



**Mtingo & another v Maganga (Environment and Land Appeal 5 of 2023)
[2024] KEELC 5951 (KLR) (Environment and Land) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5951 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL 5 OF 2023
EK WABWOTO, J
SEPTEMBER 19, 2024**

BETWEEN

PETER MWANGOMBE MITIGO 1ST APPELLANT

AMOS KITERIA MTINGO 2ND APPELLANT

AND

ROSEMARY SILVESTER MAGANGA RESPONDENT

(From the Judgment of Hon. F. M. Nyakundi (SRM) delivered on 21st January 2022 in VOI CMCELC Case No. 21 of 2019 Rosemary Sylvester Maganga =Versus= Peter Mwangombe Mtigo and Amos Kiteria Mtigo at Voi Law Courts)

JUDGMENT

1. This is an appeal in respect to the judgment and decree of Hon. F. M. Nyakundi SRM delivered on 21st January 2022 in respect to Voi CMC ELC No. 21 of 2019. In the said judgment the trial Magistrate issued the following orders:-
 1. That the submission of Werugha/2057 and 2058 in favour of the Defendant is hereby revoked.
 2. That a new survey of the whole land in the name of Werugha/Werugha/663 to be done and the said land to be subdivided into three equal portions and title deeds to be issued in the names of the Plaintiff and the two Defendants individually.
 3. That the cost of this exercise to be borne by both the Plaintiff and Defendants.
2. The Appellants being aggrieved by the said decision filed the instant appeal. The Appellants raised the following grounds in their amended Memorandum of Appeal dated 16th July 2022:-



1. That the learned magistrate erred in law and fact by finding that the plaintiff has proved her case on balance of probabilities yet the plaintiff did not tender sufficient evidence to prove the same.
 2. That the learned magistrate erred in law and fact by applying doctrine of adverse possession which was never pleaded by the respondent in her pleadings and which doctrine could only apply in a suit brought under originating summons.
 3. That the learned magistrate erred in law and fact by deciding that there was fraud and misrepresentation by defendants when sub-dividing Land Parcel No. Werugha/Werugha/633 to Werugha/Werugha 2057 and 2058 and ordering for their revocation when the defendants are not the registered owners and could not legally cause sub-division neither transfer the land.
 4. That the learned magistrate erred in law and fact by not considering that each party is bound by its pleading and that particulars of fraud and misrepresentation must be set out in the pleadings and be proved.
 5. That the learned magistrate erred in law and fact by finding that the suit properties were the properties of the late Mwang'ombe Mwaishimba and not Mkamburi Mwangombe and more so importing an assumption that the registered owner held the suit property in trust for the plaintiff without such evidence before the trial court.
 6. That the trial magistrate erred in law and fact by failing to find the suit was fatally defective and more so that the orders of the court could not in law be enforced against the defendants being not registered owners of the suit property neither against the registered owner who was not a party to the suit.
 7. That the entire judgment contradicts itself by dint of the majority of the findings by the trial court on defects in the pleadings and evidence tendered in court by plaintiffs.
 8. That the learned magistrate erred in law and fact by failing to take account and to consider the appellants submissions.
 9. That the learned magistrate failed to appreciate the submissions by the appellants by finding in favour of the respondent herein.
 10. In view of the circumstances set out herein above, the learned magistrate findings are insupportable in law or on the basis of the evidence adduced.
3. The Appellants sought the following orders:-
- a. That the appeal be allowed.
 - b. The judgement in favour of the respondent be reversed.
 - c. The appellants be awarded costs of this appeal.
4. The appeal was canvassed by way of written submissions pursuant to the directions issued by the court. The Appellants filed written submissions dated 28th June 2024. The Appellants began their submissions by stating the brief history of the matter and later proceeded to submit on the following issues:-
- i. No sufficient evidence that the Respondent was a beneficiary or dependant entitled to the Estate of Getrude Mkacharo Malila and that she could in the alternative be entitled by way of adverse possession.



- ii. No evidence of fraud, misrepresentation was expressly pleaded and proved as against appellant's or against their mother for registering or sub-dividing original parcel title No. 633 into two (2) parcels and whether misjoinder or the registered owner in suit was fatal to the suit.
 - iii. That the entire judgment fails to assign reasons how the trial court arrived at the decision in favour of the Respondent.
 - iv. Non joinder of the registered owner of the suit land was fatal to the suit.
5. Counsel for the Appellants submitted that the Respondent sued the Appellants who are her cousins while the registered owner of the suit land is Getrude Mkacharo Malila the mother of the Appellants who was not a party to the suit. It was also submitted that in the entire proceedings there has been no evidence placed before court by the Respondent that she is a beneficiary in the Estate of the Appellants or their mother. It further submitted that there was no evidence adduced to show that the Appellants had any obligation in law or otherwise to distribute the property in issue and give the Respondent her share. The finding of the trial court was faulted.
 6. In respect to the aspect of adverse possession, it was submitted that the suit was not brought by the Respondent in a correct manner, that is by way of Originating Summons. The Respondent never possessed the land to the exclusion of the Appellants and that the ingredients of adverse possession had not been met. Reliance was placed on the cases of *Wilson Kazungu Katana v Salim Abdalla Bakshein & Another* [2015] eKLR and *Mbira v Gachuhi* [2002] 1 EALR 137.
 7. Citing the case of *Kuria Kiarie v Sammy Magera* [2018] eKLR it was also submitted that no particulars of fraud were pleaded and as such the trial court erred in finding and entering judgment in favour of the Respondent.
 8. It was contended that there was no evidence tendered on how the land is held in trust. No evidence was adduced to show that the Respondent participated in the land in the name of the mother of the Appellants for the land to be held in trust.
 9. It was also contended that the non joinder of the registered owner of the suit property in the suit rendered the same fatal. Reliance was placed in the case of *Elikana Kulola vs Mkokwa Local Government at Sumbawanga Court, Tanzania Land Case No. 8 of 2022*. The court was urged to allow the appeal as prayed.
 10. The Respondent filed written submissions dated 9th July 2024 and it was submitted that all the ingredients of customary trust as set out in the Supreme Court Case of *Isaak Theuri Kieba M'inanga v Isaya Theuri M'Linturi & Another* [2018] eKLR are applicable herein. It was argued that Getrude Mkacharo Malila was registered as the owner of the consolidated parcel of land known as Werugha/Werugha/633. She held it in trust for herself as representing the deceased Malila Mwangombe and her children and Elianah Wawuda.
 11. It was further submitted that either Getrude Malila or Elianah Wawuda would have been entitled to registration as a trustee on behalf of the family and the trust and good faith prevailed. The Appellants took advantage of their mother at 96 years of age and opted to take a move in subdivision and transfer in 2019 when their Aunt Elianah Wawuda died in 2018.
 12. On the issue of joinder or non joinder of Getrude Mkacharo as a party to the suit, reliance was made to Order 1 Rule 9 and submitted that the same cannot be used to defeat the suit and further it is the Appellant who ought to have joined their mother.



13. In respect to the doctrine of adverse possession, it was argued that the Respondent's mother was a daughter of Mwangombe Mwaishibawho their patriarch and that the Respondent occupied the land by proximity by blood and as such she did not acquire it as a stranger who has stayed for so long a time.
14. As to whether or not fraud was pleaded and particularised, Counsel submitted that Article 159(2) of *the Constitution* of Kenya provides that justice should not be administered without undue regard to procedural technicalities. The court was urged to dismiss the Appeal with costs.
15. The court has considered the grounds of the appeal, the oral and written submissions by the parties. The court has also considered the authorities relied on by the parties. The following are issued for determination herein:-
 - i. Whether the Respondent made a case for existence of a trust over the suit land.
 - ii. Whether the trial court erred in finding that there was fraud on the registration of the suit land in the name of the Appellants mother without considering any particulars of fraud which were neither pleaded nor particularized.
 - iii. Whether the non joinder of the registered owner of the suit land was fatal to the suit.
 - iv. What are the appropriate reliefs to grant herein.
16. In determining the issues raised in the Appeal, this court is cognizant of its duty on a first appeal. In *China Zhongxing Construction Company Ltd v Ann Akuru Sophia* [2020] eKLR it was stated as follows:

“The appropriate standard of review established in these cases can be stated in three complementary principles:

 - a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.”
17. The High Court in the *China Zhongxing Construction Company Ltd* case (supra) cited the Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows:-

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in *Watt –vs-Thomas* (1), [1947] A.C. 484.”



18. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the parties.
19. It is not in dispute that the suit property is registered in the names of Getrude Mkacharo Malila who is the mother of the Appellants and the Aunt to the Respondent. The Appellants case before the trial court was that the suit land was originally in the names of Getrude Mkacharo Malila who is their mother.
20. It was also the Appellants case that the land in dispute was first owned by their grandfather one Mwangombe Mwaishimba (now deceased). The grandfather had 5 children including Elianah Wawuda Mwangombe who was the mother to the Respondent. The mother of the Respondent was given land by her father, the Appellants grandfather. Their mother took the initiative of following up with land adjudication on the land and was registered as an absolute owner. The Plaintiff's mother slept over her right as she did not follow up on the adjudication. Their mother later did subdivision of her land into two Plots Werugha 2057 and Werugha 2058. Plot 2057 was to go to the 1st Appellant while Plot 2058 was to go to 2nd Appellant.
21. The Respondent's case was that her mother was given a portion of land to live on with her children and they lived on the land even after 2016 when her mother passed away. It was also her case that she has never known any other place apart from the suit property. The Appellants have all along lived with the Respondent as neighbours and they have all along known that the Respondent and her siblings are entitled to the land.
22. The rights of a registered owner of property are clearly set out under sections 24, 25 and 26 of the [Land Registration Act](#), 2012. Section 24(a) provides:
 - “ 24. Subject to this Act
 - (a)The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
23. Section 25(1) provides that such a registered owner's rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. The rights of a registered owner are however subject to overriding interests declared by section 28 of the [Land Registration Act](#) as not requiring noting in the register.

Section 28 of the act/2012/3 [Land Registration Act](#) provides that:

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;”
24. Customary trust was well explained by the Supreme Court in the case of *Isack Kieba M'inanga v Isaaya Theuri M'Lintari & another* [2018] eKLR where it held as follows:
 - “ 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.”

25. From the evidence led by both parties before the trial court, it was evident that the land initially belonged to Mwang’ombe Mwaishimba the grandfather to the parties herein. It was also evident that the late Mwang’ombe Mwaishimba allocated the land to his children who included the Appellants’ father and the Respondent’s mother who were siblings. It was also evident that upon the demise of the Appellants’ father, the land was registered under the name of the Appellants’ mother Getrude Mkacharo Malila as Plot Nos. Werugha/2057 and Werugha/2058. It was also evident that the Respondent was residing in the land as at the time of registration of the same in the name of the Appellants mother and as such it was indeed evident that customary trust existed on the suit land in favour of the Respondent and the trial court was right in finding as such.

26. As to whether the trial court erred in finding that the suit property was fraudulently registered in the name of Getrude without considering particulars of fraud which had not been pleaded and particularised by the Respondent, It is trite law that a party alleging fraud must specifically plead the particulars of fraud and specifically lead evidence to prove the allegations of fraud. There are steps that must be taken to prove fraud. In the case of *Vijay Morjaria v Nansign Madhusihn Darbar & Another* [2000] eKLR, the court of Appeal stated as follows”-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”.

27. The court has perused the Amended Complaint dated 28th May 2019 and it is indeed evident that no particulars of fraud had been pleaded and particularised by the Respondent. In view of the foregoing, it is the finding of this court that the trial court erred in making a finding that the suit land was fraudulently registered in the name of the Appellants mother without considering the particulars of fraud that had not been specifically pleaded and particularised by the Respondent.

28. On whether or not the non-joinder of Getrude Mkacharo Malila who is the registered owner of the suit property to the suit rendered the suit fatally defective. It is trite law that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.



29. Order 1 Rules 9 and 10 of the Civil Procedure Rules, 2010 are clear that:

“Misjoinder and non-joinder [Order 1, rule 9.]

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”.

30. In the circumstances, it is the finding of this court that failure to join the registered owner of the suit property as a party to the suit did not in any way render the suit to be fatally defective as the trial court was able to effectively discern and resolve the dispute presented by the parties before it.

31. In conclusion, it is the finding of this court that the Respondent discharged the evidentiary burden on a balance of probability to warrant the grant of the orders sought before the trial court. The trial magistrate did not misdirect himself in granting the reliefs that were sought by the Respondent since the Respondent had proved her case to the required standard. It is therefore not open for this court to interfere with the same.

32. On the issue of costs, costs are at the discretion of the court and in any event to a party who is successful. However, in this case, this court notes that the dispute involves members of the same family and in the circumstances this court directs each party to bear own cost of the appeal.

33. Consequently, the appeal is hereby determined as follows; -

- a. The appeal is devoid of merit and is dismissed,
- b. Each party to bear own costs of appeal.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 19TH DAY OF SEPTEMBER, 2024.

E. K. WABWOTO

JUDGE

In the presence of :-

N/A for Appellants.

Mr. Gichana for Respondent.

Court Assistants: Mary Ngoira and Norah Chao.

