



REPUBLIC OF KENYA



**Ndege v Nyaboke & another (Environment and Land Appeal
E005 of 2023) [2024] KEELC 4561 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4561 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E005 OF 2023**

JM KAMAU, J

MAY 9, 2024

BETWEEN

MORAA NDEGE APPELLANT

AND

JOSPHENE NYABOKE 1ST DEFENDANT

EZEKIEL MAINDA 2ND DEFENDANT

(An Appeal arising from the decision/Decree dated 8th of March 2023 in CM ELC Case No. 2 of 2021 at Nyamira and Formerly Kisii ELC Case No. 1184 of 2016 by Nyigei – P.M.)

JUDGMENT

1. The Appellant, Moraa Ndege, who was the Plaintiff in Nyamira Chief Magistrate’s court ELC Case No. 2 of 2021 filed a suit on 13/7/2010 seeking: -
 - a. An order of eviction, from the parcel of land LR. No. West Mugirango/Siamani/2226 and permanently restraining them from re-entry.
 - b. Damages for loss of use of the land from 2007 until eviction.
 - c. Costs of the suit.
 - d. Any other or further relief of the court may deem fit to grant.
2. Her case was that the Appellant was the registered owner of the suit property by transmission vide Kisii High Court Succession Cause No. 416 of 2008. The Respondents trespassed onto and unlawfully occupied a portion of the Appellant’s land and thereon put up temporary buildings and continued cultivating the same causing other acts of waste by plucking tea therefrom and destroying the boundaries.



3. At the hearing, the Appellant produced documents to buff up her case the same being;
 - a. Grant of Letters of Administration for the estate of her late father Ndege Obanyi Nyamora issued by the High Court, Kisii in Succession Cause No. 416 of 2008.
 - b. A certified copy of the Register for land parcel No. West Mugirango/Siamani/2226.
4. The Respondent filed a Defence and a counterclaim on 15/2/2011 denying the Appellant's claim and averring that the suit land LR No. West Mugirango/Siamani/2226 was held in trust by the Appellant for one Stephen Mainda since it was earlier on registered in the name of the late Ndege Obanyi and the husband to the Appellant to hold the same in trust for his step brother, the late Stephen Mainda Nyaura whose representatives are the Respondents who obtained probate in respect to his estate. Nyaura's parcel LR. No. West Mugirango/Siamani/2226 was being occupied by Manani Ndege's son, one Manani Ndege.
5. After the hearing, the Appellant's case was dismissed and Judgment given in terms of the counterclaim. The court held that the Respondents proved their case by showing that they are in possession and occupation of a portion of the suit parcel and have therefore ".....proved the key elements of customary trust....." The Court however did not state what the key elements of customary trust or any are. Being dissatisfied with the Judgment of the Court, the Appellant appealed to this Court on the following Grounds:
 1. The learned Trial Magistrate erred in law by applying section 28 of the Land Registration Act retrospectively thereby offending the principle of *lex prospicit non respicit* in that the Respondent herein had proved customary Trust to the portion of the suit land LR. No. West Mugirango/Siamani/2226.
 2. The learned Trial Magistrate further erred in law in finding of a customary trust by the Respondent on the suit land when the particulars of the said trust were not pleaded and particularized as provided for in Order 2 Rule 10 (1) (a) of the Civil Procedure Rules.
 3. The learned Trial Magistrate misdirected herself on the alleged minutes of meetings that were convened by the local chiefs of the area which clearly did not have definite clear and conclusive decisions over the dispute between the parties.
 4. The learned Trial Magistrate failed to go through the evidence of Christopher Mosoba Defence witness No. 1 in Civil Case No. 24 of 2007 who was a witness for the Respondent herein whose evidence was to the effect that he is the one who lives on the land that ought to belong to the Respondent herein and his family.
 5. The learned Trial Magistrate erred in law by holding that possession and occupation are key elements of determining the existence of a customary Trust.
 6. The learned Trial Magistrate decided the case against the weight of evidence on record.
 7. The learned Trial Magistrate erred in law in holding that the Respondents had a customary trust over land whose dimensions are uncertain/ undefined.
 8. The learned Trial Magistrate failed to consider the history of the suit land as presented before the court whereby it was very clear that the whole of the suit land had been registered in favour of Ndege Obanyi who had absolute and unfettered ownership and claim to the entire land to exclusion of the Respondent's and family members.



6. The Appellant therefore sought for Orders to set aside the Judgment of the subordinate Court and make a finding in favour of the Appellant as pleaded in the Plaint and dismiss the counter-claim by the Respondents. As well as costs of the Appeal and the lower Court.
7. To determine this Appeal, what are the elements of customary trust? I must point out from the onset that the claimant's (customary trust) proof that he is in actual physical possession and occupation of the land is not enough to prove customary trust. This is just one of the elements of the same. A customary trust could be implied if the claimant does not have any rights arising from actual occupation or possession of the land in question.
8. Courts are duty bound to investigate the intention, conditions and effect of any customary law before confirming or rejecting it. In the past, customary trusts have been the basis of protecting unregistered claimants. The Court of Appeal in *Isack Minanga Kiebia -vs. Isaaya Theuri Mlenan & Another* held that to establish a customary trust, certain elements must be investigated. The elements that would qualify a claimant as a trustee are:
 - a) The land in question was before registration, family, clan or group land.
 - b) The Claimant belongs to such family, clan or group.
 - c) 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
 - d) The Claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
 - e) The claim is directed against the registered proprietor who is a member of the family, clan or group.
9. In the case at hand,
 - a. Was the land family, clan or group land before it was registered in the name of Ndege Obanyi:
Yes.
 - b. Does the claimant belong to the said family, clan or group?
Yes.
 - c. Is the relationship too remote?
No.
 - d. Would the claimant also have been registered as proprietor of the land but for some intervening circumstances?
Yes.
 - e. Is the claim directed against the registered proprietor who is also a member of the family, clan or group?
 - f. Yes.
10. Accordingly, I find that the Appeal is unsuccessful and I dismiss it with costs to the Respondents in addition to the costs awarded to the Respondent in the lower court.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 9TH DAY OF MAY, 2024.



MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Brenda

Appellant: Mr. Momanyi

Respondents: Mr. Gichana

