Muketha v Kimathi & another (Environment and Land Appeal E007 of 2023) [2024] KEELC 7324 (KLR) (23 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7324 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E007 OF 2023

CK NZILI, J

OCTOBER 23, 2024

BETWEEN

DAVID KIGUNDA MUKETHA .... APPELLANT

AND

FRANCIS KIMATHI .... 1ST RESPONDENT

FAITH NKATHA .... 2ND RESPONDENT

(Being an appeal from the judgment/decree of Hon. T.M. Mwangi SPM delivered on 22.6.2023 in Meru ELC No. 234 of 2018 Francis Kimathi & Another vs David Kigunda M'Muketha)

JUDGMENT

1. What is before the court is a memorandum of appeal dated 20.7.2023, in which the appellant, who was the 1st defendant in the lower court, faults the trial court for:
    a. Finding the claim by the respondents as proved against him.
    b. Disregarding his evidence, failing to analyze it and without considering his written submissions.
    c. Finding the respondent's letter of allotment and certificate of lease valid.
    d. Finding the respondents as bona fide purchasers.
    e. Holding that the land was held in trust for the respondents.
    f. Failing to appreciate the facts and the applicable principles of law in the claim.
    g. Determining issues outside the scope of the case, arriving at a wrong decision against the weight of the evidence available and failing to take into account matters relevant to the case.

2. The role of this court is to re-assess and review the record of the court below and come up with independent findings on both facts and the law, while at the same time taking into account that the trial court had the benefit of observing the parties testify.

3. In Peter vs Sunday Post Ltd (1958) E.A 424, the court observed that an appellate court has jurisdiction to review the evidence and determine whether the conclusion of the trial court should stand. The court also held that the jurisdiction should be exercised with caution such that if there is no evidence to support a particular conclusion or it is shown that the trial court failed to appreciate the weight or bearing of the circumstances admitted or proved or had plainly gone wrong, the appellate court will not hesitate so to decide.

4. In Selle & Another vs Associated Boat Co. Ltd (1968) E.A 123, the court observed that it was a strong thing for an appellate court to differ from the findings on a question of facts.

5. In Gitobu Imanyara & others vs Attorney General (2016) eKLR, the court held that an appellate court is not necessarily bound to accept the findings of fact by the court below and that an appeal is like a re-trial, where the court has to reconsider the evidence afresh, evaluate it and draw its conclusions while aware that it neither heard or saw the witnesses.

6. In Abok James Odera t/a A.J Odera & Associates vs John P. Machira t/a Machira and Co. Advocates (2013) eKLR, it was held that after re-evaluating and re-analyzing the extracts on the record, the appellate court has to determine whether the conclusions reached by the trial court should stand or not and give reasons either way. The court cited Kenya Ports Authority vs Kuston (K) Ltd (2009) 2 E.A 212, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.

7. Guided by the above case law, what then were the issues, evidence and findings of the trial court?

8. The appellant who was the 1st defendant at the trial court had been sued by the respondents as the plaintiffs, as their uncle, by an amended plaint dated 19.8.2020, for breach of trust on family land L.R No. Nyaki/Thuura/962 and its resultant subdivisions L.R No's. 5434-5439, which were initially owned by the late Muketha Rumae-(deceased).

9. It was averred that while the deceased had only two sons, the appellant's father and the respondent's late father, the appellant upon his death unilaterally and or secretly applied for and was issued with letters of administration of the estate of the deceased and proceeded to register, subdivide and transfer the suit land and the resultant subdivisions solely to his names and his children, oblivious of the rights of his late brother and by extension, the respondents who belonged to that family hence rendering them landless.

10. The respondents averred that the appellant was registered as owner of the land, subject to family or ancestral trust. Further, the respondents prayed for a declaration that the appellant held the land in trust for them in equal shares, cancellation of the subdivision and transfer order for the subdivision of the land in equal shares and registration for the half share under their names.

11. The appellant, alongside the 2nd - 5th defendants opposed the claims by a statement of defence amended on 30.10.2020. The appellant as the 1st defendant admitted that he filed a succession cause in respect of the estate of the deceased and was registered as the owner of the initial parcel of land. He denied that he was supposed to give any part of or share the suit land with the respondent's father as the latter was given and had his own land. The appellant admitted that the 1st and 2nd respondents were his nephew and niece and children of his late brother.

12. Further, the appellant averred that on 6.5.1964, the deceased and the grandfather to the respondents summoned a meeting with their late mother and grandmother to which the grandfather gave his late brother L.R No. Nyaki/Thuura/713, while the appellant was given L.R No. Nyaki/Thuura/962.

13. Therefore, the appellant averred that the succession cause having taken its course there was nothing left to trust and indeed there was no trust created or implied as all heirs of the deceased were present, of age, had the capacity and got their respective shares from their common fathers, hence the claim by the respondents was untenable, the court lacked jurisdiction to entertain a matter where parties were heard in the proper forum. He denied that the matter had been referred to a panel of elders who in any event had no capacity to deal with a matter already determined in a succession court.

14. The appellant denied receiving any demand letter before the suit was filed, but nevertheless insisted that the court had no jurisdiction to hear and determine the matter.

15. At the trial Faith Nkatha Gitonga, Francis Kimathi Gitonga, Nahashon M'Imanene and Stephen Kaburu M'Ithiri testified as PW 1, 2, 3 & 4, respectively. They all relied on witness statements dated 13.7.2021. The respondents' evidence was that their late father John Gitonga Muketha was a brother to the appellant and the only son of the deceased, who was the proprietor of the suit land.

16. PW 1 & 2 testified that the suit land was family or ancestral land measuring 3.8 ha, where their late father lived and was buried. They said that the appellant caused the suit land to be transferred or registered under his name alone through succession, breached the trust and refused to share it with them in equal shares only to subdivide it into L.R Nos. 5434 – 5439 and transferred them to the 2nd – 6th defendants, his children, yet the wish of their grandmother was to be shared by the two sons.

17. PW 1 stated that on 23.5.2018, the appellant invited her and the 2nd respondent to an advocate's office Meru Town, promising to give them a share of the land, but they declined his offer of 1 acre of land, to share among themselves. PW 1 said that despite the matter being handled by the clan and the Njuri Ncheke panel of elders, whose verdict was that the land be shared equally, he declined. PW 2, 3 & 4 echoed the sentiments of the 1st respondent regarding the trust and efforts to amicably settle the matter both at the appellants advocates office, before the clan and the Njuri Ncheke panel of elders. PW 1 said that the appellant had initially proposed to give his late father L.R No. 529 in exchange, but refused to transfer it.

18. The respondent relied on a copy of the green card for L.R No. Nyaki/Thuura/962; copies of the official search for L.R Nos. Nyaki/Thuura 5434 – 5439; summons to appear before Njuri Ncheke; demand letter dated 31.8.2018; verdict by Njuri Ncheke panel of elders; a further affidavit sworn on 15.11.2018 and title deed for L.R No. 713 as P. Exh. Nos. 1, 2 (a) – (f), 3, 4, 5, 6 & 7, respectively.

19. Regarding the defence, PW 1 denied that her late father had been given parcel L.R No. 713. To the contrary, PW 1 said that her late father acquired L.R No. 713, but it was in the appellant possession. She said that the respondents deserve half of the suit land, otherwise, L.R No. 713 was 1 acre in size both of which were still in the possession of the appellant.

20. Further, PW 1 said that their father passed on in 1988, while she was still a minor at a time that he had separated from their mother. Asked why her late father did not stake a claim on the land before he passed on, PW 1 told the court that the late father used to be a drunkard and his body was retrieved from Kathita River as per DMF1 (2). Before his death, PW 1 told the court that the deceased was living on parcel L.R No. 529. She denied that the late grandfather and mother shared out L.R Nos. 962 and 713 in favour of the appellant and the late father as alleged by the appellant.

21. Again, PW 1 told the court that the grandfather passed on, on 31.12.1997 after she had “fetched” them from their maternal parent's place and continued working for the appellant, but would live with the grandmother who every day would assure them that the appellant was going to share the land with them as their ancestral right.

22. PW 1 said that even though the late father used to live on parcel L.R No. 529 until he passed on, she was born there but the appellant removed or chased them away from the land after their father passed on. It was the 1st & 2nd respondents' evidence that even though they were four and two years old when the suit land came under the name of the appellant in 1974, the history of the land was given to them by their late grandmother before she passed on, including L.R No. Nyaki/Thuura/713, which came under the name of their late father on 22.3.1973, but unfortunately was being utilized by the appellant alongside the suit land and parcel L.R No. 529.

23. PW 1 & 2 said that even though their late father would visit them on parcel L.R No. 529 where they were living with their mother, he would not stop there since he was separated until he passed on when they were 15 years and 13 years old. PW 1 & 2 said that although the late father and the appellant acquired L.R Nos. 713 and 962, the same day on 23.2.1973, the former was not ancestral land. PW 2 insisted that his late father used to live on the suit land until he passed down and his body was buried therein.

24. As to PW 3, he confirmed that the appellant called him to attend the advocate's offices in Meru with an intention of giving the respondents a share of their late father’s land who, (appellant), had taken care of since the death of their father in 1988 when they were still young. PW 3 added that the respondents lived on the grandmother’s land and in Nairobi, since the appellant had failed to keep his promises to share the suit land with them.

25. Regarding PW 4, he confirmed also that the respondents were living at the grandmother's land since the appellant had neglected to give them a share of their late father’s L.R No. Nyaki/Thuura/962 which was ancestral or family land leaving them landless.

26. PW 5 a treasurer of Njuri Ncheke Imenti North panel of elders, he testified that the respondents in the company of their late mother approached the panel which issued summons twice through the area chief to the appellant but declined to attend. Again, PW 5 told the court that the respondents brought to the panel a copy of the green card which indicated that the land initially belonged to the deceased.

27. David Kigunda Muketha testified as DW 1. He relied on his witness statement dated 10.9.2019 as his evidence-in- chief. His testimony was that before then, it was the appellant's testimony that his late father had three children namely; himself as the firstborn, Teresia Kaari M’Mungania and the late John Gitonga Muketha born in 1943, 1946 and 1948, respectively. He stated that the deceased had two parcels of land L.R Nos. 713 and 962, which on 6.5.1964, he shared them among the two sons with no opposition at all. DW 1 added that as the eldest son, he was the one taking care of his parents until they passed on. Later in 1974, DW 1 said that he filed a succession cause with the consent of his late brother and sister, where he was registered owner of the suit land on 8.11.1974, during the lifetime of his mother. He denied that there was any trust created or implied as all the parties were of age, had capacity and got their respective shares from the common father.

28. Additionally, DW 1 stated that his late brother who was older did not stake any claims over the suit land and was surprised that the respondents were disregarding the history of the land to make baseless claims. He also stated that the respondent's mother Charity Gatuti, was never married by his brother and had never lived on any of the parcels of land or knew anything about the suit land, as alleged in her affidavit produced as P. Exh. No. (6).

29. DW 1 denied giving the respondent's mother L.R No. Nyaki/Thuura/529, to cool any tempers as alleged or at all. He insisted that the respondent's late father was a minor in 1973, the land used to be occupied by their parents and after their mother passed on in 1995, he stepped in to ward off intruders. DW 1 said that he offered to assist the respondents obtain letters of administration, paid legal fees for a succession cause but the respondents rebutted his offer. DW 1 produced a copy of the search for L.R No. Nyaki/Thuura/962 as D. Exh No. (1); official search as P. Exh No. (2) and a death certificate for his late brother as D. Exh No. (3).

30. Further, DW 1 said that the respondents were his late brother's children. DW 1 again stated that the late father passed on in 1964, he shared his land and gave L.R Nos. 113 and 962 to his late brother and himself. According to him, L.R No. 962 was transferred to him in 1974, through a succession cause. He denied taking the whole land from his late brother and by extension, the respondents otherwise his late brother was a sober person in 1974 up to his demise in 1988.

31. DW 1 denied that though his late brother was married but he had children, (respondents), born out of wedlock who he had taken care of after the said brother passed on. He denied receiving a summons from the Njuri Ncheke as alleged by PW 5. Further, DW 1 denied attempting to deny respondents a share of the suit land for it was solely given to him by their late father and grandfather of the respondents, who was the 1st registered owner on 22.3.1973. Asked about parcel L.R No. 713, DW 1 said it was his late father, on his own volition, who caused it to be registered in the name of John Gitonga as the 1st registered owner.

32. DW 1 admitted that though registered under his late brother's name, he was the one utilizing the land after the respondents refused to take up the vacant possession. Asked about the participation of the respondent's late father in the succession cause leading to the acquisition of the suit land, DW 1 had no evidence to that effect. Shown in paragraphs *6*, *14* & 15 of the witness statement as to the age of the late brother, DW 1 was unable to reconcile the two as to the age of his late brother in 1973.

33. Teresia M'Mungania testified as DW 2. She relied on her witness statement dated 10.9.2019. She stated that their late father was the one who shared the land amongst the two sons, but the respondent had declined to take up the share that belonged to their late father John Gitonga. DW2 confirmed that in 1974, the late John Gitonga was still in school.

34. In cross-examination, DW2 insisted that the respondents were entitled to an equal share of the land for they are not lesser children. At the close of the defence case, the trial court allowed the respondents claim which was appealed before this court.

35. This appeal was directed to be canvassed by way of written submissions due by 15.10.2024. The appellant relied on written submissions dated 15.10.2024 and submitted on grounds numbers 1, 4 & 5 of the appeal, that trust is only inferred in case of absolute necessity to effect the intention of the parties. In this appeal, the appellant submitted that no direct evidence by the respondents was tendered for the trial court to infer trust in their favour.

36. The appellant submitted that the suit land was registered under his name on the second and third registrations, following the gift to him by his late father with no objections from his late brother. Regarding the evidence tendered by the respondents, it was submitted that PW 3, 4 & 5 did not shed any light on the issues at hand, to find a trust. Instead, it was submitted that the trial court made a wrong assumption on the manner that the land was registered in 1973, when Patrick was long dead.

37. In addition, the appellant submitted that since parties are bound by their pleadings, the evidence by the respondents was at variance with the pleadings and was unable to meet the ingredients set out in *Kiebia vs M'lintari & another (Civil Case 10 of 2015)* [2018] KESC 22 (KLR) (5 October 2018) (Judgment).

38. On disregard of the appellant's evidence, it was submitted that the correct forum sought the revocation of the grant which gave him the property was not before the trial court. Reliance was placed on Motor vessel Lillian "S" vs Caltex Oil (K) Ltd (1989) eKLR.

39. It was submitted that the respondent knew that the appellant lawfully acquired the land hence the reason they did not attribute any fraud or illegality on his part. To that extent, the appellant submitted that the trial court was misguided to presume or imply trust and to shift the burden of proof to him despite the contradiction of the respondents', evidence, especially on occupation, use and possession of the suit land. Reliance was placed on Anne Wambui vs Joseph Kiprono Ropkoi & another (2005) eKLR.

40. The respondents relied on written submissions dated 15.10.2024. They submitted that trust was a matter of fact to be proved through evidence. In this case, the respondents submitted that they called five witnesses whose evidence was not controverted that the land was ancestral and meant to be shared between the two sons of the deceased. Again, the respondents submitted that the appellant was unable to explain why his late father would give one son 1 acre only and give him 9 acres.

41. Further, it was submitted that the appellants failed to explain why he failed to involve other members of his father's family in the succession cause. The respondents submitted that the title held by the appellant in the circumstances obtained, was subject to trust as provided in Sections 25 & 28 of the *Land Registration Act*.

42. The court has carefully reviewed the grounds of appeal, a record of the trial court, written submissions and the law.

43. The issues calling for my determination are:

    a. If the trial court had jurisdiction to hear the suit.

    b. If the respondents proved customary trust to be entitled to the reliefs sought.

    c. If the appeal has merits.

    d. What is the order as to costs?

44. The appellant has submitted that the trial court had no jurisdiction to hear and determine the matter since he derived his title deed from a gift inter vivos, which was followed by a successful confirmation of a grant for the estate of his late father, which the late brother did not object to from 1973 until he passed on in 1988. It was the appellant's contention, therefore, both in the statement of defence at the trial court and before this court, that jurisdiction is everything and without it, the trial court should have downed its tools as held in Motor vessel Lillian "S" (supra).

45. The first issue is whether the appeal is competent. What the appellant has filed is a record and supplementary record of appeal dated 10.5.2024 and 17.7.2024. The two are not pagination. They do not contain all the pleadings and exhibits relied upon in the lower court. For instance, the reply to defence is missing in the proceedings. The list of witnesses, witnesses' statements and documents are missing in the record of appeal. The proceedings at the lower court are not certified. The judgment of the lower court is not included in the record of appeal since it runs up to page 52. I therefore find the appeal incompetent for it offends Order 42 Rule 13 (4) of the Civil Procedure Rules.

46. It is trite law that parties are bound by their pleadings and issues for court determination arise out of pleading. Other than pleading that the court has no jurisdiction and that the suit land was registered in favour of the appellant out of a succession cause, no confirmed certificate of grant or proceedings were tendered in favor of that assertion by the appellant.

47. A copy of the record for L.R No. Nyaki/Thuura/962 shows that the suit land was registered in favor of the deceased on 22.3.1973 and came into the name of the appellant on 8.11.1974, through succession. The succession cause was not cited in entry number 2 in the copy of the record. The appellant failed to attach copies of the confirmed certificate of grant or the court proceeding to show that the late John Gitonga and the widow of the deceased who passed on in 1995, were involved in the succession cause.

48. The jurisdiction of the High Court while exercising probate and administration duties governs primarily the identification of the free property of the deceased, the beneficiaries to the estate, their respective shares and distribution thereof.

49. That jurisdiction does not cover customary, family, implied and constructive trusts, save for continuing trust, regarding the children of the deceased below the age of majority. See Re-estate of Alice Mumbua Mutua, Re-estate of Mbai Wainaina (deceased) (2015) eKLR and Muthuita vs Wanoe (1982) KLR 166.

50. Lower courts therefore have jurisdiction to handle customary trusts so long as the value of the subject land falls under their pecuniary jurisdiction under Section 7 of the Magistrates Act and Section 26 of the *Environment and Land Court Act*.

51. Equally, the is no limitation of a claim based on trust as provided by Section 20 (2) of the *Limitation of Actions Act*. See Macharia Kihari vs Ngigi Kihari C.A No. 170 of 1993 and *Stephens & 6 others vs Stephens & another Civil Appeal No. 18 of 1987*.

52. The registration of the suit land in the name of the appellant in 1973 did not therefore defeat any claim as held in Mukangu vs Mbui [2004] eKLR and in Kanyi vs Muthiora 1984) KLR 712. Even if there was a succession cause in 1974 as the appellant would wish the court to believe, which was followed by registration in favour of the appellant on account of a certificate of confirmation of grant, which was not challenged by his late brother before he passed on in 1988, still the probate and administration court had no jurisdiction to hear and determine customary trusts.

53. In Bwana Mohamed Bwana vs Silvano Buko Bonaya & others (2014) eKLR, the court observed that courts of law litigate on factual issues, look at facts and will not engage in mitigating an apprehensive case or on speculation. In Kenya Commercial Finance Co. Ltd vs Richard Akwesera Onditi (2008) eKLR, an appeal was struck out for lack of documentary exhibits relied upon at the trial.

54. The next issue is whether customary trust was proved by the respondents. Customary trust is a matter of fact which is established by leading evidence. The ingredients to found a customary trust were laid out in Kiebia vs M'lintari (supra), where the court held that each case has to be determined on its own merits and the quality of evidence, since not every claim of a right to land may qualify as a customary trust. The court cited with approval James N. Kiarie vs Geoffrey Kinuthia & Another (2012) eKLR, that what was essential was the nature of the land holding and the intention of the parties.

55. The court went on to state that a customary trust could be presumed, if the holding was for the benefit of other members of the family whether or not there was actual occupation or possession of the land. The elements to establish include:

    i. The land before registration was a family, clan or group land.

ii. The claimant belongs to such a family, clan or group.

iii. The relationship of the claimant to such family, clan or group is not so remote or tenuous to make the claim idle or adventurous.

iv. The claimant could have been entitled to be registered as owner or beneficiary of the land but for some intervening circumstances.

v. The claim is directed against the registered proprietor who is a member of the family, clan or group.

56. In the appeal, it is not disputed that the land initially belonged to the deceased, the appellant's father and the grandfather of the respondents. The appellant does not dispute that he obtained registration through a succession process. Evidence that there was a gift inter vivos in 1964 and before the demise of the late Muketha Rumae was not tendered other than the oral evidence by the appellant and his sister.

57. Effecting the gift inter vivos during the lifetime of the initial owner by way of documentary evidence was key in the appellant's evidence to rebut the presumption of trust. See Re-estate of Gideon Manthi Nzioka (deceased) (2015) eKLR.

58. The court takes judicial notice that a firstborn son such as the appellant could be registered as the owner of the suit land during the lifetime of his mother since females at the time, in 1964 had no identification cards. It was normal then, for firstborn males to be registered as owners of land to hold in trust for the family, including their mothers. Evidence was led by the respondents and corroborated by PW 3 – 5, that they were living on the suit land with their grandmother and after her demise continued to live on the land under the superintendence and care of the appellant. The appellant conceded to these facts to the extent of admitting that they were his nephew and niece, who he had educated and taken care of, after his late brother passed on in 1988.

59. It is not the quantity but the quality of evidence that matters in a court of law. Admission of salient facts by the opposite party is one form of proving or disapproving the existence or non-existence of facts in issues. In this appeal, there is no dispute on elements numbers 1-5 set out in the Kiebia vs M'Lintari (supra), between the appellant and the respondents. The evidence of DW 2 was that DW 1 should give the children of their late brother their rightful share, for the deceased had given her two brothers equal portions of the suit land. DW 2 said that the late John Gitonga was in school when the suit land was registered in favor of the appellant, in 1973.

60. Similarly, DW 2 was emphatic that no child should be discriminated against, for there was no greater or lesser child. The evidence adduced by DW2 appeared more consistent with the intention of the patriarch of the family in registering the suit land under the appellant's name, to hold in trust.

61. In M'Mboroki vs M'Mboroki ELC 2027 of 2020 (2023) KEELC 16483 (KLR) (22nd March 2023) (Judgment) the court cited Mathuita vs Mathuita(1982-88) 1 KAR 42, that customary trust could be proved by leading evidence on the history or root of the suit property, the relevant law on which the trust was founded and which the claimants subscribe to. Further, the court cited *Peter Gitonga vs Francis Mangi M'Kiara Meru HCC NO. 146 of 2000*, that the circumstances surrounding the registration must be looked into, so as to determine the purpose of registration.

62. The circumstances surrounding the registration of the land from the late M'Muketha Rumae to the appellant without the involvement of John Gitonga and Marion Nthuru, their late mother who continued to live on the suit land until 1988 and 1997, respectively, leaves no doubt in my mind that the appellant as the firstborn, was a trustee to the family. PW 5 was emphatic on customary law practices of the Ameru people, as captured in P. Exh No. (5). See Kanyi vs Muthiora (supra).

63. A court of law can presume a trust only so as to give effect to the intention of the parties. See Peter Ndungu Njenga vs Sophia Watiri Ndungu (2000) eKLR. The appellant as the eldest son inherited the land, subject to the rights and interests of his late brother and late mother, who he continued to allow to occupy the suit land. The same African milk was extended to his niece and nephew, even after his late brother passed on. The rights of the respondents were not extinguished by the resultant transfer of the land to the 2nd - 5th defendants, in the initial suit. See Justus Maina Muruku vs Jane Waithira Mwangi (2018) eKLR.

64. Trust is an equitable remedy. The appellant took advantage of his trusteeship, subdivided and transferred the suit land to his children, while aware of the overriding interests of his niece and nephew. He should not be allowed to unjustly enrich himself at the expense of the respondents. Having evaluated the evidence before the trial court, I find that the trial court acted on the correct legal principles and judiciously arrived at the conclusion that there was a customary trust. The respondents were entitled to the reliefs sought. The 2nd – 5th defendants have not appealed against the judgment. They did not also dispute the claim by offering evidence at the trial court. The appeal is hereby dismissed for incompetence and for lack of merits. Costs to the respondents.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 23RD DAY OF OCTOBER, 2024

In presence of

C.A Kananu

Kaba for Mutuma for respondents

HON. C K NZILI

JUDGE