



**Kiruki & 3 others v Kiruki (Environment and Land Appeal
E044 of 2023) [2024] KEELC 5783 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5783 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E044 OF 2023**

CK NZILI, J

JULY 24, 2024

BETWEEN

MONICAH NKIROTE KIRUKI 1ST APPELLANT

CELINA MUKIRI KIRUKI 2ND APPELLANT

CATHERINE KIENDE KIRUKI 3RD APPELLANT

JOHN KITHINJI KIRUKI 4TH APPELLANT

AND

LUJINO KIRUKI RESPONDENT

*(Being an appeal from the judgment of Hon. J. Irura – PM
delivered on 15.11.2023 in Nkubu ELC No. E018 of 2021)*

JUDGMENT

1. The appellants sued their father, the respondent, at the lower court by a plaint dated 7.4.2021, claiming that he held LR No. Nkuene/Taita/2212, a subdivision of LR No. Nkuene/Taita/342, initially owned by their grandfather on account of customary or ancestral trust. It was averred that in breach of the trust described above, the respondent, without reference to or in consultation with the appellants and with the intention of disposing of the commercial storey building on the suit land, evicted and blocked the 3rd appellant from accessing her business which she has been operating since 2009. Further, the appellants averred that the respondent was dealing with the property and failed to account for or disclose its status to their detriment.
2. The appellants prayed for:
 - a. A declaration that the property is held by the respondent in trust.
 - b. Registration of the suit property jointly with them.



- c. Permanent injunction.
3. Through a statement of defence dated 13.4.2021, the respondent denied the claim. The respondent averred that he bought the suit land and solely developed it; hence, it was not ancestral or family land. Similarly, the respondent denied that the 3rd appellant was operating any business thereon.
 4. At the trial, Monica Nkirote Kiruki, John Riungu M'Itwamwari and Adrian Muthuri Jeremy testified as PW 1, 2 & 3. They relied on a supporting affidavit sworn on 7.4.2024 as their evidence in chief. The appellants told the court that as per their identification cards attached, they were children of the respondent, who was the registered owner of LR No. Nkuene/Taita/2212, a subdivision of LR No. Nkuene/Taita/342, initially registered in the name of the late Jeremano Inoti. The appellants produced copies of the green cards and official searches as P. Exh No. (1), (2) & (3).
 5. PW 1 told the court that the late grandfather subdivided the land and registered it in the name of the respondent to hold in trust for them since it was family land. PW 1 said that the grandfather had developed the land into a commercial storey building with several businesses at the time when he transferred it to the respondent, among them the 3rd appellant, who has been operating a business known as Gateway Bar and Restaurant since 2009, she told the court that since 29.3.2021, the respondent had denied the 3rd appellant access to her business and warned her that he was disposing of the suit property. PW 1 urged the court to grant the reliefs sought.
 6. In cross-examination, PW 1 told the court that the plot had two floors and that the respondent had disposed of other plots, among them one next to Turkwel petrol station. Similarly, PW 1 said that she had step-brothers and sisters.
 7. The appellants said they could not understand why their father had chased away Catherine Kiende from operating a club on the suit land.
 8. PW 2, as a cousin of the respondent, confirmed that he was the one who constructed the plot for the respondent's late father. PW 2 said that the respondent had a second wife whom he was staying with.
 9. PW 3, on his part as a brother of the respondent, confirmed that the land belonged to the respondent's late father, who had developed it before transferring the same to the respondent. PW 3 said that there was a family meeting where it had been agreed that the 3rd appellant retain the business she was operating on the plot.
 10. Lujino Kiruki testified as DW 1. He confirmed that the appellants were his children, though they had disowned him. DW1 said that his children were lazy and instead of working hard in their youth to generate their wealth, they had given him endless pressure, demanding his sweat which he acquired in his youth.
 11. Similarly, DW 1 told the court that even though he had allowed the 3rd appellant to operate a business on his commercial plot and pay monthly rent, she became evasive, following which he instructed auctioneers to levy distress only for her to rush to court to claim breach of trust.
 12. DW 1 said he needed income from his building for medication and other special needs since he was of advanced age; otherwise, his children were out to deprive him financially and perhaps for him to succumb to death so that they may inherit the property.
 13. Again, DW 1 added that none of the appellants assisted him in developing the land. DW 1 added that he bought the land as per an agreement dated 6.7.2006, which he produced as D. Exh No. (1), acknowledgement receipts as D. Exh No. (2) and a plaint in Nkubu PMCC No. 30 of 2007, where he had been sued by the seller as D. Exh No. (3). Additionally, DW 1 relied on rates and rent payment



receipts, approved building plans and green cards for LR No. Nkuene/Taita/2212, 342 & commercial building photographs as D. Exh No's. 4, 5, 6, 7 & 8, respectively.

14. In cross-examination, DW 1 said that Parcel LR No. 2212 belonged to Mwari Ndiara, who gave it to Jeremano M'Inoti, who eventually sold it to Severio Muthamia. Even though entry number (7) of P. Exh No. (1) showed that the respondent transferred the plot as a gift, DW 1 insisted that he bought the land. He said that even though his late father had constructed the plot he was the one who renovated it and built the upstairs floor. DW 1 admitted that he had two wives and that the appellants were children of the 1st wife. He denied neglecting them and said that he had given them some other land, which was in the process of being transferred to them by his advocates.
15. Further, DW 1 told the court that he bought the plot from his late father for a figure he could not recollect.
16. The appellants fault the trial court for:
 - i. Bringing up or introducing a sale agreement that was not produced before the court.
 - ii. Relying on evidence that was not produced before the court or on record to dismiss the suit.
 - iii. Ignoring evidence that the land was gifted to the respondent by their grandfather, hence formed part of a customary trust.
 - iv. Relying on evidence marred by conjecture and speculation to dismiss the suit.
 - v. Deciding on evidence, facts and law that was not before the court.
17. The mandate of this court is spelt out under Section 78 of the *Civil Procedure Act*. It includes rehearsing and re-assessing the lower court record with an open mind and coming up with independent findings on facts and the law while appreciating that the trial court, which had the opportunity to see and hear the witnesses testify. See *Abok James Odera t/a A.J Odera & Associates vs P.J Machira t/a Machira & Co. Advocates* (2013) eKLR, *Gitobu Imanyara & 2 others vs Attorney General* (2016) eKLR.
18. The primary pleadings before the trial court were the plaint dated 7.4.2021, accompanied by a list of documents dated 7.4.2021 with no witness statements. The statement of defence dated 13.4.2021 was accompanied by a list of documents dated 21.4.2021, 3.9.2022 and a list of witness statements. The three documents in the 1st defendant's list of documents included a sale agreement dated 6.7.2006, acknowledgement receipts, summons and plaint dated 5.4.2007.
19. The appellants' claim was based on customary trust. To prove customary trust, a party must establish:
 - 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 to such family, clan or group is not so remote or tenuous as to make the claim idle or adventurous.
 - iv. The claimant could have been entitled to be registered as an owner or beneficiary of the land, but for some circumstances.
 - v. The claim is directed against the registered proprietor who is a member of the family, clan or group. See *Kiebia vs M'Lintari and another* (Civil case 50 of 2015) (2018) KESC 22 (K.R.) 15th October 2018) (judgment).



20. The relationship between the appellants and the respondent was not disputed. The appellants produced P. Exh No's. (1), (2) & (3) being copies of green card for LR No's. Nkuene/Taita/342 and 2212. LR No. Nkuene/Taita/342 came under the name of Mwari Ndiara on 7.3.1972 and later to M'Inoti M'Mwari on 10.3.1973. It indicated that on 30.4.1986, the land was compulsorily acquired by the government vide gazette number 3012 of 3.10.1981 and later on 3.4.2007 came to the name of Zaverio Muthamia M'Marete, who partitioned it into LR No. 2212 and 2213.
21. The title register for LR No. Nkuene/Taita/2212 was opened on 12.10.2007 in the name of the respondent. A copy of the official search certificate shows that on 16.8.2010, the land was charged in favour of Equity Bank Ltd for Kshs.600,000/=.
22. The appellant's case was that the land initially belonged to the late Jeremano Inoti, who handed it over to the respondent as a commercially developed plot in 2007. Entry No. 7 on the copy of records indicated that the transfer was a gift.
23. DW 1, in his statement of defence, denied that the land was ancestral. He pleaded that he bought and solely developed the land from his late father. His statement of defence was accompanied by a witness statement and documents showing that he bought the land by a sale agreement dated 6.7.2006, from M'Inoti M'Itwamwari as Plot No. 84B for Kshs.450,000/=, who acknowledged receipt of the money as per acknowledgement receipts dated 11.2.2008. DW 1 also displayed a copy of the summons and a plaint where he had been sued for the balance of Kshs.250,000/= by the seller.
24. The trial court record shows that the respondent was not forthright in his evidence that he bought the land from his late father. He ruled out the alleged inheritance. He insisted there was a sale agreement on record and that after purchasing the building, he made renovations or improvements by putting up an extra floor.
25. Trust is a matter of fact. It is established through evidence showing an intention to create it. At the lower court, it was the appellants who were alleging that the registration of the suit land in favour of the respondent was effected by their late grandfather, with an intention to create a trust. Evidence of PW 1, 2 & 3, however, was not challenged by the respondent. The thread flowing from the pleadings and the evidence tendered by the appellants coupled with the respondent's documents is that the land was ancestral or family land.
26. The transfer and registration in the name of the respondent was subject to intergenerational equity. The respondent was silent on how his father could have sold the plot to him.
27. Given the preceding, my findings are that the appellants had proved the ingredients of customary trust. The upshot is that I find the appeal with merits. The lower court decree is overturned and replaced with an order allowing the claim.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 24TH DAY OF JULY, 2024

In presence of

C.A Kananu/Mukami

Appellants

HON. C K NZILI

JUDGE

