



**Mbui v Mbui (Environment & Land Case E005 of 2024)
[2024] KEELC 7241 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7241 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E005 OF 2024**

CK NZILI, J

OCTOBER 30, 2024

BETWEEN

JACOB KINYUA MBUI PLAINTIFF

AND

PAUL MURIUKI MBUI DEFENDANT

JUDGMENT

1. The plaintiff approached the court through a plaint dated 26.3.2024. He has sued his elder brother, the defendant, for breach of trust over L.R No. Ntima/Igoki/5542 (the suit land), which he says is a family land. The plaintiff avers that the suit land initially belonged to their late father, who caused it to be registered under the name of the defendant to hold in trust for himself and the rest of his siblings, who have lived, developed and continue to occupy, portions of the suit land, as shown to them by their late father, close to 50 years ago.
2. In breach of the said trust, the plaintiff avers that the defendant was in the process of alienating the family trust land to third parties, so as to disinherit or evict them, oblivious of their entitlements, occupation and developments thereon. The plaintiff prayed for a declaration that the suit land is family or ancestral and held in trust for him in equal shares, which ought to be transferred to him and a permanent injunction.
3. The defendant opposed the claim by a replying affidavit sworn on 21.5.2024. He admitted that he is the owner of L.R Ntima/Igoki/5542, which was transferred to his name by his father Mbui as a trustee. The defendant averred that the land issue has been in court for more than 25 years, through Civil Case No. 717 of 1995, Mbui vs Jacob Mberia, between his uncle and father, until it was finalized in 2020. The defendant avers that he used a lot of financial resources being the firstborn son, after stepping in for his father in the suit, for he had to borrow from friends to cater for the legal fees.



4. More so, the defendant avers that he was not willing to give the plaintiff any piece of the land since, despite knowing the costs he has incurred in raising or educating him since childhood, yet he has refused to assist him in settling the legal costs. The defendant avers that the plaintiff should vacate the land because he has not bothered, after leaving school, to contribute anything by way of expenses, pertaining to the suit land, saying that the land belongs to his late father and that he has rights to it.
5. At the trial, Jacob Kinyua Mbui testified as PW 1. He adopted a witness statement dated 26.3.2024 as his evidence-in-chief. PW 1 testified that he has been using the ancestral land peacefully and without any interference, as it was passed to them through intergenerational equity from his grandfather, father and his elder brother, the defendant.
6. PW 1 said that in February 2024, some strange person came to the land with a land surveyor, from whom he reliably learned that the defendant intended to dispose of the land without consulting members of his family with a view of disinheriting or evicting them from the land.
7. Similarly, PW 1 stated that he raised the issue with the defendant who refused to listen to him and instead insisted that he would do whatever he wanted to do with the land. PW 1 relied on a copy of an official search certificate for L.R No. Ntima/Igoki/5542; copy of the record and a sale agreement dated 27.9.1999 as P. Exh. No. (1), (2) & (3), respectively.
8. In cross-examination, PW 1 told the court that they were born and brought up on the suit land. He added that the suit involving the suit land against his uncle went up to the Court of Appeal Nyeri, with effect from 2010 and that he equally assisted in the payment of legal fees.
9. Paul Muriuki Mbui testified as DW 1. He adopted his replying affidavit sworn on 21.5.2024 as his evidence-in-chief. He produced copies of receipts for payments in Case No. 717 of 1995 between Mbui M'Limbere vs Mberia M'Limbere, his deceased father, as D. Exh No. 1 (a) & (b). DW 1 stated that there was also the Court of Appeal No. E081 of 2022 between himself and David Gitonga. He produced the ruling as D. Exh No. 2.
10. Further, DW1 testified that there was also a Land Dispute Tribunal No. 4 of 2008, which was finalized before this court in Meru ELC Appeal No. E023 of 2023. DW1 said that it was he who followed up all these suits on behalf of the family in order to protect the suit land, yet the plaintiff and his other brothers had ganged up against him to the extent of driving him out of the suit land, since he feared for his security.
11. Further, DW1 added that the plaintiff and his other brothers had attempted arson on his structures on the suit land. He also stated that his late father had two wives and eight sons, all of whom lived on the suit land.
12. In cross-examination DW1 confirmed that he acquired the family land initially as L.R No. 3980, before it was subdivided to the instant parcel number. DW1 said that his late father transferred the land to him to hold it in trust as the firstborn son. DW1 said that in P. Exh. No. (2), David Gitonga had sued all the family members and that he was the one defending the suit on behalf of his brothers, hence the reason he was demanding the costs and expenses he had incurred.
13. DW1 also stated that, though there was no agreement for a refund, he had taken up the burden of defending or protecting the suit land from intruders as the elder son. He added that he took the risk to defend the suit land to the extent of serving a jail sentence in Criminal Case No. 2338 of 2018.
14. As to P. Exh No. (3), DW1 stated that he had attempted to dispose of the land to cater for the legal expenses only for the plaintiff and his other brothers to object to the sale, following which he had to refund the purchase price. DW1 added that as long as his brothers agreed to refund all his expenses,



- he was willing to subdivide the land amongst them. He insisted that due to threats from his brothers, he vacated the suit land and let out some rooms to the tenants. He estimated the value of the suit land at Kshs.2,000,000/=.
15. With the close of the defense case, by consent of the parties, the court directed the Deputy Registrar of the court to visit the locus in quo, establish who was in occupation, and prepare a scene visit report. In a report dated 17.10.2024, the Deputy Registrar made a finding that both the plaintiff and the defendant were in occupation of the suit land; each of them has a separate block, with a shop touching the main tarmac road. It was also indicated that the houses were predominantly temporary and single-roomed rental houses, with the plaintiff's block having two permanent houses on the ground floor with an additional shop that has an extra room behind it. As to the defendant, it was indicated that he has a block of 2 permanent single-roomed houses with a permanent shop touching the tarmac road.
 16. The issues calling for my determination are:
 - a. Whether the plaintiff has proved that the suit land is held in trust by the defendant.
 - b. If the plaintiff is entitled to the reliefs sought.
 - c. What is the order of costs?
 17. A party who alleges customary trust must prove that it was the intention of the parties or family members that the parcel of land would be registered in trust for other family members. The ingredients to found customary trust were set out in *Isack Kiebia M'Inanga vs Isaaya Theuri M'Lintari & another* Supreme Court of Kenya No. 10 of 2015. They include that:
 - i. The land in question before registration was family, clan, or group land.
 - ii. The claimant belongs to the said family, clan, or group.
 - iii. The relationship of the claimant to the family, clan, or group is not so remote or tenuous as to make his claim idle or adventurous.
 - iv. The claimant could have been entitled to be registered as an owner or other beneficiary but for some intervening circumstances.
 - v. The claim was directed against the registered owner, who was a member of the family, clan, or group.
 18. In *Meru HCC No. 146 of 2000, Peter Gitonga vs Francis Maingi M'Ikiara*, the court observed that the circumstances surrounding the registration of the land must be looked at to determine the purpose of the registration and establish whether a trust was envisaged.
 19. From the cited case, it is clear that customary trust is proved through leading evidence by way of physical or actual occupation or possession of the land. In *Cosmas Cherono & others vs Veronica Cherono (2021) eKLR*, the court cited *Alice Wairimu Macharia vs Kirogo Philip Macharia (2019) eKLR*, that the legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust, by laying bare the root of the title to create the nexus or lack of the trust to title holder and the claimant.
 20. In *Muthuita vs Muthuita (1982-1988) 1 KLR 42*, the court held that trust was a question of fact that must be proved by whoever is claiming a right under customary law. In *Kiebia vs M'Lintari (supra)*, the court observed that each case has to be determined on its own merits and the quality of evidence, since not every claim of right to land will qualify as customary trust. The court cited *James N. Kiarie v. Geoffrey Kinuthia & Another (2012) eKLR*, that what is essential is the nature of the holding of the



- land and the intention of the parties. The court further held that 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 favor of such other members, whether or not they are in the possession or actual occupation of the land.
21. Applying the caselaw cited above, there is no dispute that the suit land initially belonged to the late M'Mbui M'Rimbere, going by Entry No. (1). The copy of records for L.R No. Ntima/Igoki/5542, shows that the title register was opened on 10.12.1996, before it came under the name of the defendant.
 22. The defendant has admitted in paragraph 3 of the replying affidavit sworn on 21.5.2024, that the land was transferred to him by his late father as a trust in 1995, since it was facing several lawsuits which he had to step in and assist the late father in defending from other claimants and which he successfully handled between 1995 to 2020.
 23. DW1 has admitted the fact that all his eight brothers are on the land or entitled to it. He however blames some of them for ganging up to chase him away from the suit land, yet they never helped in catering for legal expenses and costs, during the long litigation process, spanning many years up to the Court of Appeal. The defendant averred and testified that he was not willing to subdivide and transfer the land amongst his siblings in general and, in particular, the plaintiff who has refused to cater for or refund to him monies expended in defending the suit land. What is not in dispute is that the land is ancestral or family; and under the use of all the siblings of the deceased. The widow of the deceased is said to live in Isiolo Town. None of the parties called her to testify. The rest of the brothers were also not called as witnesses.
 24. In *Ngugi vs Kamau & another* (2022) KEELC 2261 9KLR) (23rd June 2022) (Judgement), the court observed that customary trust was an encumbrance on land which rights are not registrable on the register for they ran with the land. In *Kanyi vs Muthiora* (1984) KLR 172, the court observed that the registration of the land in the name of the appellant, did not extinguish the respondent's rights under Kikuyu customary law, and neither did it relieve the appellant of her duties or obligations as a trustee. See *Njenga Chokera vs Maria Wanjiru Kimani & others* (2005) eKLR.
 25. The facts, evidence and the circumstances surrounding the registration of the suit land in the name of the defendant when the plaintiff and his other brothers were in occupation, leave no doubt that there was an intention to create a trust in favor of not only the parties here, but also the rest of the family members said to be in occupation of the land.
 26. The registration was consistent with the customary practices among most tribes in Kenya, where the eldest son inherits land to hold in trust for himself and other heirs. See *Justus Maina Muruku vs Jane Waithira Mwangi* (2018) eKLR. Both parties are in actual physical occupation of the parcel of land. See *Mbui Mukangu vs Gerald Mutwiri Mbui* C.A No. 281 of 2006. Further, the court cited *Mungai Njoroge & another vs Kiarie Njoroge & another* (2020) eKLR, where a brother in occupation had changed his mind not to transfer the land. The scene visit report is clear that each of the two parties has distinct permanent and semi-permanent structures on the suit land. The plaintiff has established all the elements in *Kiebia vs M'Lintari* (supra).
 27. In *Mukangu vs Mukangu* ELC 88 of 2015 (2022) KEELC 14787 (KLR) (16th November 2022) (Judgment), the court cited with approval *Omollo vs Oduor* (Civil Appeal 46 of 2017) (2022) KECA 371 (KLR) (18th February 2022) (Judgment) and *Charles Kahende Kinuthia & another vs Naomi Nyabae Kamuyu* (2019) eKLR, on the nature and quality of the evidence to be tendered on the circumstances surrounding the registration, to establish a customary trust.
 28. In this suit, the justification by the defendant for not subdividing and transferring the land on the basis that he incurred a lot of costs and expenses to protect the land during its previous litigation is



not supported by documentary evidence. If the defendant has any such claim, he is still at liberty to lodge it against the siblings.

29. The upshot is that I find that the suit land is held in trust by the defendant for himself and the rest of his family members, inclusive of the plaintiff. I direct that each of the said brother's names be entered into the register of the title as tenants in common. There will be no orders as to costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 30TH DAY OF OCTOBER, 2024.

In presence of

C.A Kananu

Mrs. Otieno for plaintiff

Defendant in person

HON. C K NZILI

JUDGE

