



**Matayo v Namunani (Environment and Land Appeal 25 of 2023)
[2024] KEELC 6822 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6822 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 25 OF 2023
EC CHERONO, J
OCTOBER 17, 2024**

BETWEEN

VINCENT KIMORIKO MATAYO APPELLANT

AND

ELIUD KIACHI NAMUNANI RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the Principal Magistrate Hon. Hon. T.M.Olando delivered on 8th June 2023 in Bungoma Chief Magistrate Court CM-ELC Case No.E003 OF 2020.
2. The brief background of this case is that vide an amended plaint dated 12th December, 2020, the Appellant sued the Respondent in the Magistrate court for the following orders;
 - a. As prayed in paragraph 6C above
(The Plaintiff's claim against the Defendant, his agents, servants, is for a permanent injunction restraining the Defendant, his servants, agents, family and or anybody who may claim through him from trespassing, remaining, tilling and or causing any interface on land parcel no. N.Malakasi/S. Wamono/715 and the Plaintiff also prays for mesne profits.)
 - b. Costs of the suit
 - c. Interests at court rates
 - d. Any other relief this Honourable Court may deem fit to grant.
3. The Appellants' claim before the Trial Court was that he is the administrator of the estate of Matayo Muliongo Kinaibei, as per Bungoma CMC Succession Cause No. E013 of 2020. Before his death, Matayo Muliongo Kinaibei was the registered owner of land parcel No. N. Malakasi/S. Wamono/715(hereinafter referred to as 'the suit land'), measuring approximately 2.6 hectares. It was



averred that the Respondent, who is a brother to the late Matayo Muliongo Kinaibei, trespassed onto the land in 2015 and began planting crops thereon.

4. The Respondent filed his defence and counter-claim dated 7th December, 2020 where he denied the Appellants averments and counter-claimed that he is a beneficial owner of land parcel No. N. Malakasi/S. Wamono/715 which is family land registered in the name of Matayo Muliongo Kinaibei to hold in trust. He averred that he has been in occupation of the suit land since his birth 75 years ago and if anything, the Appellants suit was time barred. His counterclaimed for the following orders
 - a. A declaration that the land parcel no. N. Malakasi/S. Wamono/715 was held in trust by Matayo Muliongo Kinaibei for himself.
 - b. An order that land parcel no. N. Malakasi/S. Wamono/715 be transferred to the Defendant by the Plaintiff herein and in default the Executive Officer of this Court be authorized to execute all transfer documents to vest land parcel no. N. Malakasi/S. Wamono/715 in the name of the Defendant.
 - c. Costs of the suit.
5. The matter proceeded for hearing with the Appellant testifying as the sole witness while the Respondent called two witnesses. PW1 Vincent Khumiko Matayo where he adopted his witness statement dated 18.12.2020 as his evidence in chief. He equally produced into evidence his list of documents. During cross examination he stated that the Respondent and his family do not reside in the suit land and that the land was bought by his father from one Karkapo. It was his evidence that his grandfather Malingo Naibei did not have land and therefore the suit land was not ancestral. PW1 testified that the suit land was registered in the name of his father in the year 1978. He testified that he had not been in use of the land but the Respondent has been tilling on the land. He stated that the Respondent has his own land which is parcel no. N. Malakasi/S. Wamono/718.

DW1 Eliud Msahi Naibei adopted his witness statement as his evidence in chief. He equally produced into evidence documents as Dexhibit 1-3. He testified that he is the one living on the land. It was his evidence that during registration the land was sub-divided into Land Parcel No. N.Malakasi/S.Wamono/718 and 715. During cross examination he testified that his land is land parcel no.718 and that parcel 715 was registered in the name of the Appellants father. The witness testified that his 2 wives and children live in land parcel no. N. Malakasi/S. Wamono/718. He testified that the Appellants father prior to his death in the year 2008, handed over to him the title deed in relation to the suit land. DW2 Denis Wekunde NAIIBEI reiterated the respondent's evidence and his witness statement dated 7/12/2020. It was his evidence that parcels no. N. Malakasi/S. Wamono/715,733 and 693 were ancestral land initially registered in the name of Matayo Muliongo Kinaibei who inherited the same from his father Naibei Kipkania. It was his evidence that the Appellant resides in Land Parcel No.N. Malakasi/S. Wamono/633 which was given to him by his father Matayo Muliongo Kinaibei while suit land was given to the Respondent and the original title given to him
6. Upon hearing the matter to conclusion, the trial court entered judgment in favour of the respondent as against the appellant on 8th June, 2023 as per his counter-claim.
7. Being aggrieved by the trial court's judgment, the Appellants herein preferred the present appeal vide a memorandum of appeal dated 19th June,2023 on the following grounds;
 - a. The trial magistrate erred in law and in fact by not appreciating order 21 of the Civil Procedure Rules hence arriving ata a wrong decision.



- b. The trial magistrate erred in law and in fact by finding that the Respondent had stayed on the suit land for over 75 years when the respondent admitted in court that he had never stayed on the suit land hence arriving at a wrong decision.
 - c. The trial magistrate erred in law and in fact by relying on a document titled ‘Will’ when the said ‘Will’ does not fulfil the principles of the *law of succession Act* hence arriving at a wrong decision.
 - d. The trial magistrate erred in law and in fact in relying on the evidence of the Respondent and his witness which witnesses contradicted themselves heavily hence arriving at a wrong decision.
 - e. The trial magistrate erred in law and in fact by not appreciating that the Appellant who is only holding a limited grant for purposes of suit and he did not have power to transfer the suit land to the Respondent hence arriving at a wrong decision.
 - f. The trial magistrate erred in law and in fact in holding that the Appellant had admitted in court that the Respondent stays on the suit land contrary to the evidence on record hence arriving at a wrong decision.
 - g. The trial magistrate erred in law and in fact by holding that the Appellant had not proved his case when the evidence on record is overwhelming hence arriving at a wrong decision.
 - h. The trial magistrate erred in law and in fact by not appreciating that the suit land LR No. North Malakasi/ South Wamono/715 and the Respondents title L.R. No.North Malakasi/South Wamono/718 was registered during land adjudication at the same time hence the appellants father could not have registered the suit land and hold the title in trust for the Respondent.
 - i. The trial magistrate erred in law and in fact by not considering the evidence of both parties properly hence arriving at a wrong decision.
8. The Appellant sought for the following prayers;
 - a. The appeal be allowed.
 - b. The decision, judgment of the Lower court be overturned by allowing the appellants suit and dismissing the Respondents counter-claim.
 - c. The Respondent be ordered to pay costs of this appeal and the trial courts costs.
 - d. Any other relief the court may deem fit.
 9. The Appeal was agreed to be canvassed by way of written submissions. The Appellant his filed submissions dated 23rd May, 2024 while the Respondent filed his submissions dated 15th July, 2024.
 10. The Appellant in summary submitted that he had the legal standing to agitate the suit having acquire letters of administration ad litem. He stated that the title deed for the suit land Is registered in the name of the Matayo Muliongo Kinaibei, a fact which has not been denied by the Respondent and as such, the Respondent has no legal or beneficial interest in the same and he therefore ought to be restrained from utilizing the land. Reliance was placed in the case of Pius Kipchirchir Kogo vs. Frank Tenai (2018) eKLR, Kiplangat Shelisheli Mutarakwa vs. Joseph Rotich Kones (2018) eKLR.
 11. The Appellant further submitted that having proven that his deceased father is the registered owner of the suit land, he is entitled to mesne profits of Kshs 1,500,000/= from the year 2015 when the Respondent encroached on the land. He cited the case of Joseph Kipchirchir Koech vs. Philip Cheruiyot Sang (2018) eKLR. The Appellant also submitted that the Respondent has not proved his



claim that the land was registered in the name of Matayo Muliongo Kinaibei in trust as required under Section 107 (1) of the *Evidence Act*. He relied in the case of *Juletabi African Adventure Limited & Another vs. Christopher Michael Lockley* (2017) eKLR. The Appellant argued that the evidence by the Respondent was untruthful since the register to the title was opened in 1977 and he was the 1st registered owner of the suit land. Further, it was submitted that the Respondent was allocated his own land which is LR No. N.Malakasi/S.Wamono/718 and registered in his name in the year 1977 which is the same year the register for the suit land was opened, therefore there was no intention for the suit land to be held in trust as alleged by the Respondent.

12. Last but not least, the Appellant submitted that Matayo Muliongo Kinaibei did not leave behind a valid will as alleged by the Respondents according to the Law of Succession. He relied on the case of *In Re Estate of Murimi Kennedy Ngogu-dcd* (2016) eKLR. He also contested the recording of the alleged will and its authenticity. Lastly, the Appellant argued that the Respondent was untruthful since he does not reside in the suit land as alleged.
13. The Respondents on the other hand submitted that the Appellant in his submissions has not supported the grounds of appeal as contained in his memorandum of appeal which is in contravention of Order 42 Rule 4 of the Civil Procedure Rules. Reliance was placed in the case of *Twaher Abdulkarim Mohammed vs. Independent Electoral and Boundaries Commission (IEBC) & 3 Other* (2014) eKLR. It was submitted that the Appellant in the trial court failed to discharge his duty by presenting sufficient evidence and it is on these grounds that the suit in the lower court was dismissed for want of prove under Section 107 of the *Evidence Act*. The Respondent submitted that the validity of the will as brought up by the Appellant is not proper before this forum on the basis this court lacks jurisdiction to make such a determination. He cited the case of *Nashon Onyango Otieno vs. George Onyango Otieno* (2021) eKLR.

Legal Analysis and Decision.

14. I have carefully considered the entire appeal including the record of appeal and the submissions as well as the case law relied in the said submissions.
15. This being a first appeal, this Court is under a duty to consider the evidence adduced before the trial Court, evaluate it afresh and draw its own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses as they testified. Secondly, an appellate Court should not interfere with the exercise of the discretion of the trial Court unless it is satisfied that the Court misdirected itself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of its discretion and that as a result there has been an injustice. This was so held in the case of *Pitbon Waweru Maina –vs- Thuka Mugiria Civil Appeal No. 27 of 1982* or eKLR 1983.
16. Although the Appellant raised Nine (9) grounds of appeal, I am of the opinion the issue that arise for determination can be summarized as;
 - a. Whether the Appellant proved his claim for a permanent injunction and mesne profits
 - b. Whether the Respondents counter-claim was merited.
17. The Appellants claim is for the Respondent to be permanently enjoined from dealing with the suit land and for mesne profits. The Respondent on the other hand counter-claimed that he is a beneficial owner of the suit land by way of a trust.
18. I begin by first discussing the common facts. It is not in contention that Matayo Muliongo Kinaibei and Eliud Kisachi Namunani are brothers and that the suit land i.e. LR. No. N.Malakasi/S.Wamono/715



is registered in the name of the former who is now deceased. That the Appellant is a nephew to the Respondent.

19. For the purposes of this judgment, the court shall discuss the two issues jointly. It is not in dispute that the suit property was registered under the Registered Land Act Cap 300 (now repealed). The provisions of Section 27 & 28 of Registered Land Act state that the rights of a registered proprietor of registered land under the Act are absolute and indefeasible and only subject to rights and encumbrances noted on the register or overriding interests which are set out under section 30 of the Act. The provisions of 27 & 28 are similar to the provisions set out in section 24, 25 26 & 28 of the Land Registration Act, 2012. Section 30(g) of Registered Land Act provided for customary trust. While Section 28 (b) of the Land Registration Act, 2012 specifically provide for overriding interests as may subsist on the land and affect it without it being noted on the register such as customary trusts.
20. The provisions of the law above are to the effect that the overriding interest such as customary trust need not be noted on the Register of the suit land. It therefore follows that registration of a person as a proprietor of land does not preclude him from holding an interest in trust for another. Customary trust is an encumbrance on land. These are non-registrable rights which run with the land. They are overriding. They subsist on the land.
21. In the case of Mbui vs Mukangu vs Gerald Mutwiri Mbui C.A No. 281 of 2000, the Court of appeal stated that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. The Court also held that possession and occupation are key elements in determining the existence of a customary trust.
22. In the present case, it is important to examine the root of the suit land. The Appellant presented evidence indicating that the suit land belonged to his late father, having been registered in his name in 1980. He testified that the land in question was acquired through purchase, not inheritance. However, no evidence was presented to the court to support the Appellant's above claim, apart from his statement that his father had told him so. In contrast, the Respondent and his witness testified that the suit land, along with other parcels of land, originally belonged to Naibei Kipkani, the father of both the Respondent and the Appellant's father. The Respondent claimed that, without his knowledge, the Appellant's father registered the suit land and other parcels in his own name, a matter that was later reported to the elders. Further, the Respondent testified that before his death, the Appellant's father convened a meeting during which he distributed the titles to the various parcels of land, including the suit land, to those he deemed appropriate. It is during this meeting that the Respondent was given the title to the suit land.
23. It is trite that customary trust must be proved by way of evidence. The Respondent further testified that he has been in use of the suit land where he had been farming and has established structures thereon since he was born i.e for 77 years. It further emerges from the evidence that the Respondent has been in actual use and possession of both parcels of land to the exclusion of the Appellant or his immediate family members. the Respondent and his witness stated on oath that he has been on the suit land as early as 1945 and 2015. The evidence of the Respondent in my view is probable and believable. The Appellants case on the other hand is based on hearsay and is not supported by any documentary evidence.
24. Section 107 of the Evidence Act further provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person



is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

25. Section 108 of the [evidence act](#) provides as follows;

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side”.

26. Section 109 of the aforementioned act again provides that:

“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”.

27. In this case, both parties bore the burden of proof to prove their respective claims. From the above analysis and based on the evidence adduced and weighing it on a balance of probabilities, this Court agrees with the findings of the trial court that customary trust subsists on the suit land in favour of the Respondent. The Appellant therefore is not entitled to the prayers sought in his amended plaint.

28. The Respondent in his counter-claim further sought to have the Appellant transfer the suit land into his name. It is noteworthy that the Appellant holds limited grant of letters of administration ad litem limited for the purposes of filing this suit and as such, he is not the appropriate party to execute the documents. However, it is noteworthy that it is a principle tenet of law that court orders should not be issued in vain and a successful litigant ought to enjoy the fruits of his judgment or decision. In this case, it is unlikely the Appellant will willfully take out letters of administration for his father’s estate so as to enable the transfer of the suit land to the Respondent. For the purposes of enforcement of the judgment and decree of this court and in the interest of justice, this court orders the Deputy Registrar to execute the transfer documents.

29. Consequently, the Appellants appeal is devoid of merit and the same is dismissed. The Deputy registrar shall execute the transfer documents to ensure registration of the suit land in the favour of the Respondent.

30. Due to the nature of the relationship between the parties herein, I make an order that each party bears their own costs.

31. It is so ordered

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

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Wanjala H/B for Alubala for Respondent.
2. Mr. Wattangah H/B for Wamalwa R for Applicant.
3. Bett C/A.

