



REPUBLIC OF KENYA



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**Justus v Ntarangwi & another (Environment and Land Appeal
E023 of 2023) [2024] KEELC 4787 (KLR) (12 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4787 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E023 OF 2023**

CK NZILI, J

JUNE 12, 2024

BETWEEN

STANLEY KIMATHI JUSTUS APPELLANT

AND

SILAS NTARANGWI 1ST RESPONDENT

EVANGELINE NCURUBI M'MUGWIKA 2ND RESPONDENT

*(Being an appeal from the Judgment of Hon. T.M Mwangi –
SPM Delivered on 15.09.2022 in Meru ELC No. 57 of 2018)*

JUDGMENT

1. The appellant, as the plaintiff at the lower court, sued the respondents as the defendants for breach of family trust over L.R No. Kirima/Kithithina/1/2281. It was averred that the suit land was initially registered under the name of the 2nd defendant to hold in trust for himself, the plaintiff, and another family member.
2. In breach of the said trust, the appellant averred that on 10.2.1999, the 2nd respondent fraudulently and without consent, secretly caused the land to be registered in the name of the 1st respondent without recognizing his overriding rights of occupation and developments in the suit land.
3. The appellant prayed for the cancellation of the title deed, replacement of the register with his name; a declaration that the registration in favor of the 1st respondent was illegal; inequitable; arbitrary; null, and void, and a permanent injunction barring and restraining the respondent's servants, employees or agents from trespassing into, transacting, dealing or interfering with the suit land.
4. The 1st respondent opposed the suit by a statement of defense dated 12.4.2012, denying that the suit land was ever registered in the name of the 2nd respondent. The 1st respondent averred that he was an innocent purchaser of the suit land with notice of any trust as virgin land on 14.2.1996, from the 2nd



- respondent before the joint proprietorship was severed. He denied that the suit land was ever family land, occupied or used by any family member(s).
5. Further, the 1st respondent averred that the acquisition of the suit land was regular, procedural, and in compliance with all the attendant processes after purchasing the same from the 2nd respondent, who had the capacity and held good title to the land free of any encumbrances. Further, the 1st respondent denied that the suit land ever belonged to the appellant's father neither were there any land disputes at the tribunal and the Magistrate's Court Meru over the land. The 1st respondent termed the suit as vexatious and an abuse of the court process.
 6. The 2nd respondent opposed the suit through a statement of defense dated 2.5.2012. The 2nd respondent averred that initially, the land was registered under her name as an absolute proprietor, free of any overriding rights or interests. However, the 2nd respondent admitted that the appellant had been on the land since childhood. The 2nd respondent denied that the prolonged occupation amounted to any trust as alleged or at all.
 7. Further, the 2nd respondent admitted that she sold and transferred the land on 10.2.1999, to the 1st respondent in order to meet her hospital bill after the appellant, as her son and others, became unable to offer her any financial assistance.
 8. At the trial, Stanley Kimathi Justus testified as PW 1 and adopted his witness statements dated 28.2.2012 and 30.3.2019 as his evidence in chief. He produced a copy of the green card, letters dated 4.8.2000 and 28.1.2010, land dispute tribunal proceedings, and a search certificate dated 24.3.2009 as P. Exh No's (1) – (5), respectively. Briefly, he told the court that initially, the land belonged to his father, Justus M'Mugwika, share No. 537 of Coffee Society Miriga Mieru, who passed in 1996, leaving his mother as the administrator of all his properties.
 9. PW 1 told the court that the 2nd respondent rented out the suit land to the 1st respondent, who unfortunately had sinister plans to purchase the land. After learning of the 1st respondent's motives in 1996, PW 1 placed a caution over the title on 3.12.1996 only to establish that the same was removed through Misc Application No. 26 of 1999 and the land transfer to the 1st respondent on 20.2.1999.
 10. PW 1 told the court that he filed a land dispute tribunal case which ordered that he should refund the purchase price. He said that he unsuccessfully appealed at the Embu Provincial Land Disputes Tribunal and later on filed a matter at Meru Chief Magistrates Court only to be referred to this court.
 11. PW 1 termed the acquisition of the land by the 1st respondent as fraudulent, irregular, out of collusion, and aimed at disentitling him of any share of his father's estate. Again, PW 1 told the court that the land was acquired out of assistance from his grandfather, who sold cattle to assist his parent in acquiring independent land since his land was small in size and could not accommodate six of his sons. PW 1 said that the land was transferred in the name of his mother after his father passed on, to hold in trust and later shared it with him for he was in school only to rent it out to the 1st respondent, a neighbour.
 12. PW 1 said that he had forewarned the 1st respondent not to buy the land but maintained that he was a mere licensee, only to learn later on that he had deposited some building materials on the land. PW 1 said that they visited the land office on 19.1.1999, only to find out that this caution was removed through a court order. He said that he visited the court to obtain an order and lodged a second caution on 28.12.1996.
 13. Eventually, PW 1 said that they complained to the ODPP's office, wrote a witness statement and investigations were lodged both in court and at the land registry. PW 1 told the court that the 1st



respondent was charged in Meru CMC Cr. Case No. 676 of 2015, only to be acquitted after offering a defense. He produced the criminal proceedings and judgment as P. Exh No's. 6 & 7.

14. In cross-examination, PW 1 told the court that his father passed on 6.6.1966. He denied that L.R No. Kirimara/Kithithina/1/281 was jointly owned by the 2nd respondent and one Paul M'Ituamwari in defined shares, which were subdivided to give rise to the suit land. Similarly, PW 1 denied that the 1st respondent bought the land through a sale agreement dated 14.2.1996, since his mother never disclosed the same to her children. PW 1 said that the 1st respondent had taken advantage of his mother to acquire the land.
15. M'Itangata M'Nderi testified as PW 2 and adopted his witness statement dated 28.2.2012 as his evidence in chief. PW 2 told the court that the suit land initially belonged to his later brother Justus M'Mugwika in 1959, whose wife was the 2nd respondent, and their marriage was blessed with two sons. He said that his late brother bought the land from his coffee shares No. 531 of Mirigamieru Coffee Society. He said that it was irregular to sell the land, leaving the two sons of his late brother landless. In cross-examination, PW 2 told the court that his elder brother left behind three children. He said that he was not a witness at the land disputes tribunal.
16. Cyrus Ntarangwi M'Ncebere testified as DW 1 and adopted his witness statement dated 12.4.2012 as his evidence in chief. He told the court that he bought the suit land measuring approximately 3 acres from the 2nd respondent by letter dated 14.2.1996 and acquired a title deed on 14.2.1999.
17. DW 1 said that the land initially belonged to the 2nd respondent jointly with one Paul M'Itwamwari, with defined shares and that he only bought the 2nd respondent's share. He said that after purchasing the land, he took vacant possession and established a homestead therein. He denied that the land belonged to the appellant's late father.
18. Moreso, DW 1 said that he bought the land for value and followed all the requisite procedures for acquiring land. DW 1 relied on the sale agreement dated 14.2.1996, acknowledgment receipt dated 11.1.1996, proceedings and award in Land Dispute Tribunal Case No. 101 of 2000, ruling in Misc Civil Application No. 26 of 1999 and proceedings in land dispute tribunal case No. 4 of 2001 as D. Exh No's. 1-5, respectively.
19. In cross-examination, DW 1 told the court that though a caution had been lodged against the title, the same was lawfully vacated through court order following notice to the cautioner as per D. Exh No. (5). He denied any award by the Land Dispute tribunal ordering the appellant to refund him the purchase price. DW 1 said that he was not aware that the land initially belonged to the 2nd respondent's late husband. He said that he believed that the 2nd respondent notified her children about the intention to dispose of the land; further, he denied that the reason for the sale was for the 2nd respondent to obtain a medical fee. From the court record, it appears the 2nd respondent did not testify in support of her statement of defense.
20. The appellant, through a memorandum of appeal dated 21.3.2023, faults the judgment of the trial court for:
 - i. Failing to find the suit land as family land, where the 2nd respondent had no right to sell it.
 - ii. Failing to find that the land was registered in the name of the 2nd respondent to hold in trust for him and his siblings.
 - iii. Failing to find that the 1st respondent conducted no due diligence before purchasing the land; otherwise, he would have established it was family land.



- iv. Failing to consider the caution placed by him was removed without his knowledge of an ex parte court order.
 - v. Failed to establish that the appellant had made several attempts to refund the purchase price, but all the time, the 1st respondent would decline.
 - vi. Finding the 1st respondent was an innocent purchaser without notice, yet at the time of the sale, caution was in existence.
 - vii. For not finding that the excuse by the 2nd respondent was an afterthought.
 - viii. For disregarding his testimony and that of his witness and its weight in proving the case.
 - ix. For making a finding contrary to law and evidence on record.
21. A court of appeal of the first instance has the mandate to review, rehearse, and reappraise the lower court record and come up with independent findings, facts, and the law while giving credit to the trial court, which had the opportunity to see and hear the witness testify first hand. See *Selle & another v Associated Motor Boat Co. Ltd* [1968] E.A 123, *Gitobu Imanyara vs Attorney Generla* [2016] eKLR.
22. The appellant complained that the suit land was initially family land held in the name of his mother in trust for herself and her children, who had been in occupation of it since childhood but was dwelt with in total disregard of his overriding rights or without his consent or approval. He termed the sale and transfer between the 1st & 2nd respondents as in breach of this family trust, irregular, fraudulent, and wrongful.
23. To sustain his claim, the appellant produced a copy of the record as P. Exh No. (1), showing that the title register was opened on 5.4.1996. Customary trusts are subsumed in Section 25(b) of the [Land Registration Act](#).
24. The ingredients of customary or family trust were laid out by the court in *Isaack M'Inanga Kiebia vs Isaaya Theuri M'Lintari SCoK* Petition No. 10 of 2015 (Civil Case [2018] KESC 22 (KLR) (October 5th, 2018) (Judgment). The court observed that under African customary law, rights of possession and occupation have no equivalent either in common law or in equity but are overriding rights. The court said that such rights were not subject to interference or disturbance, such as by eviction, save where inquiry is made, and they are not disclosed. It held that a court can declare customary trust as long as the same can be proved to subsist upon first registration and through evidence, such as if the land was reserved for family or clan use could be determined on case to case basis.
25. The court set out the guiding principles:
- i. The land in question was before registration family, clan, or group land.
 - ii. The claimant belongs to such family, clan, or group.
 - iii. The relationship of the claimant with the group, clan, or family is not so remote or tenuous as to make their claim idle or adventurous.
 - iv. The claimant could have been entitled to be registered as an owner or other beneficiary of the land, but in some intervening circumstances.
 - v. The claim is directed against the registered proprietor who is a member of the family clan or group.



26. In establishing whether a customary trust exists or not a court is entitled to enquire into the circumstances of registration to establish whether a trust was envisaged. Trust is proved through leading evidence. In *Juletabi African Adventure Ltd & another v Christopher Michael Lockley* [2017] eKLR, the court held that the law never implies and the court never presumes a trust unless, in a case of absolute necessity to give effect to the parties, intention.
27. In *MNK vs POM Initiative for Strategic Litigation in Africa (Isla) Amicus Curiae (Petition 9 of 2021)* [2023] KESC 2 (KLR) family (January 27th, 2023) (Judgment), the court cited Section 119 of the *Evidence Act* that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the ordinary course of natural events, human conduct, and public and private business in their relation to the facts of the particular case.
28. In this appeal, it is the appellant had alleged that the suit land initially belonged to his late father. Other than calling PW 2, the appellant failed to call for copies of records from the lands registry, predating the death of his late father in 1966. Registration of land is a matter of law and fact. P. Exh No. (1) was opened on 5.4.1996 in the name of the 2nd respondent.
29. In *John & 5 others vs Mugambi & 3 others E & L Case Civil Suit No. 45 of 2014* (2023, KEELC 327 (KLR) (25th January 2023) (Judgment), the court cited *T. Mwangi Maina v Davidson Kagiri Nyeri C. A No. 6 of 2011*, that equity detests unjust enrichment and suffered no wrong without a remedy and that tracing was an equitable remedy where equity should trace the suit property for the ends of justice to be served.
30. The copy of the records produced by the appellant did not bear the names of his late father or grandfather as one of the owners of the suit land. The duty was upon the appellant to ascertain that the land in question was before the registration, family land. As held in *Omollo vs Oduor* (Civil Appeal 46 of 2017 [2022] KECA 371 9KLR) (February 18th, 2022) (Judgment), evidence must be led to prove the existence of a trust, and each case is determined on its merits and the quality of evidence presented before the court. See Also *Kambo vs Mwangi (Civil Appeal 186 of 2017)* KECA 54 (KLR) (April 28th 2022) (Judgment).
31. The evidence of PW 1 and PW 2 failed to establish the nexus between the late Justus M'Mugwika, late wife, and one Peter M'Itwamwari and the appellant. Even though the appellant was aware that the land initially was L.R. No. Kirimara/Kithithina/12, going by a copy of the record, he did not lay any evidence of how the land would be jointly owned by the 2nd respondent and one Paul M'Itwamwari.
32. The appellant was categorical in his pleadings and testimony that the land from the names of his late father came to the name of the 2nd respondent. Unfortunately, that piece of evidence was not supported by any documents from the lands office. The appellant was unable to trace the land from 1966 to 1996 and establish that it was family or ancestral land.
33. More importantly, other than claiming that the land initially belonged to his late father, the appellant was unable to trace any roots to the land, by way of long possession or occupation, developments thereon such as houses, burial sites, or otherwise to show that he was living, utilizing, occupying, possessing and using the land in 1972-1996, when the title deeds were issued in the names of his mother and during the time the land was sold and transferred to the 1st respondent. DW 1 told the court that the suit land was vacant when he bought it, took vacant possession, and embarked on developing it.
34. There was no evidence that the appellant asserted any ownership or possessory rights if at all, he had been living on the land since childhood when the 1st respondents moved in. Evidence of any abandoned houses or structures belonging to the appellant was lacking. PW 2 was also unable to trace



the history of the acquisition of the land by his brother by way of documents from the coffee factory, to corroborate his assertion that this brother used the coffee cherry proceeds to acquire the land. None of the appellant's siblings and or neighbors came to testify in support of his claim.

35. The appellant was unable to produce evidence to show when the first registration of the mother title occurred before 1996. As much as the appellant tendered evidence on all the efforts he had made to assert his rights over the land status, from placing cautions on the title, filing a claim at the land disputes tribunal, moving to the area chief, lands office, and the Chief Magistrate's Court, the circumstances of the registration of the title to the land is what is critical for a court to establish if there was an intention to establish a family or customary trust.
36. Family or ancestral roots were crucial in establishing if the 2nd respondent was a trustee and the appellant was a beneficiary. See *Twalib Hatayan & another v Said Saggah Ahmed Al-Heidy & others* [2015] eKLR.
37. The appellant had laid blame on the 1st respondent for taking advantage of his mother to defraud her of the land. The circumstances of the sale and transfer did not suggest that the transferor had no intention to confer a beneficial interest upon the transferee. Even though the 2nd respondent didn't testify in support of her statement of defense, she had written a witness statement saying that the appellant had another parcel of land in Giaki and had also abandoned her while she was sickly and in need of medical fees.
38. The appellant failed to rebut the fact that his mother had the capacity and competence to sell and transfer the land. The appellant failed to lead evidence in attacking her words and conduct, as stated in her witness statement that she consciously sold and transferred the land. See *Peter Kyalo Mutinda v Elizabeth Katete Mutinda* [2018] eKLR.
39. Evidence of any intervention made by PW 2 on behalf of the appellant and her siblings to amicably settle the matter was lacking. Similarly, the particulars of fraud, illegality, or collusion were not pleaded and proved. Once the 1st respondent was acquitted of the alleged fraud or forgery of documents to acquire the land, the appellant was left with nothing to sustain his claim based on fraud, collusion, illegality, and undue influence to acquire or breach the alleged family trust.
40. The upshot is that I find the appeal lacking merits. The same is dismissed with no order as to costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 12TH DAY OF JUNE, 2024**

In presence of

C.A Kananu

Akwalu for the 1st respondent

HON. C K NZILI

JUDGE

