of the allegations made in the subject Application.
36. The above are the Pleadings of the parties, the evidence adduced in court, rival written submissions and cited authorities which this court has carefully read and considered. The court too has considered the relevant provisions of law and finds as follows;
37. In this Originating Summons, the Applicant had sought for three prayers. The 2nd and 3rd prayers were seeking issuance of inhibitory orders to restrain the Respondent and / or his agents or servants from dealing with the suit property Loc 4/ Muruka/ 1062, pending the hearing and determination of the Originating Summons and the suit. These two prayers are basically the same given that the Originating summons is still this suit. The prayers sought were inhibition orders pending the hearing and determination of the suit. The suit has been heard and is now being determined, and therefore these two prayers have been overtaken by events.
38. The only prayer pending determination is prayer No 4, which is for a declaration that the Respondent who is the registered owner of the suit property, and father to the Applicant is holding the suit land in trust for the Applicant and his siblings, since the Respondent inherited the suit land from his father(grandfather to the Applicant).
39. The allegations of existence of customary trust were vehemently opposed by the Respondent who is the father to the Applicant. In fact, this is a case involving a father and son, and should basically have gone for mediation, but escaped the screening at the Registry.
40. Be that as it may, the court has to determine whether indeed, the Respondent is holding the suit land in trust for himself and his children, the Applicant included. There is no doubt that the suit land is registered in the name of the Respondent herein John Gathua Wainaina, as is evident from the Certificate of official search dated 9th August 2010. The copy of the title deed, nor the Green Card were not attached and the court cannot find with certainty when the suit land was registered in the name of the Respondent, and its history.
41. However, the Certificate of official search is dated 9th August 2010, and therefore, it is clear that the land was registered in the name of John Gathua Wainaina, prior to 2012, and certainly the said registration falls under the Registered Land Act Cap 300 LOK (repealed).
42. Under the said Regime of Cap 300, section 27 provides that the registration of a proprietor grants such a registered proprietor absolute ownership with all rights and privileges appurtenant thereto. Further section 43, provides that the rights of such proprietor cannot be defeated, except as provided by the Act.
43. Under the said Act, instances that can defeat the rights of a proprietor of a parcel of land is proof of existence of overriding of interests, as are provided in section 30 of the said Act. This provision of law is now found in section 28 of the Land Registration Act. Section 28(b) provides as follows;

“28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(b) trusts including customary trusts.”



44. Therefore, even if the Respondent is the registered owner of the suit land, if there is proof of existence of customary trust, then his rights may be defeated.
45. It is trite that a claim of customary trust must be proved by the person asserting such claim. It is also trite that trusts including customary trusts must be proved, by facts or by availing sufficient evidence. The Court of Appeal in the case of *Mumo vs Makau* (2002) 1 E.A 170, stated that “ trust was a question of fact to be proved by evidence...” This position has been held by various other courts; See *Kanyi Muthiora vs Maritha Nyokabi Muthiora*, Nairobi Court of Appeal No. 19 of 1982; *Elija Ouko Matagaro & Another Vs Roselyne Dola Ouko& 4 others* (2017) eklr, *David Murimi Muriuki & Another vs Mwathi Kaba & Another Kerugoya ELC NO. 208/ 2013*.
46. Further, it is not in doubt that he who alleges must prove. See Section 107 of the [Evidence Act](#), which states;

“ 107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

47. Again sections 108 and 109 of the [Evidence Act](#) provide;

“ 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

48. In this instant suit, the Applicant is the one who has asserted and the burden of proof falls squarely upon him. The Applicant needed to call sufficient evidence to prove existence of customary trust. See the case of *Susan Mumbi Waititu –VS-Mukuru Ndata & 4 others* (19 of 2007) eKLR where the court held;

“As for trust, the plaintiffs must prove with cogent evidence that the suit premises were ancestral land and thus family land. In the circumstances of this case, the plaintiffs have miserably failed in this onerous task. The 1st defendant has deponed that he purchased the suit premises for value. Accordingly, it is not family land passed over through the ages. I have no reason to cast doubts over this averment. The plaintiffs themselves have not in the supporting affidavit deponed to anything to suggest that the suit premises were actually ancestral land. Trust cannot be imputed. It must be proved. In the absence of such proof, I find and rule that there was no trust envisaged by the 1st defendant in favour of the plaintiffs”



49. Further, in the case of *Elijah Ouko Matagaro & another v Roselyne Dola Ouko & 4 others* [2017] eKLR where the court cited decision in *Richard Nyamemba Auka & 2 Others –vs- Josephine Motarohi & 2 Others*, the court also held;

“The existence or not of a customary trust is a matter of fact. The alleged trust must be pleaded particularized and proved. ...Customary trust is classified as an overriding interest which means that it may affect registered land although it does not appear in the register...”

50. Consequently, the Applicant had a duty to call evidence and prove his case on the required standard of balance of probabilities. The elements to be considered in a claim for customary trust were set out by the Supreme Court in the case of *Isack Kieba Isack Kieba M’inanga v Isaya Theuri M’Lintari & another* [2018] Eklr, where it held as follows:

“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

51. From the above case, it is clear that the Applicant needed to prove that the suit land is an ancestral land. How was the Applicant to prove that? He needed to avail the Green Card of the suit land so that the court can trace the root of the title. So, when was the suit land first registered? Did it belong to the grandfather of the Appellant? Did the Respondent inherit it or he purchased the same? When was the land registered in the name of the Respondent and how? Without the Green card, this court cannot be able to find answers to the above questions.

52. It is evident that the Applicant only produced a Copy of the Certificate of Official Search, which cannot provide that answers being sought. Further, the Application for placing of caution is not enough to prove that the suit land is ancestral land. see the case of *Alice Wairimu Macharia vs Kirigo Macharia* (2019) eKLR, the court held that;

“the legal burden of proving existence of a trust rests with the one who is asserting a right under customary trust, and that person must prove that the suit property was an ancestral land, and one family member was designated to hold it on behalf of the rest of the family member. “



53. Courts have also held that customary trust is proved by facts and evidence. See the case of Njenga Chogera vs Maria Wanjira Kimani & 2 Others (2005) eklr, which referred to the case of Muthuita vs Muthuita (1982-88) 1klr 42, the Court of Appeal held that;
- “ Customary trust is proved by the person claiming it under, by leading evidence and trust is a question of fact which is proven by evidence. Further that a trust is never implied by the Court, unless there was an intention to create a trust in the first place.”
54. In the pleadings herein, the Applicant has alleged that the Respondent is holding the suit land in trust for himself, the Applicant and his other siblings. The Respondents testified that though he does not hold the land in trust, he subdivided his land in 2012, and has given each of his sons a portion where they have built their homes, the Applicant included. That none of the other sons are dissatisfied apart from the Applicant.
55. With the above denial, the Applicant ought to have called his other siblings to give credence to his allegations. He alleged that the area chief was also aware of the dispute and the customary trust and the intended subdivisions and sale. The said chief was not called as a witness to support this allegation. Given that customary trust is proved by facts, this evidence of a single witness is not sufficient to prove existence of a trust.
56. Further, the Applicant alleged that the Respondent has subdivided the land with intentions of selling the suit land to third parties. There was no evidence of such subdivision or evidence of such threat of selling the suit land to third parties. Who are these third parties? None of them came forward to confirm that he/ she was ready to purchase the alleged subdivision. The burden of proof was not discharged. See the case of Miller Vs Minister of Pensions (1947) 2 ALL ER 372, where the court held;
- “ That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal, it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”
57. The Applicant had also alleged that he placed a caution on the suit land, but the said caution was removed secretly. No evidence of such caution that had been placed on the suit land was produced as exhibit in court. As the court observed earlier, the application for caution is not a caution itself.
58. Without evidence of existence of customary trust, this court finds and holds that the Respondent who is the father to the Applicant and the registered owner enjoys all the rights of a proprietor as provided by section 24 of the [Land Registration Act](#).
59. Even if the Respondent inherited the land from his father, that was not automatic that he was holding it in trust for the Applicant. In the case of Jemutai Tanui vs Juliana Jепtepkeny & 5 others ELC No. 44 of 2013 (formerly HCC No. 60 of 2012) Eldoret, Munyao J. while dealing with the question as to whether a proprietor who inherited her land from her father automatically held the said land in trust for her children, held that there was no automatic trust arising from that inheritance, and the proprietor was not bound to consult her children when she wanted to sub-divide the land and sell it.
60. It was not enough for the Applicant herein to claim that the suit land was ancestral land. He needed to avail tangible evidence to show that the suit property was actually ancestral land, and that his father,



the Respondent was holding it in trust for the Applicant and his other siblings, which siblings never appeared in court at all to claim the suit land.

61. In the SCOK Petition No. 10 Of 2015 Isack M'inanga Kiebia Vs Isaaya Theuri M'lintari and Another(supra), the court while declaring that customary trust subsists to bid a registered proprietor held that "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."
63. Having analyzed the evidence as above, this court finds and holds that the circumstances of this court do not warrant a finding of customary trust at all.
64. Given that the Respondent who is the father to the Applicant has shown good will and even subdivided his land and given each portion to his sons, the Applicant should be grateful to him, and allow him to spend his sunset days peacefully, instead of dragging him to court.
65. Indeed, the Respondent, who is the father to the Applicant and other siblings, deserves peace and tranquility in his sun set years as he has the right to use his parcel of land in the manner he pleases as provided by the law. In the case of John Ndungu Muriithi versus Gideon Karegwa Ndungu and 5 Others H.C.C.No. 94 of 2004, Musinga J (as he then was) held; the Applicant has displayed unmitigated greed and utter selfishness by haranguing his aging father to court over his own parcel of land. The Applicant is seeking to inherit his father's parcel of land, while the father is still alive. This cannot be allowed to happen and is against the National Values enshrined in the Constitution of; human dignity, equity, social justice.
66. Having carefully considered the available evidence, this court finds that the Applicant has miserably failed to prove his case on the required standard of balance of probabilities. For the above reasons, this instant Originating Summons dated 30th May 2023, is found not merited and is dismissed entirely with costs to the Respondent herein.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA THIS 9TH DAY OF MAY 2024.

L. Gacheru

Judge

Delivered online in the presence of;

M/s Musyoka for the Applicant.

Mr. Nduati for the Respondent.

Joel Njonjo -Court Assistant.

L. Gacheru

Judge

9/5/2024

