



**Kiunga & another v Mutuma (Environment and Land Appeal
E004 of 2022) [2024] KEELC 6825 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6825 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E004 OF 2022
CK YANO, J
OCTOBER 17, 2024**

BETWEEN

JAMES MWENDA KIUNGA 1ST APPELLANT

STEPHEN MAINGI KUNGU 2ND APPELLANT

AND

MWITI MORRIS MUTUMA RESPONDENT

JUDGMENT

Introduction

1. The appeal herein emanates from the judgment in Meru CMC ELC Case No. 45 of 2014 which was consolidated with ELC case No. 35 of 2014. Upon consolidation case No. 35 of 2014 was treated as a counterclaim. The respondent, who is the registered proprietor of the suit properties LR. Nos Ntima/Ntakira/4488 and 4489 was seeking an order of permanent injunction restraining the appellants herein from trespassing onto the suit properties. On their part, the appellants filed case No. 35 of 2014 against the respondent herein and one John Kiaria M’Kiunga. The appellants claim was that the suit properties are sub-divisions of original land LR No. Ntima/Ntakira/318 which they claimed was ancestral land. They prayed for a declaration that the said John Kiaria M’Kiunga had breached the trust and wanted the registration of the properties in the name of the respondent cancelled and the same to be transferred to the appellants as well as an order of permanent injunction. The parties filed defences in each of the cases, denying the other’s claim.
2. Upon considering the matter, the trial court (Hon. D.W Nyambu, CM) found that the respondent had proved his case on a balance of probabilities and judgment was entered in his favour. The trial court dismissed the appellant’s counterclaim with costs.
3. The appellants were aggrieved by that judgment and filed the appeal on the following grounds:



1. That the learned Chief Magistrate erred in law and facts by finding that the respondent is the rightful owner of the suit properties Ntima/Ntakira/4488 & 4489 alleged as a lawful purchaser for value whereas the alleged vendors had no proper title to pass to the respondent.
 2. That the learned Chief Magistrate erred in failing to find that the respondent did not obtain proper title since the vendors had no proper title and hence could not pass a clean title to the respondent
 3. That the learned Chief Magistrate failed to interrogate the alleged gift inter vivo claims raised by the respondent and the vendors which interrogations would have determined whether or not the vendors possessed a proper title to pass to the respondent.
 4. That the learned Chief Magistrate failed to find that the gift intervivo as claimed by the respondent and the vendors failed to pass to the alleged vendors by operation of Law as a result of the donor having committed suicide.
4. The appellants pray for the appeal to be allowed and the judgment and decree of the Chief Magistrate's Court in Meru ELC Case No. 45 of 2014 to be set aside in its entirety, the court to allow the appellants' counterclaim and make and/or issue judgment and decree in terms of the pleadings of the counter claim and costs be awarded to the appellants.
 5. Pursuant to direction given by the court, the parties agreed to canvass the appeal by way of written submissions. The appellants filed their submissions dated 25th September 2023, through the firm of Mithega & Kariuki Advocates while the respondent filed his submissions dated 15th September, 2023 through the firm of Mwirigi Kaburu & Co. Advocates and further submissions dated 29th September, 2023.

Appellants' Submissions.

6. In their submissions, the appellants gave a brief background of the matter and identified the issues for determination to be whether the suit property is customary land held in trust for the appellants, whether the respondent obtained a proper title and costs.
7. Regarding the issue as to whether the suit property is customary land held in trust for the appellants, the appellants counsel relied on the Supreme Court decision in the case of *Isack M'Inanga Kieba v Isaaya Theuri M'Lintari & another* [2018] eKLR which set the elements that would qualify a claimant as a trustee. These are that, the land in question was before registration family, clan or group land; the claimant belongs to such family, clan or group, 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, the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances and the claim is directed against the registered proprietor who is a member of the family, clan or group.
8. The appellants' advocate pointed out that the appellants testified that the suit land Nyaki/Ntakira/318 is customary land which was gathered by their clan through their late grandfather and was subsequently consolidated and registered in the name of their late father M'Kiunga M'Inui. That those averments were supported by the production of a green card over land parcel No. Nyaki/Ntakira/318 which was marked as D exh -01 which proves that the appellants' late father was the initial proprietor of the suit property upon consolidation. Further, that the evidence of the appellants' witnesses confirmed that indeed the suit land is customary land. That DW -06, Elizabeth Kathambi, who is the widow to M'Ikunga M'Inui confirmed in her evidence that she got married before mau mau after which they settled on their ancestral land which is the suit property. That she also confirmed that they moved from



the suit land in the company of their six children and the appellants were left on the suit land together with their families.

9. The appellants submitted that the averments by the respondent's witness that the suit property was bought by the late M'Kiunga M'Iniu have never been proved and that to the contrary, the appellants by way of evidence and witnesses have ascertained that the suit land is their ancestral land. That, further the suit land borders the land belonging to one Justus Kanyamu, brother to the late M'Kiunga M'Iniu where the appellants grandfather was buried, proving that the lands were one piece before he shared the same between his sons. Therefore, the appellants invited the court to arrive at the conclusion that the suit property is ancestral land of the appellants and was held in trust for them by their brothers John Kiara M'Kiunga and Zakayo Kamundi Kiunga. The appellants relied on the case of *Ishmael Kegode Havi & another vs Dan Amena Atinga* [2022] eKLR.
10. On the issue whether the respondent obtained a proper title, the appellants submitted that it is the respondent's case that he bought the land parcels No. Ntima/Ntakira/4488 and 4489 which are subdivisions from land parcel No. Ntima/Ntakira/318 from the appellants' brothers John Kiara M'Kiunga and Zakayo Kamundi Kiunga. That during the trial, John Kiara M'Kiunga and Zakayo Kamundi Kiunga who testified as PW 02 and PW -05 alleged that the suit property was transferred to them as a gift inter vivos. That they further stated that their late father sought for consent to subdivide the land and transferred the portions to them during his life time. That surprisingly, despite the witnesses confirming that the late M'Ikiunga M'Inuiu was illiterate and sickly in the year 2011, the respondent's witnesses maintained that he did all the subdivisions and subsequent transfer. The appellants relied on the case of *Micheni Aphaxad Nyaga & 2 others vs Robert Njue & 2 others* (2021) eKLR and submitted that the late M'Kiunga M'Iniu having handed over the suit land to the appellants in the 1970's and thereafter moved together with the rest of his family including John Kiara M'Kiunga and Zakayo Kamundi Kiunga leaving the appellants together with their families on the suit land could not thereafter move to transfer the same to John Kiara M'Kunga and Zakayo Kamundi Kiunga. That DW – 06 the wife to the late M'Kiunga M'Iniu, stated before the trial court that her late husband gave the suit land to the appellants and moved the rest of the family to Thuura. That she also confirmed that she was never aware of any subdivision or transfer of the suit property to John Kiara M'Kiunga and Zakayo Kamundi Kiiunga despite the fact that she lives with the appellants on the suit land to date.
11. The appellants further submitted that it was also established from the witnesses that the deceased was illiterate and was ailing due to his advanced age at the time when the respondent's witnesses claim that he subdivided and transferred the suit land to them. That it was also established that none of the other family members were aware of the alleged subdivision and transfer including the deceased's own wife. That it is in fact suspicious that out of the ten children of the late M'Kiunga M'Iniu, only John Kiara M'Kiunga and Zakayo Kamundi Kiunga were aware of the subdivision and subsequent transfers.
12. It is the appellants' submissions that the late M'Kiunga M'Iniu had no intention whatsoever to subdivide and transfer the suit land to John Kiara M'Kiunga and Zakayo Kamundi Kiunga for the reason that he had already handed over the suit land to the appellants way back in the 1970's when he moved from the suit land together with John Kiara M'Kiunga and Zakayo Kamundi Kiunga leaving the appellants and their families on the suit land. That in addition, the respondent herein failed to carry out proper due diligence when purchasing the suit property since he never visited the suit land to ascertain who was in occupation of the same until after purchasing the property. It is the appellants' submission that, had the respondent done thorough due diligence, he would have easily ascertained that the suit property is ancestral land and that the appellants are the genuine and actual owners of the same. That since the vendors did not have valid titles and the failure by the respondent to visit the suit land before purchasing to ascertain the occupation status of the suit land, defeats the respondent's title. That the



respondent has further transferred the suit land to one Joseph Muchina Githinji as per the contents of the application dated 22nd August 2023 in a bid to defeat the appellants' claim. The appellants urged the court to find that the respondent did not obtain a good title for the reason that the vendors had no capacity whatsoever in selling the family land. That the court should find that the appellants herein proved their case that the suit land is customary land and that the same was unlawfully subdivided and sold to the respondent. That the appeal is merited and should be allowed.

Respondent's Submissions

13. The respondent gave a brief background of the matter and submitted on the issue whether the respondent is the rightful owner of the suit properties Ntima/Ntakira/4488 and 4489 having acquired as lawful purchaser for value. It was submitted that the respondent purchased the suit properties from vendors who are not parties to the appeal but who were the registered owners of the suit land having acquired the same from their deceased father who was the first registered owner of parcel of land number Ntima/Ntakira/318 which he subdivided into Ntima/Ntakira/4488, 4489 and 4490 during his lifetime and transferred parcel No. 4488 and 4489 to the vendors who are his sons. That the vendors in turn sold the said land parcels to the respondent. The respondent cited Section 26 of the Land Registration Act No. 3 of 2012 and relied on the case of Elijah Makeri Nyagwara vs Stephen Mungai Nyaguna & another [2013] eKLR. It was submitted on behalf of the respondent that the purpose of Section 26 (1)(b) is to protect real title holders from being deprived of the titles by subsequent transactions. It was submitted that the respondent purchased the suit lands from vendors who had acquired their titles legally, hence the rightful owner of the suit land.
14. Regarding the issue whether the respondent obtained a proper title and whether the vendor had a proper title to pass to him, it was submitted that the vendor obtained the suit land as gift intervivos from their deceased father and therefore they had a proper title hence the respondent obtained a proper title as an innocent purchaser for value. That during the trial, there was no evidence of any fraud or illegality on the exchange of the title to the suit land from the appellants' deceased father. That the appellants were only claiming trust which they were not able to prove, hence the holding of the trial magistrate which the respondent urged the court to uphold.
15. The other issue submitted on by the respondent is whether the allegation of gift intervivos was proved. It was submitted that the vendors' deceased father made subdivision of land parcel Ntima/Ntakira/318 during his lifetime and transferred the resultant LR Nos Ntima/Ntakira/4488 and 4489 (suit lands) to the vendors who in turn sold them to the respondent. That there was no evidence adduced by the appellants during trial to contradict the steps taken by the original owner who is now deceased on the transfer process to the respondent, hence the suit lands were passed to the vendors properly as gift intervivos. That the copy of the mutation, Land Control Board application, consents together with duly executed and registered transfer forms were produced as evidence and therefore the transfer process was fully proved. That although the donor later committed suicide, he had prior to his death completed the gifts to the vendors and his death by way of suicide did not relate to the gifts donated to the vendors. That the gifts intervivos did not fail to pass simply because the donor committed suicide since he had applied for the requisite consents and transferred the suit lands to the vendors who obtained the title to the same.
16. The respondent further submitted that the Memorandum of Appeal dated 18th January 2022 does not raise any ground of appeal on customary trust and the issue framed for determination at paragraph 12(a) of the appellants' submissions is unsupported by any ground of appeal. On the same issue, the respondent urged the court to look at his submissions filed before the trial court. It is also the respondent's submissions that there is nowhere in the proceedings before the trial court that the



appellants testified that LR No. Nyaki/Ntakira/318 was customary land gathered by their clan. That mere statements by the witness cannot suffice. The respondent submitted that all the appellants' witnesses were not competent to testify on the issue of trust.

17. The respondent further submitted that the appellants' suit against the respondent was fatal because of non joinder of Zakayo Kamundi Kiunga as a party to the suit since he was the registered owner of LR No. Ntima/Ntakira/4488 which he eventually sold to the respondent herein. That in this appeal, John Kiara M'Ikiugu has not been named as a respondent in the appeal. It is the respondent's submission that it is a well settled principle that no judgment or order can be issued against a non-party to a suit or an appeal. The respondent submitted that the present appeal is incompetent and it ought to be dismissed with costs.

Analysis & Determination

18. I have considered the appeal, the submissions by counsel for the parties and the authorities relied on. This being a first appeal this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions of course bearing in mind that it did not see or hear witnesses testifying and therefore give due allowance for that. This was settled in the case of *Selle & another Vs Associated Motor Boat Co. Ltd* (1968) EA 123.
19. In *Gitobu Imanyara & 2 others vs Attorney General* [2016] eKLR, the Court of Appeal stated that:
- “An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”
20. In *Peters v Sunday Post Ltd* [1958] EA 424 it was held that;
- “Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution, if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”
21. The issues I find for determination are;
- i. Whether the appellants proved that the suit properties were ancestral or family land held in trust.
 - ii. Whether the respondent had good title.
 - iii. What is the order on costs.
22. Section 28 of the *land Registration Act* provides for the overriding interests affecting land. Subsection (b) provides for trusts including customary trusts as an overriding interest. The legal burden to prove the existence of trust rests with the one who is asserting a right under customary trust. In this case, it is the appellants. Customary trust is an interest on land. They are non-registrable rights which run with the land. They are overriding and subsist on the land. To discharge the burden of prove of the existence of a trust, the person asserting the right must prove that the suit property was ancestral or clan land, that during adjudication and consolidation, one member of the family was designated to hold on behalf of the family, that the registered person was the designated family member who was registered



to hold the parcel of land on behalf of the family. In other words, 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.

23. Customary trust was well explained by the Supreme Court in the case of *Isack Kieba M'Inanga vs 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 Vs 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 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, and (5) the claim is directed against the registered proprietor who is a member of the family, clan or group.”

24. In the case of *Felista Muthoni Nyaga vs Peter Kayo* [2016] eKLR, it was held that:

“While it is the law that the registration of a party as the proprietor of land does not defeat a claim of trust nor relieve such proprietor of his obligation as a trustee, there must be evidence upon which a court can conclude that in fact the registered proprietor of the land subject of the suit before it is in fact holding the same as a trustee for the benefit of others.”

25. In *Susan Gacheri Mugambi vs Maureen Florence Kagwiria & 2 others* [2016] eKLR the court observed that;

“A trust is a powerful institution and a substantial question of law. But its existence is largely a matter of fact unless it is presumed. Thus, he who alleges existence of a fact must prove. On this see Section 109 of the *evidence Act* which states that-;

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

26. Makhandia J as he then was) in the case of *Patrick Mathenge Gachui vs Karumi Wambugu & another* [2010] eKLR expressed himself thus;

“The burden of proving trust rests on the protestors. In my view, they have failed miserably to prove such trust. Their entire evidence was hearsay which a court of law cannot act upon. The mere fact that the protestors are in occupation of the suit premises is no proof of trust. In any event it is apparent that the 2nd protestor only came to the suit premises in 1986. It is also instructive that the deceased got registered as the proprietor of the suit premises in 1978 when the 1st protestor's father and 2nd protester were all adults. One wonders then why the two could not at the time claim their portion of the suit premises if indeed they were clear in their minds that their deceased brother held the suit premises in trust for himself and



themselves. The trust having not been proved, there is no basis for the protests. Accordingly, they were dismissed.”

27. In *Alice Wairimu Macharia vs Kirigo Philip Macharia* [2019] eKLR the court stated that-;

“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 of land 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.”

The court also stated the following at paragraph 19 – 22 of the judgment

19. In the case of *Njenga Chogera – vs Maria Wanjira Kimani & 2 others* [2005] eKLR which quoted with approval the holding in the case of *Muthuita vs Muthita* [1982 - 88] 1 KLR 42, the Court of Appeal held that customary law trust is proved by leading evidence. Trust is a question of fact which must be proved by whoever is claiming a right under customary trust.

28. In *Juletabi African Adventure Limited & another vs Christopher Michael Lockley* [2017], it was 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 courts 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.”

29. In this case, the appellants contended that their father held the land in trust for them. It is not disputed that the appellants father, M’Kiunga Muniu, was the registered proprietor of the parcel of land known as LR No. Ntima/Ntakira/318 which he later subdivided into different portions including the suit properties LR. No. Ntima/Ntakira/4488 and 4489. Pursuant to the said subdivision of parcel No. Ntima/Ntakira/318, the appellants father gifted parcel No. Ntima/Ntakira/4488 and 4489 to two of his sons. LR No. Ntima/Ntakira/4489 was given to John Kiara Mutunga who testified at the trial court as (PW 2) while LR No. Ntima/Ntakira/4488 was given to Zakayo Kamundi M’ikiunga (PW 5). John Kiara Mutunga and Zakayo Kamundi M’ikiunga thereafter sold their respective parcels of land to the respondent herein. The appellants claim that the land was supposed to be held in trust for them. They further claim that their brothers, John Kiara Mutunga and Zakayo Kamundi M’ikiunga sold the parcels of land to the respondent in breach of the alleged trust. That the land was given to their father by their grandfather. In order to determine whether the land in question was held in trust, the court will have to look at the origin of the same.

30. This court has perused the documents that were produced as exhibits. The green card that was produced as P exh B1 indicates that the first registered owner of parcel No. Ntima/Ntakira/318 was the appellants father. He was registered as owner on 7th April, 1965. There was no evidence presented to suggest that prior to demarcation and subsequent registration, the land belonged to the appellant’s grandfather. The said grandfather was said to have died in 1980. If that were the case, then it means he was still alive in 1965 and therefore the land should have been registered in his name. There is no explanation from the appellants as to why the land was registered in 1965 in the name of the appellants’ father and not their grandfather who was then alive and who they claimed their father inherited the



land from. In this case, there was no evidence placed before the trial court, and indeed this court, that would support a claim for trust. A trust can never be implied by the court unless there was intention to create one in the first place. The appellants bore the singular responsibility to prove the existence of trust by leading evidence. The appellants, in my view, failed in this endeavor. Looking at the root of the source land and going by the decision of the supreme court referred to hereinabove, I am not persuaded, and it is my finding that trust was not proved by the appellants. Trust is a question of fact which must be proved by whoever is claiming it by leading evidence.

31. The next issue to consider is whether the respondent had good titles to the suit properties. In this case, there is no dispute that the respondent is the registered owner of the suit properties. The circumstances under which the respondent ended up being the registered proprietor of the parcels of land is also not disputed. To determine whether the respondent holds good titles or not, the court would have to determine whether the respondent acquired the suit premises legally and procedurally. I have perused the material on record. The respondent testified that he purchased the two parcels of land from the appellants brothers. He purchased LR No. Ntima/Ntakira/4488 from Zakayo Kamundi who testified as PW 5 and LR No. Ntima/Ntakira/4489 from John Kiara M’Kiunga (PW 2). The respondent produced the agreements for sale of the two parcels of land. The evidence on record also confirm that PW 2 and PW 5 as vendors, applied for land Control Board Consents to transfer the said parcels to the respondent which consents were issued. These were produced as P exhibit 9. Further, the vendors executed transfer forms in favour of the respondent and the respondent lodged the said transfer forms to the lands registry and was issued with titles for both parcels in his name on 25th September 2013.
32. From the evidence on record, it is also not in dispute that the vendors (PW 2 & PW 5) got parcels No. Ntima/Ntakira/ 4488 and 4489 from their father M’Kiunga M’Iniu who had subdivided his land LR no. Ntima/Ntakira/318 into various portions, including parcels nos. 4488 and 4489. M’Kiunga M’Iniu then transferred parcel No. 4489 to his son PW 2 and parcel No. 4488 to his other son PW 5. M’Kiunga M’Iniu applied for Land Control Board consent to subdivide his parcel No. Ntima/Ntakira/318 and thereafter consent to transfer parcels Nos. 4488 and 4489 to PW 5 and PW 2 respectively. The exhibits (P exh 8) produced also confirm that the said M’Kiunga M’Iniu executed transfer forms for parcels Nos 4488 and 4489 in favour of PW 5 and PW 2 respectively. Since M’Kiunga M’Iniu was the owner of the suit properties, he was within his right to subdivide it and transfer some portions to his sons (PW 2 and PW 3) as he did in this case. There is no law upon which he could be compelled to distribute it in a certain way as suggested by the appellants herein. As the owner of the property, M’Kiunga M’Iniu while alive voluntarily and on his own free will decided to sub divide and gift his sons some portions intervivos. The rights of the appellants could only accrue after the death of the proprietor. Similarly, PW 2 and PW 5 were within their rights, as owners of parcel Nos. Ntima/Ntakira/4488 and 4489 to sell and transfer the same to the respondent herein. From the forgoing, it is my finding that the father to the appellants and PW 2 and PW 5 followed due process and the law while subdividing his land parcel No. Ntima/Ntakira/318 and also followed due process in transferring parcel Nos. Ntima/Ntakira/4448 & 4489 to PW 5 and PW 2. PW 2 and PW 5 also followed due process of the law and sold their respective parcels of land to the respondent herein. Consequently, it is my finding and I so hold, that the respondent acquired the suit parcels of land procedurally and legally. His title deeds are protected by the provisions of section 24 and 25 of the [*Land Registration Act*](#).
33. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am satisfied that the learned trial magistrate was justified in arriving at the decision she made. The findings and holdings of the learned trial magistrate were well founded and I find no basis to interfere with the same.
34. In the result, the appeal is dismissed with costs to the respondent



DATED, SIGNED AND DELIVERED AT MERU THIS 17TH DAY OF OCTOBER, 2024

C.K YANO

ELC JUDGE

In the presence of

Court Assistant – Tupet

Mwirigi Kaburu for respondent

