



Ngabulo v Hudson Juma Masibo (Suing as the Legal Representative of the Estate of David Nyongesa Masibo - Deceased) (Environment and Land Appeal E008 of 2023) [2024] KEELC 5372 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5372 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E008 OF 2023
EC CHERONO, J
JULY 18, 2024**

BETWEEN

KUNDU NALIYANYA NGABULO APPELLANT

AND

HUDSON JUMA MASIBO HUDSON JUMA MASIBO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DAVID NYONGESA MASIBO - DCD) RESPONDENT

(Being an appeal arising from the judgment delivered by Hon. P.Y. KULECHO (SRM) in Webuye PM's ELC Case No. 15 of 2019 on 17th January, 2023)

JUDGMENT

A) Introduction.

1. Vide a Memorandum of Appeal dated 1st February, 2023, the Appellant appeals to this court challenging the judgment dated 17th January, 2023 in Webuye PM-ELC Case No. 15 of 2019 wherein the court held that the Appellant held 3 acres in parcel Ndivisi/Muchi/622 in trust for the estate of the deceased and made a consequential order directing that the title thereto be transferred to the said estate.
2. Being aggrieved by this decision, the Appellant preferred an appeal on the following grounds;
 - a. That the learned trial magistrate to evaluate the evidence adequately before reaching her verdict.
 - b. The learned trial magistrate failed to adequately appreciate the law of succession in particular.
 - c. The learned trial magistrate failed to appreciate the law adequately as it refers to trusts.
 - d. That the learned trial magistrate considered extraneous matters when reaching her verdict.



- e. The learned trial magistrate's verdict failed to take account that the Respondent is not a beneficiary of the estate of the late Ngabulo Cornel.
- f. That the judgment is bad in law and has caused a failure of justice.

B) Parties Pleadings

3. The background of the case is that the Respondent sued the Appellant vide a plaint dated 25th April, 2019 and amended on 24th February, 2020 where he averred that the defendant and his father were step-brothers being sons of Ngabulo Cornel who during his lifetime gave specific parcels of land to his sons. He averred that upon sharing his land parcel No. Ndivisi/Muchi/622(hereinafter referred to as the suit land), the said Ngabulo Cornel retained ownership of the same until his demise in the year 1993. He further stated that in the year 1992, the said Ngabulo Cornel demarcated the said land parcel no. Ndivisi/Michi/622 into two portions measuring Five (5) acres and Three (3) acres respectively. He stated that the larger portion was gifted to the Appellant while the smaller portion was gifted to Hudson Juma Masibo (hereinafter 'the deceased').
4. The Respondent also averred that the deceased settled on his allocated portion where he lived with Ngabulo Cornel to his death and continued to reside therein until his demise in the year 1995 and was interred on the same portion of land. It was his evidence that sometime in the year 2014, the Appellant sought to evict the deceased's family from their portion through Webuye PMCC ELC Case no. 197 of 2014 which case was dismissed. He said that it was at this point that he discovered that the Appellant had caused the registration of the suit land parcel no. Ndivisi/Michi/622 in his name. The Respondents stated that the said registration was irregular, unlawful, unprocedural and fraudulent. He set out particulars of the alleged irregularities and further averred that the Appellant holds title to the three (3) acres comprised in the suit land in trust for the estate of Juma Masibo (deceased).
5. The Respondent therefore prayed for judgment against the Appellant for;
 - a. A declaration that parcel of land comprised in Ndivisi/Muchi/622 was irregular, unlawful, unprocedural and fraudulent and consequently an order cancelling the title and reverting it into the name of Ngabulo Cornel.
 - b. A permanent injunction restraining the Defendant (Appellant), his agents and or servants or whoever to interfere with and or impede the deceased's estate's quiet and peaceful enjoyment possession and user by those 3 acres comprised in title Ndivisi/Muchi/622.
 - c. In the alternative a declaration that the Defendant is holding those 3 acres in trust for the estate of the deceased and a consequential order direction that the title thereof be transferred to the estate.
 - d. Costs of this suit.
6. The Appellant in filed an amended defence dated 5th March, 2020 where he averred that the Respondent and his deceased's father each had his own piece of land. He stated that the Respondent's father John Masibo Ngabulo (deceased) was registered as proprietor of land parcel Ndivisi/Muchi/624 while his father Cornel Ngabulo(deceased) was interred in his own parcel of land i.e. parcel Ndivisi/Muchi/622. The appellant further averred that he acquired parcel Ndivisi/Muchi/622 after filing succession cause No. 16 of 2020 for the estate of his late father. He sought to have the Respondents case dismissed with costs.



C) Parties Evidence.

7. After the close of pleadings, the parties took directions and agreed to have the suit heard by viva voce evidence where the Respondent called 2 witnesses and the Appellant called one witness.
8. PW1 Hudson Juma Masibo gave sworn testimony and identified himself as the plaintiff and a resident of Sitikho Location. He was referred his witness statement dated 25/04/2019 which he adopted as his testimony-in-chief. He stated that the Appellant/defendant is his paternal uncle and step brother to his father John Masibo. He stated that his grandfather, the late Cornelius Kabulo Nato had three sons namely Hudson Juma(the deceased), John Masibo and Julius Kundu Nalianya(the Appellant). He testified that the suit land was demarcated by sisal plants and the gifting was done in the presence of several elders and the clan chairman. He testified that the deceased resided in his portion of the suit land until his death in the year 2005 and that the Appellant took out letters of administration for their late grandfathers' estate without their knowledge. It was his evidence that the Appellant destroyed the homestead of the deceased and interfered with the graves of their deceased grandfather, and their aunt who had been buried in the suit land. In support of his case, he produced a bundle of documents as P-Exhibit 1-15.
9. PW2 Henry Wafula Godia reiterated the evidence of PW1 and added that he is the regional chairman and the Appellants cousin. It was his evidence that the late Ngalubo Cornel gave 3 acres of the suit land to his grandson David Nyongesa who resided therein with him, his grandmother and aunt who subsequently died and were buried thereon. He testified that when the suit land was being shared out, he was present and so was the Appellant. He stated that he was later informed that the Appellant took out letters of administration for their grandfather without involving the rest of the family and thereafter transferred the entire suit land to himself disinheriting the estate of the deceased.
10. DW1 Kundu Nalianya Ngabulo Identified himself as the Defendant/Appellant and stated that he legitimately acquired title to the suit property. It was his evidence that the Respondent (David Nyongesa Masibo) was his brother's son and that his brother was allocated his own land by their father i.e. parcel Ndivisi/Muchi/624. He testified that the Respondent sued him in Bungoma ELC 197/2014 which case was dismissed for lack of evidence. DW1 stated that he filled a succession cause for his late fathers' estate and acquired the suit land which was his since his other brothers had already been allocated land by their father. It was his evidence that his land measures 3.0Ha.

D) Analysis and Determination.

11. As the first appellate court, this court's mandate is to re-evaluate the evidence adduced before the trial Court and its findings in order to come to its own conclusion as was succinctly stated by the Court of Appeal in *Okeno -Vs- Republic* (1972) EA 32 as follows: - "An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant's court own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses"
12. The Appellant challenged the trials courts' evaluation of the evidence presented where he argued that the Respondent was not a beneficiary of the estate of the late Ngabulo Cornel. I have read the Memorandum of Appeal, the extract of Appeal, written submissions filed by the parties and the court



record generally and identify two issues from the six grounds of appeal and hereby consolidate the six grounds to two grounds of appeals as follows

- (i) “Whether the trial magistrate failed to appreciate the law adequately as it refers to trust?”
- (ii) Whether the trial Magistrate failed to evaluate the evidence adequately before reaching her verdict?

13. It is not in dispute that the parties herein are related. It is not also in dispute that the Deceased was the Appellants nephew and they both claim land that originally belonged to one Ngabulo Cornel who is now deceased. Further, it is common ground that the Appellant is the registered owner of the disputed land. The Respondent on the other hand is the legal representative of the estate of David Nyongesa Masibo and asserts that the deceased’s estate is entitled to 3 acres of the suit land. Section 25 of the [Land Registration Act](#) No. 3 of 2012 provides for rights of a proprietor as hereunder: -

- 1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject
 - a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and,
 - b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register
- 2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26. Section 28 of the [Land Registration Act](#) provides for Overriding interests.

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—

- (a) deleted by [Act No. 28 of 2016](#), s. 11a.
- (b) trusts including customary trusts;

14. The case of *Twalib Hatayan & another v Said Saggar Ahmed Al-Heidy & 5 others* [2015] eKLR aptly summarizes the different types of trust that can arise and the court held;

“From the foregoing it is clear that registered land is subject to trust under Section 28 (2) and overriding interests under Section 28 which include under subsection (b) “trusts including customary rights.”

“... according to the Black’s Law Dictionary, 9th Edition; a trust is defined as

- “1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”



15. It is trite that a trust must be proved by credible evidence adduced by the person claiming that a trust exists. In the case of *Salesio M'itonga v. M'ithara & 3 Others* (2015) eKLR, the Court of Appeal stated:
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- “It is trite law that trust is a question of fact and has to be proved by evidence. In *Gichuki -vs- Gichuki – Civil Appeal No. 21 of 1981*, this Court held that a party relying on the existence of a trust must prove through evidence the existence of a trust...
16. In the case of *Justus Maina Muruku vs Jane Waithira Mwangi* [2018] eKLR the court noted that customary trusts are an encumbrances on land. That they are non-registrable rights which run with the land. The Court of Appeal in *Mbui Mukangu vs Gerald Mutwiri Mbui* C. A no. 281 of 2000 stated that customary trust is an intergenerational equity where the land is held by one generation for the benefit of succeeding generations. It further held that in order for one to establish a claim in customary trust, one had to prove that they are in actual physical possession or occupation of the parcel of land.
17. From the evidence presented, it is undisputed that the suit land was originally registered in the name of Ngabulo Nato Cornelius, the Appellant's father and the deceased's (David Nyongesa Masibo) grandfather. The Respondent asserted that the deceased was allocated 3 acres where he lived with his grandmother and aunt after his grandfather's death until his demise in 2005. It was further stated that their remains were interred on the disputed portion of the suit land. Additionally, the deceased's family is reported to have continued occupying the 3 acres until approximately 2014, when the Appellant sought their eviction.
18. This evidence was not rebutted by the Appellant. What the Appellant contended was that the said interment took place in his absence. He however doesn't deny that the deceased was allocated and occupied 3 acres of the suit land and had established his homestead thereon where his family still resides to date. The Appellant's further contention was that the Respondent's father had been allocated land and that he ought to claim a share from his father's inheritance.
19. In the *Isack M'inanga Kieba vs. Isaya Theuri M'lintari & another* [2018] eKLR the Supreme Court proceeded to identify some of the elements that would qualify a Claimant as a trustee. These elements are:
- a. The land in question before registration was family or 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.
20. On the basis of the evidence in the instant case, this court is persuaded that the elements in the cited case above have been proved on a balance of probabilities. That a trust has been proved in respect of the 3 acres of the suit land which is held by the Appellant in trust for the estate of the late David Nyongesa Masibo.
21. Therefore, it is my finding that the trial magistrate did not err in her judgment delivered on 17th January, 2023 and therefore the Appellants appeal fails.



22. In the upshot, the Appellants appeal lacks merit and the same is hereby dismissed. Since the parties herein are members of one family and in the interest of justice cohesion and co-existence, I order each party to bear their own costs.

DATED, SIGNED and DELIVERED AT BUNGOMA THIS 18TH DAY OF JULY, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Were for the Appellant
2. Respondent-present
3. Bett C/A

