



REPUBLIC OF KENYA



KENYA LAW
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**Isimbu v Isimbu (Environment & Land Case E010 of 2021)
[2024] KEELC 6304 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6304 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E010 OF 2021
TW MURIGI, J
SEPTEMBER 25, 2024**

BETWEEN

MUKENE ISIMBU PLAINTIFF

AND

MWALILI ISIMBU DEFENDANT

JUDGMENT

1. By a Plaint dated 6th April 2021, the Plaintiff prays for judgment against the Defendant for:-
 1. An order declaring that land parcel number Nzai/Nziu/683 is held and registered in the name of the Defendant to hold, in trust for Mukene Isimbu, Mwalili Isimbu and Tutwa Simba Mwikya.
 2. An order compelling the Defendant to subdivide Nzai/Nziu/683 into three equal portions and transfer the same to Mukene Isimbu, Mwalili Isimbu and Tutwa Simba Mwikya within 14 days and in default the Deputy Registrar of the court do sign all relevant documents including but not limited to transfers, mutation and application forms for effective transfer to the three beneficiaries.
 3. Costs of this suit be awarded to the Plaintiff against the Defendant.
 4. Any other and/or further relief that this Honourable court deems fit to grant.
2. The Defendant filed a statement of Defence dated 16th April 2021 denying the Plaintiff's claim.
3. The Plaintiff filed a reply to the defence dated 4th August 2021 denying the Defendant's allegations.

The Plaintiff's Case

4. The Plaintiff Mukene Isimbu testified as PW1 and called two witnesses in support of her case.



5. She adopted her witness statement dated 8th May 2021 as her evidence in chief. She also produced the list of documents dated 07/05/2021 in support of her case.
6. The Plaintiff testified that she is the daughter of the late Wanzuu Isimbu the owner of the suit property. She testified that the suit property is ancestral land and that only three children of Wanzuu Isimbu were entitled to share the same. She went on to state that her son and the wife to her nephew have all along cultivated on the suit property without any objection from the Defendant. She stated that under the Kamba customary law land would be set aside for unmarried women as well as for married women in case they divorced. She further testified that under the Kamba customary law she is a beneficial owner and is therefore entitled to a third of the suit property since she never got married. It was her testimony that the suit property was surveyed and registered in the name of the Defendant to hold in trust for the family in accordance with the Kamba customary law since women could not be registered as owners of land.
7. She went on to state that they co-existed peacefully and openly recognised the suit property as ancestral land until sometime in 2021 when the Defendant attempted to sell the suit property without their consent. That in a family meeting held on 26th February 2021, the Defendant admitted that the suit property was ancestral land and agreed to cancel the sale and subdivide the land amongst them. She further testified that the Defendant fraudulently failed to register the trust in the land register and subdivide the suit property into three portions. She urged the court to grant the orders as sought in the plaint.
8. On cross examination, she testified that under the Kamba customary law, women could not be registered as owners of land. She testified that three out of eight children of the late Wanzuu Isimbu were entitled to the suit property since the other children were married. She testified that the suit property was not subdivided and that they all cultivated on the same land.
9. On re-examination the Plaintiff testified that the suit property was registered in the name of the Defendant to hold in trust for his unmarried sisters.
10. PW2 Alice Mulee Kiawa testified that she is a sister to both the Plaintiff and Defendant herein. She further testified that the suit property was ancestral land and belonged to their late mother. She further testified that under the Kamba Customary Law, the Plaintiff is entitled to a third of the suit property because she never got married. She went on to state that the suit property was surveyed and registered in the name of the Defendant because under the Kamba customary law, women could not be registered as owners of land. She further testified that in a meeting held on 26th February 2021, the Defendant admitted that the suit property was ancestral land and agreed to cancel the sale and subdivide the suit property amongst them.
11. She further testified that unmarried and divorced women were entitled under the Kamba customary law to a share of the ancestral land and added that the Plaintiff's share of the suit proper was registered in the name of the Defendant.
12. In conclusion, she testified that the Defendant fraudulently caused the suit property to be registered in his name by failing to register the trust.
13. On cross examination, she testified that the suit property initially belonged to their grandfather who later gave it to their late mother. She testified that the Defendant holds the suit property in trust for the Plaintiff.
14. On re-examination she testified that they co-existed peacefully on the suit property before their elder brother passed away.



15. PW3 Mutuku Tutu Ingu testified that he is a grandson of the late Wanzuu Isimbu. He testified that the suit property was registered in the name of the Defendant because he was the only son available when the survey exercise was being undertaken. He asserted that he is entitled to a third of the suit property because his late father was the son of the late Wanzuu Isimbu. Concluding his evidence, he stated that the Defendant fraudulently caused the suit property to be registered in his name by failing to register the names of the other beneficiaries in the land register.
16. On cross examination he testified that the suit property was not subdivided and that it belonged to his grandmother. He testified that under the Kamba customary law women could not be registered as land owners. He confirmed that the Plaintiff never got married and added that her son was residing on the suit property.

The Defence Case

17. The Defendant Titus Mwalili Mwikya testified as DW1 and called one witness in support of his case. He adopted his witness statement dated 7/09/2021 as his evidence in chief. He also produced the list of documents dated 7th September 2021 in support of his case.
18. DW1 testified that he is the son of the late Wanzuu Mwikya and that he is the registered proprietor of the suit property. He stated that the suit property initially belonged to their late grandfather Thati Mutweia. He went on to state that he was allocated the suit property in the late 1960s after his late grandfather's family distributed his parcels of land amongst the male family members. He further testified that the suit property was surveyed and later registered in his name in the year 1970/71 when the land adjudication exercise was undertaken and the same happened for every male member of Thati Mutweia's family who acquired land during the distribution exercise in the late 1960s.
19. He stated that their late mother was not the legal owner of the suit property as it was amongst the several parcels of land belonging to his late grandfather.
20. He further testified that the Plaintiff was married as at the time when the family land was distributed. He further stated that under the Kamba customary law, married women could not inherit land from their parents. He testified that the clan held a meeting regarding the suit property and resolved that the Plaintiff should go back to her matrimonial home. He testified that his mother gave him the suit property to subdivide it amongst his six siblings. He asserted that the Plaintiff was not entitled to a share of the suit property.
21. On cross examination, he testified that he did not purchase the suit property and reiterated that his mother gave him the suit property together with his siblings.
22. He admitted that under the Kamba customary law, the first son would be registered as the owner of the land in the absence of the father and that was the reason why the suit property was registered in his name. He added that under the Kamba customary law his siblings were allowed to reside and cultivate on the suit property. He further testified that his late mother used to cultivate on the suit property before she passed on.
23. He stated that his father was alive in the year 1960 when the land was subdivided. He denied attending a meeting with his sisters to discuss the suit property and insisted that he only attended the clan meeting held in his house because he wanted the clan to help him to subdivide the suit property amongst his siblings.
24. He testified that he gave the Plaintiff a portion of land to cultivate because she had left her matrimonial home. He testified that his father was not alive when his grandfather gave land to his grandsons.



25. DW2 Mbengwa Mangoka adopted her witness statement dated 07/09/2021 as her evidence in chief. She testified that she was married to the late Mangoka Thati, an uncle to the parties herein. It was her testimony that she witnessed the Plaintiff's marriage to her first husband in the mid-1960s.
26. She further testified that she witnessed the distribution of land belonging to Thati Mukoma to the male siblings in the late 1960s. That during the land distribution exercise, the suit property was allocated to the Defendant as ancestral land. She went on to state that the Plaintiff was married as at the time when their grandfather subdivided his land amongst male the siblings. She added that no land was given to any of the Mukoma family daughters including the Plaintiff. She testified that the Plaintiff left her matrimonial home and was currently residing on a parcel of land that was distinct from the suit property where together with her grandchildren they had constructed their homes. It was her testimony that the Plaintiff's sisters were all married and were not demanding for any land.
27. On cross examination she stated that the Defendant was given the suit property by his grandfather during his mother's lifetime. She denied the allegations that the Defendant was holding the suit property in trust for his siblings.
28. She admitted that the suit property was ancestral land and added that she was present when the land was subdivided on 9/9/2019. She testified that she attended the meeting held on 8/4/2021 whose agenda was to settle the instant case out of court.
29. After the close of the hearing both parties agreed to file and exchange their written submissions.

The Plaintiff's Submissions

30. The Plaintiff's submissions were filed on 16th November 2023.
31. On her behalf, Counsel outlined the following issues for the court's determination:-
 - a. Whether the Plaintiff has made a case for the existence of a customary trust over land parcel No. Nzai/Nziu/683 and that the Defendant is registered as the proprietor of the same to hold it in trust for himself, the Plaintiff herein and Tutwa Isimbu Mwikya?
 - b. Whether the Plaintiff is entitled to the reliefs sought?
 - c. Who should bear the costs of the suit?
32. As regards the first issue, Counsel submitted that the Defendant was registered on the suit property to hold in trust for the Plaintiff and the other beneficiaries of the Estate of Wanzuu Mwikya thereby giving rise to a customary trust.
33. Counsel submitted that the Plaintiff has satisfied the requirements of a trust as set out by the Supreme Court in the case of *Isack M'Nanga Kieba v Isaya Theuri M'Lintari & Another* (2018) eKLR. Counsel further submitted that the onus lies on the party alleging the existence of a trust to prove it through evidence. To buttress this point, Counsel relied on the case of *FPS V SKM* (2020) eKLR
34. Counsel submitted that based on the evidence adduced by the Plaintiff, the suit property initially belonged to their grandfather, Thati Mutweia who subsequently divided it amongst his children including their late mother, Wanzuu Mwikya. Counsel submitted that the Defendant caused the portion allocated to his mother to be registered in his name in trust for the beneficiaries of the Estate of Wanzuu Mwikya.
35. Counsel further submitted that the Plaintiff has proved the necessary elements of a trust as the suit property is ancestral land that was registered in the name of the Defendant in accordance with the



- Kamba customary law. Counsel further submitted that the Defendant admitted that he did not purchase the suit property.
36. Counsel contended that the suit property being ancestral land and having been distributed in the late 1960s is governed by the Kamba customary law since the *Law of Succession Act* commenced on 1st July 1981.
 37. Counsel argued that the Estate of Wanzuu Isimbu ought to be in tandem with the Kamba customary law as the Defendant was allocated the suit property in the year 1960 and later registered during the land adjudication process before the commencement of the *Law of Succession Act*. Counsel argued that the registration of the Defendant on the suit property does not negate the fact the he was holding the suit property in trust for the Plaintiff and other beneficiaries of the estate because an overriding interest in a parcel of land need not be indicated in the land register.
 38. With regards to the second issue, Counsel submitted that the Plaintiff is legally entitled to 1/3 of the suit property as she had proved that the suit property is ancestral land and constitutes a customary trust.
 39. On costs, Counsel submitted that the Plaintiff has proved her case against the Defendant on a balance of probabilities and is therefore entitled to costs in line with Section 27 of the *Civil Procedure Act*.
 40. To buttress his submissions, Counsel relied on the following authority:
 - a. *Mary Wanjiru Mwangi & 4 Others v Eunice Wanjiru Igamba (sued as the Administrator of the estate of the late Peter Igamba Njoroge) & Another (2016) eKLR.*

The Defendant's Submissions

41. The Defendant's submissions were filed on 7th March 2024.
42. On his behalf, Counsel identified the following issues for the court's determination:-
 - a. Whether the Plaintiff has proved the existence of a trust?
 - b. Whether the Plaintiff is entitled to the prayers sought?
43. As regards the first issue, Counsel submitted that the Plaintiff has failed to prove the basic requirements of a customary trust. Counsel submitted that the Plaintiff did not challenge the registration of the Defendant on the suit property. To buttress this point, Counsel relied on the case of *Alice Wairimu Macharia v Kirigo Philip Macharia (2019) Eklr* where the court stated as follows:-

“The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must prove that(a) the suit properties were ancestral 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 on behalf of the family. In essence, one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant”. Counsel further relied on the case of *Juletabi African Adventure Limited & Another v Christopher Michael Lockley (2017) eKLR* where the court held that:-

“ It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because: “The law never implies, the court never presumes a trust but in case of absolute necessity. The court will not imply a trust save in order to give effect to the intentions of the parties. The intention



of the parties to create a trust must be clearly determined before a trust will be implied.”

Counsel submitted that the Plaintiff failed to discharge the burden of proving that the suit property is ancestral land and that the Defendant was holding it in trust for the other beneficiaries.

44. With regards to the second issue, Counsel relied on Section 26 of the *Land Registration Act* to submit that the certificate of title issued by the Land Registrar is prima facie evidence that the person named is the absolute and indefeasible owner of the land. Counsel submitted that the Plaintiff failed to demonstrate that the Defendant was holding the suit property in trust for her or that he acquired the title fraudulently.

45. Concluding his submissions, Counsel urged the court to dismiss the suit with costs.

Analysis and Determination

46. Having considered the pleadings, the evidence on record and the respective submissions the only issue that arises for determination is whether there exists a customary trust between the parties over the suit property.

47. The Black’s Law Dictionary 9th Edition defines a trust as follows:

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

48. A customary trust falls within the ambit of the proviso to Section 28(b) of the *Land Registration Act* which provides as follows:-

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.
- b. trusts including customary trusts.

49. It is clear from the above provision that the registration of a person as a proprietor of land does not automatically exclude any obligation to which such proprietor may be subject as a trustee. The overriding interests such as customary trust need not be noted on the register. These are non-registrable rights which run with the land.

50. The Plaintiff is seeking for a declaration of a customary trust in the suit property. The Supreme Court in the case of *Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another* [2018] eKLR, articulated the elements which a person must prove to demonstrate the existence of a trust as follows:-

“(52) Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered *Land Act*. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for



family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land
2. The claimant belongs to such family, clan, or group
3. 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.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

51. Customary trust is a matter of evidence and not inference. The burden of proof lies with the person who wishes the Court to make a finding as to the existence of such trust. It is an issue both of fact and law which requires serious demonstration through proper evidence.

52. Similarly, in the case of *Salesio M’itonga v M’ithara & 3 others* (2015) eKLR the Court of Appeal held that:-

“It is trite law that trust is a question of fact and has to be proved by evidence.”

53. Turning to this case, the following issues are not in dispute that:-

1. The Plaintiff and Defendant herein are siblings.
2. The Defendant is the registered owner of the suit property.
3. Under the Kamba customary law, the eldest son would be registered on land in the absence of the father.
4. Under Kamba customary law, women could not be registered as owners of land.

54. It is the Plaintiff’s case that the suit property is ancestral land belonging to their late mother. PW1, PW2, PW3 testified that the suit property initially belonged to their grandfather Thathi Mutweia



- who later gave it to their mother. It was their testimony that the suit property is ancestral land. Their evidence was corroborated by DW2 who admitted in her evidence that the suit property is ancestral land.
55. The Defendant on the other hand admitted that the suit property initially belonged to their late grandfather Thathi Mutweia. It was his testimony that his late mother gave him the suit property to share it out amongst his siblings and added that he did not purchase the same.
 56. The question that begs for answers is how the Defendant was registered as the proprietor of the suit property. It is not in dispute that the suit property was surveyed in the late 1960s. The Plaintiff and her witnesses testified that during the land demarcation period, the suit property was surveyed and registered in the name of the Defendant to hold in trust for his siblings in accordance with the Kamba customary law since women could not be registered as owners of land.
 57. According to PW3, the Defendant was registered on the suit property to hold in trust for the other beneficiaries because he was the only son available when the land adjudication exercise was undertaken.
 58. The Defendant on the other hand asserted that he is the absolute proprietor of the suit properties by virtue of his registration and issuance of a title deed in his name. He testified that he acquired the suit property after land belonging to their late grandfather was distributed amongst the male family members and denied holding it in trust for the Plaintiff.
 59. In his evidence in chief, the Defendant admitted that he did not purchase the suit property and that his mother gave him the land together with his siblings. He admitted that under the Kamba customary law, the first son would be registered on the land in the absence of the father and that is the reason why the suit property was registered in his name. The Defendant did not lead any evidence to demonstrate that his late grandfather's family allocated the suit property to him. The Defendant did not call any witness from his grandfather's family to corroborate his testimony. From the foregoing it is clear that the suit property is ancestral land
 60. It is not in dispute that the late Wanzuu Isimbu used to cultivate on the suit property. The Plaintiff led evidence to show that her son and her nephew's wife have all along cultivated on the suit property without any objection from the Defendant.
 61. From the Plaintiff's evidence, it is clear that the Defendant was registered on the suit property to hold in trust for his siblings in accordance with the Kamba customary law. There is evidence that the Plaintiff, the late Wanzuu Isimbu used to cultivate on the suit property without any objection from the Defendant. There is evidence that the suit property is ancestral land. PW3 testified that the Plaintiff's son resides on the suit property. I am inclined to agree with the Plaintiff considering that her son resides on the suit property. I find that the suit property forms part of the ancestral land.
 62. The Defendant produced minutes of Euani Ma Muli clan meeting held in his home on 8/4/2021. From minute No. 5, it is clear that the clan resolved that Mwalili and other Mukoma families agreed that the family ancestral land should be subdivided and allocated to individual family members.
 63. The Plaintiff disclosed the nature of the trust in her plaint and led evidence of customary law that applied to the parties herein.
 64. On the basis of the evidence before me, I find that the Plaintiff has established a valid claim to the suit property based on customary trust that subsisted at the time of first registration which trust was rooted in customary law.
 65. Even though the Defendant is registered proprietor of the suit properties, this court finds that he holds the same on his own behalf and in trust for the Plaintiff and other beneficiaries.



66. In the end, I find that the Plaintiff has proved her case against the Defendant on a balance of probabilities. Accordingly, I enter judgment for the Plaintiff against the Defendant in the following terms:-

- i. An order be and is hereby issued declaring that land parcel number Nzai/Nzi/683 is held and registered in the name of the Defendant to hold, in trust for Mukene Isimbu, Mwalili Isimbuand Tutwa Simba Mwikya.
- ii. An order be and hereby issued compelling the Defendant to subdivide Nzai/Nzi/683 into three equal portions and transfer the same to Mukene Isimbu, Mwalili Isimbuand Tutwa Simba Mwikyawithin 14 days and in default the Deputy Registrar of the court do sign all relevant documents including but not limited to transfers, mutation and application forms for effective transfer to the three beneficiaries.

67. Since both parties are closely related, I direct that each party bears its own costs of the suit.

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HON. T. MURIGI

JUDGE

JUDGMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 25TH DAY OF SEPTEMBER, 2024.

In the presence of:

Ms Mutuku for the Defendant

Ms Nyabisi for the Plaintiff

Court assistant Steve

