



Khavere v Kavuludi & 3 others; Kisia (Interested Party) (Environment and Land Appeal 12 of 2022) [2024] KEELC 4939 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4939 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL 12 OF 2022**

**E ASATI, J
JUNE 13, 2024**

BETWEEN

CAROLINE KHAVERE APPELLANT

AND

PETER KHENDI KAVULUDI 1ST RESPONDENT

EMILLY KHAVERE 2ND RESPONDENT

FLORENCE KHAVAI 3RD RESPONDENT

HELLEN KHADI 4TH RESPONDENT

AND

JAMIN MISIGO KISIA INTERESTED PARTY

(From the judgement and decree dated 17/10/2022 in Hamisi PMC EL Case No. E025 of 2021)

JUDGMENT

1. The Appellant was the 2nd Defendant in Hamisi PMC EL Case No. E025 of 2021. The Appellant together with others were sued vide the plaint dated 25th October, 2021 by the Respondents herein over parcels of land known as Tiriki/Senende/5 and 106 and the resultant parcels after sub-division parcel No. Tiriki/Senende/106 namely; Tiriki/Senende/110, 111, 112. The prayers sought in the suit against the Appellant were that: -
 - a. The honourable court do find and declare that land parcels Tiriki/Senende/5 and Tiriki/Senende/106 were ancestral and that the registration of the 1st Defendant Jamin Misigo Kisia as proprietor was by trust for the Plaintiffs who were at all times beneficiaries entitled to the same under trust.



- b. The honourable court do find and declare that the sub-division of land parcel known as Tiriki/Senende/106 to create Tiriki/Senende/110, 111 and 112 and the subsequent transfer of the resulting parcels to the Defendants to the exclusion of the Plaintiffs was in violation of the existing customary trust and to that extent null and void for all purposes.
 - c. The sub-division of land parcels Tiriki/Senende/106 and the transfer of the resulting parcels to the Defendants having been found to be unlawful, be cancelled and the new titles revoked and the same revert to the original title in the name of the 1st Defendant.
 - d. The 1st Defendant be compelled to transfer land parcel Tiriki/Senende/106 to the surviving children of the 2nd wife for the benefit of the children of the said house OR in the alternative the 1st Defendant remains the registered proprietor but in trust to be recorded in the register of the land parcel Tiriki/Senende/106.
 - e. An order of this honourable court directed at the Land Registrar – Vihiga to register a prohibition on the suit land parcels Tiriki/Senende/110, 111 and 112 prohibiting any dealing or registration parcels or altering registration on the same.
 - f. Costs be recovered from the Defendants.
2. The record of appeal shows that in response to the Respondents' claim, the Appellant and the other 2 parties she was sued with filed a joint defence:- the 1st, 2nd and 3rd Defendants' Statement of Defence dated 3rd November, 2021 wherein they denied the Respondents' claim and contended that the suit land was never ancestral land, was never held in trust for the Respondents and that the same was bought by the 1st Defendant with the saving of the Appellant's mother and that the Appellant was gifted parcel no Tiriki/Senende/111 for her outstanding work of diligently educating and taking care of her siblings who include the Plaintiffs.
 3. The records shows further that the case was thereafter heard before the trial court which, vide the judgement dated 17th October, 2022, found that the Respondents had proved their case on a balance of probabilities and allowed their claim as contained in the plaint.
 4. Aggrieved by the judgement, the Appellant filed the present appeal vide the Memorandum of Appeal filed on 31st October, 2022. The Appellant seeks for orders that: -
 - a. The judgement and decree of the subordinate court be substituted with an order dismissing the Respondents' suit with costs.
 - b. The judgement of the subordinate court dated 17th October, 2021 be set aside and be substituted with a proper finding by this honourable court.
 - c. Costs of the appeal be awarded.
 - d. Any other relief that this honourable court deems fit and just to grant.
 5. The grounds of appeal as contained in the Memorandum of Appeal are that the learned trial Magistrate:
 - a. erred both in law and in fact by pronouncing judgement in favour of the Respondents when there was no legal or otherwise basis of doing so in light of there being no sufficient evidence adduced before her.



- b. erred both in law and fact by pronouncing judgement in favour of the Respondents whereas the Respondents had not adduced any evidence to show fault on the Appellant's part in acquiring proprietary rights to the suit parcel of land.
- c. erred both in fact and law by failing to take into account all material and relevant facts presented by the Appellant as to her acquiring the suit parcel of land through the mode of a gift.
- d. erred both in fact and law by not considering all the evidence adduced by the Appellant through witness testimony and exhibits.
- e. erred both in fact and law by holding that the Respondents had proved trust in the suit parcels of land without producing any documentary evidence.
- f. erred both in fact and law by proceeding to revoke the Appellant's title without due regard to her constitutional right to own property.
- g. misdirected herself by failing to apply or applying wrong principles on the existence of a trust in the suit parcel of land thus issuing orders which were manifestly defective in the circumstances.
- h. erred in fact and law in failing to consider the evidence of the Appellant.
- i. erred in law and in fact by relying on averments that were neither in the adopted statements of the Respondents or referred to during both examinations in chief and cross-examination.
- j. erred in law and fact by disregarding the evidence adduced concerning the conduct of the Respondents prior to their filing of the suit at Hamisi.
- k. erred in law and in fact by taking into account irrelevant factors and failing to take into account relevant factors thereby arriving at an erroneous judgement.
- l. the judgement of the learned Magistrate in the circumstances is unjust.

Submissions

6. The appeal was argued by way of written submissions.
7. It was submitted on behalf of the Appellant that there are two issues that emerge for determination namely: -
 - i. whether the 1st Defendant held the suit land under customary trust.
 - ii. whether the Appellant (sic) had duly gifted the suit property to her daughter Lilian Khavere the Appellant as a gift inter vivos.
8. On the first issue, Counsel submitted that the 1st Defendant in the suit was the 1st registered owner of the suit land having purchased the same. That there is no evidence on record to show that he inherited the land from his ancestors. That trust including customary trust must be proved. That it was a question of fact that must be proved by evidence. Relying on the provisions of sections 107, 108 and 109 of the *Evidence Act*, Counsel submitted that the burden of proof was on the Plaintiffs' (Respondents') herein to prove the existence of a customary trust. Counsel relied on the case of *Susan Mumbi Waititu -vs- Mukuru Ndata & 4 Others (19 of 2007)*eKLR where it was held that as for trust, the Plaintiff must prove with cogent evidence that the suit premises was ancestral land and thus family land. That in the instant case, the Plaintiff did not produce any documents or rather the history of registration to prove that the 1st Defendant Jamin Misigo inherited the suit land from his



forefathers. Counsel urged the court to find that it had not been proved that the 1st Defendant in the suit held the land under customary trust.

9. On the second issue of whether the land had been gifted to the Appellant, Counsel submitted that it was the 1st Defendant's evidence that he gifted the land to the Appellant for her immense assistance in educating her siblings and caring for him after he had been abandoned by the Plaintiffs (Respondents herein). That a gift inter vivos cannot be cancelled or reversed. Counsel relied on the case of *Bia –vs- Jam & Another* [2019]eKLR to support the submission.

Counsel submitted further that it is clear that the 1st Defendant willingly gifted the 2nd Defendant land NO. Tiriki/Senende/111 and transferred the same to her and therefore it cannot be revoked.

10. Written submissions dated 27th May, 2024 were filed by the firm A.B.L. Musiega on behalf of the Respondents. Counsel submitted that the issue for determination in the appeal is whether or not the trial Magistrate rightly held that the sub-division of land parcel NO. Tiriki/Senende/106 to create land parcels known as NO. Tiriki/Senende/110, 111 and 112 and the subsequent transfer of the resulting parcels to the Interested Party, the Appellant and Senende Tea Buying Centre was in violation of the existing customary trust. Counsel submitted that the Interested Party one Jamin Misigo Kisia is the biological father to the Appellant and the Respondents. That land parcel NO. Tiriki/Senende/106 was ancestral land where the second wife to the Interested Party had settled with her family. That the Interested Party had stated that he bought only a portion of the suit land and the rest of it was ancestral land. That the land was being used by one Magdalena who was the Interested Party's step-mother and that the parcel belonged to the Interested Party's father. That the Interested Party did not have the land sale agreement.
11. Counsel submitted further that the Respondents are the biological children of the Interested Party and that they are all entitled to benefit from the suit land which the Interested Party held in trust for them. That since the Interest Party held the suit property for the benefit of both the Appellant and the Respondents, then a customary trust is to be presumed to have been created in their favour. That there are no protected rights of proprietorship by the Interested Party who unlawfully sub-divided the suit parcel and transferred one of the resulting parcels to the Appellant as he failed to prove the said proprietorship rights.
12. That on the other hand, the Respondents were able to prove that they are children of the Interested Party and that the suit parcel was ancestral. That the suit parcel initially belonged to the Interested Party's father and the same was utilized by the Interested Party's step mother before her death.

That the Respondents proved the element of customary trust as outlined in the Supreme Court decision in *Isaac M'nunga Kieba –vs- Isaya Theuri M'inturi and Another* (201)eKLR. That the Respondents having met the requirements submit that the trial court was right to hold that there existed customary trust hence sub-division of land parcel NO. Tiriki/Senende/106 and the subsequent transfers were null and void for having violated the customary trust.

Issues for Determination

13. The sole and substantive issue for determination that emerges from the grounds of appeal and submissions made is whether or not the trial court erred in finding that the Respondents had proved the existence of a customary trust over land parcel NO. Tiriki/Senende/106 in their favour.

Analysis and Determination

14. This being a first appeal, the court reminds itself of the duty, under section 78 of the *Civil Procedure Act*, to re-examine and analyze the evidence placed before the trial court with a view to arrive at its



own independent conclusion. See case of *Selle & another vs Associated Motor Boat Company Ltd & Another* (1968) IEA 123) where it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact and law by the court below but has a duty to re-examine the evidence placed before the trial court.

15. The evidence placed before the trial court as can be seen from the proceedings (pages 142 to 162 of the record of appeal) comprises of the testimonies of four (4) witnesses and the exhibits they produced. PW1 was the 1st Respondent. He adopted the contents of his witness statement dated 24th October, 2021 as his evidence in chief. He stated that he was one of the children of the 1st Interested Party herein Jamin Misigo Kisia by the 2nd wife. That his mother was settled with her children on land parcel NO. Tiriki/Senende/106 and that that is where their home was established. That when his brother Hezron Amyunzu died, he was buried there.
16. That sometimes back, their father became hostile forcing his mother and his other siblings to vacate the land prompting him to purchase a plot in Lugari Scheme where he relocated and lives with his family. That in July, 2021 he learnt that his father had sub-divided land parcel NO. Tiriki/Senende/106 and created three (3) parcel Numbers NO. Tiriki/Senende/110, 111 and 112 which he transferred to himself, the Appellant and Senende Tea Buying Centre respectively.
17. That land parcels NO. Tiriki/Senende/5 and NO. Tiriki/Senende/106 are ancestral lands which were registered in the name of the 1st Interested Party herein as proprietor but on trust for the 1st Respondent, the two wives of the 1st Interested Party and their children who had been settled on the respective parcels.
18. That the 1st Interested Party had no absolute right to deal with the land parcels as he did to the exclusion of the Respondents.
19. PW1 produced Green Card and title deed in respect of the suit lands, certificates of official search for NO. Tiriki/Senende/110, 111 and 112, mutation form for parcel No. Tiriki/Senende/106, consent to transfer and photographs, a Will and translation thereof and minutes.
20. PW1 testified further that he was born on land parcel No. Tiriki/Senende/ 106 but that they left due to family squabbles. That the land was ancestral land which the 1st Interested Party inherited from PW1's grandfather one Moses Misigo.
21. On cross-examination, PW1 stated that the 1st Interested Party was the 1st registered owner of the suit land. That the land was registered in his name in 1973 and that there was no other owner. That his father – the 1st Interested Party, can sub-divide his property the way he wishes. He stated that if Caroline is given property by their father, there is no issue. That his father had a right to sub-divide his property. That the father showed him where to build and that Caroline has a right to be given property by their father. That Carolyne should be given land where the 1st family stays on parcel NO. Tiriki/Senende/5.
22. PW2 testified that the suit land was being used by 1st Interested Party's step mother by the name of Magdalena. That the suit property is ancestral land. That Carolyne should be given land where her mother had been given land.
23. PW3 stated that he is a neighbour to the parties. That Carolyne has a right to inherit property from her father. That Magdalena was the mother of the 1st Interested Party and that she cultivated one side of the suit land while Estella cultivated the other.
24. PW4 on cross-examination stated that he does not know how their father acquired the suit land.



25. On behalf of the Defendants, the 1st Interested Party herein (who was the 1st Defendant in the suit) and the Appellant testified as DW1 and DW2 respectively and called one witness. DW1 adopted the contents of his witness statement dated 3rd November, 2021 as his evidence in chief. He had stated in the witness statement that the land formerly known as NO. Tiriki/Senende/106 was registered in his name having bought it using his savings and the savings of his wife Rasoha, now deceased. That he did not inherit the land from his father. That the land is now registered as NO. Tiriki/Senende/110, 111 and 112.
26. That for her immense assistance in educating, clothing and feeding her siblings and taking care of him (1st Interested Party) he gifted the Appellant with a portion of the suit land now registered as NO. Tiriki/Senende/111.
27. On cross-examination, he confirmed that the Appellant was his daughter with his first wife. That he gave her some property in Parcel No. Tiriki/Senende/106. That Magdalena farmed thereon. That he bought the land in 1948 with his money. That as the registered owner of the land, he can distribute it.
28. DW2 was the Appellant herein. She stated that her father gave her land as gift for the help she had given him. That the Plaintiffs are her step-brothers who live in different areas. That her father and mother said they bought the land. That they were farming on one side and Peter's mother on the other side. That Peter encroached onto her portion. That part of the land was bought and part inherited.
29. DW3 had his witnesses statement adopted as his evidence in chief. He testified on behalf of the 3rd Defendant on how the 3rd defendant in the suit (Senende Tea buying Centre) bought land from the 1st Interested party.
30. I have considered the grounds of appeal, the submissions made and the entire record. The Respondents' claim was based on customary trust. It was submitted by the Respondents on the elements of customary trust as laid out by the court of Appeal in the case of Isaac M'nanga Kieba vs Isaya Theuri and another (2018) eKLR. In the present case it is not in dispute that the suit land was registered in the name of the 1st Interested Party as a first registration. That he is the one who willingly sub-divided it and gave a portion thereof to the appellant as a gift.
31. The 1st Interested party testified that he bought the land in 1948 with his savings and savings of the appellant's mother, deceased. That he did not hold the land in trust for the Respondents or any person. The Respondents' evidence was that he 1st Interested Party inherited the land from his father (the Respondents' grandfather) and hence it was ancestral land. That the said grandfather had placed one of his wives by the name Magdalena to use the land. That this proves that the land was ancestral land. My understanding of ancestral land is land belonging to the ancestors and or forefathers and which is passed from one generation to the next so that the current holder thereof holds it in trust for the next generation. In the present case the first evidence of ownership presented to court shows that the land belonged to the 1st interested party. There is no evidence that the land ever belonged to the 1st interested party's father. The evidence concerning Magdalena came from PW2 and PW3. While PW2 said Magdalena was the step-mother of the 1st Interested Party, PW3 stated that Magdalena was the mother of the 1st Interested Party. PW1 said nothing about Magdalene. Be that as it may, there was no evidence that the said Magdalena was given the land by the father of the 1st Interested Party. PW4's evidence was that he did not know how the 1st Interested Party acquired the suit land.
32. On customary trust the Supreme Court gave guidance in the case of Isaak Kieba M'inanga vs Isaaya Theuri M'Linturi and Another, where it highlighted the elements of a customary trust as:
 - 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.
33. Further in Ngugi Kamau and Another (Environment and Land case no 36 of 2020) [2022] KEELC 2261 (KLR and Juletabi African Adventure Limited and Another vs Christopher Michael Lockley [2017] eKLR it was held that the burden of proof lay with the party relying on the existence of a trust to prove the existence thereof. That to discharge the burden of the existence of a customary trust the claimant must prove that;
- a. The suit property was ancestral or clan land.
 - b. During adjudication and consolidation one member of the family was designated to hold on behalf of the family.
 - c. The registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family.
34. I find that no sufficient evidence was placed before the trial court to enable the court to conclude that the elements of customary trust had been proved. Similarly, no sufficient grounds were demonstrated for cancellation of the appellant's title.
35. This court finds that the trial court erred in its findings that a trust had been established and in cancelling the appellant's title.
36. Regarding costs of the appeal, though under section 27 of the *Civil procedure Act* costs ought to follow the event, for the reason that the parties herein are close family members, the court considers it to be in the interest of justice that each party bears own costs of the appeal.
37. The upshot is that the court finds that the appeal herein has merit and allows it as follows: -
- i. The judgment of the trial court dated 17/10/2022 is hereby set aside and substituted with a judgment dismissing the Respondents' suit in the lower court.
 - ii. Each party to bear own costs of the appeal.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED VIRTUALLY THIS 13TH DAY OF JUNE, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

**E. ASATI,
JUDGE.**

In the presence of:

Ajevi: Court Assistant.

Nabasenge for the appellant.



Malanda for the Respondents.

