



REPUBLIC OF KENYA



KENYA LAW
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**Nyambasi v Nyambasi (Environment and Land Appeal E020 of 2023)
[2024] KEELC 13287 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13287 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E020 OF 2023
AY KOROSS, J
NOVEMBER 21, 2024**

BETWEEN

BENSON ORIRO NYAMBASI APPELLANT

AND

OMONDI NYAMBASI RESPONDENT

*(Being an appeal from the judgment of PM Hon. B. Limo
delivered on 17/11/2023 in Siaya PM ELC Case No. E007 of 2023)*

JUDGMENT

Background of the appeal

1. In the lower court, the appellant was the plaintiff and the respondent the defendant. The parties are step-siblings and share one mother but different fathers.
2. The parcel of land in dispute is land parcel no. Central Alego/Nyalgunga/1469 (suit property) registered in the respondent's name.
3. In a plaint dated 9/01/2023, the appellant stated their mother was initially married to the respondent's father and was living in Ukwala or Ugenya and when her marriage broke, she got married to the appellant's father and relocated to her new matrimonial home in Nyalgunga.
4. It was contended the respondent was a child of their mother's 1st marriage while the appellant of the 2nd marriage. It was averred at adjudication, that their mother's 2nd husband Nyambari Musudia (Musudia) registered the suit property in the respondent's name to hold in trust for the appellant.
5. It was asserted that in 1978, the respondent relocated back to his biological father's ancestral home and has never made use of the suit property.



6. It was contended that during the entire period, it had been occupied by the appellant who had developed and cultivated it and had even buried their mother and his biological father therein.
7. It was contended in the recent past, the respondent had breached the respondent's peaceful occupation by cutting down his trees. He sought the following reliefs from the trial court: -
 - a. Permanent injunction restraining the respondent, his agents, employees, assignees, and representatives from entering, encroaching, trespassing, or in any way dealing with the suit property that he held in trust for the appellant.
 - b. A declaration the respondent held the suit property in trust for the appellant.
 - c. The land registrar Siaya, does cancel the respondent's names from the register of the suit property and instead registers the appellant's name.
 - d. Costs of the suit.
8. In response, the respondent filed a defence and counterclaim dated 2/05/2023. In the defence, the respondent asserted that though they were step-siblings and the suit property was registered in his name, he never held the suit in trust for the appellant. He denied the other averments of the plaint and put the appellant to strict proof.
9. In the counterclaim, he asserted that at registration, Musudia registered the suit property in the respondent's name and at the same time, registered land parcel no. Central Alego/Nyalgunga/1468 (1468) in the appellant's name. This was on 17/08/1978.
10. He averred that intending to evict him, the appellant constructed a semi-permanent house on the suit property, planted trees upon it, and placed a caution on it on 16/12/2022. He sought the following reliefs: -
 - a. A declaration that the appellant is the bonafide owner of Central Alego/Nyalgunga/1468.
 - b. A declaration he is the bonafide owner of the suit property.
 - c. An order directing the District Land Registrar, Siaya to withdraw a restriction and or caution placed over the suit property by the appellant on 16/12/2022.
 - d. An order of eviction against the appellant, his agents, employees, and relatives and demolition of structures put up in the suit property.
 - e. Permanent injunction restraining the appellant, his agents, employees, relatives, servants, and representatives from trespassing, converting, or interfering with the respondent's quiet enjoyment and occupation of the suit property.
 - f. General and exemplary damages for trespass, conversion, and nuisance.
 - g. The OCS of a police station with jurisdiction over the Nyalgunga sub-location to oversee the implementation of court orders.
 - h. Costs of the suit with interests.
11. The matter proceeded to a hearing, parties were heard, documents produced, cases closed and submissions filed and impugned judgment was rendered on 17/11/2023.



12. In the impugned judgment, the learned trial magistrate identified 3 issues for determination, whether the appellant had proved customary trust, whether the respondent was the absolute owner of the suit property, and who meets the costs of the suit and the counterclaim.
13. On the 1st issue, the learned trial magistrate found customary trust did not subsist over the suit property, on the 2nd issue, he stated in the absence of trust, the respondent was entitled to some of the reliefs sought in the counterclaim and on the last issue, he granted several reliefs including dismissing the appellant's suit and allowing prayers (a) (b) (c) (e) (g) and (h) of the counterclaim and awarded the respondent costs.

Appeal to this court

14. This decision did not augur well with the appellant and he filed his memorandum of appeal dated 12/10/2023 in which he raised the following 4 grounds of appeal which contended the learned trial magistrate erred in law and fact for: -
 - a. Ignoring the appellant's evidence and submissions on customary trust.
 - b. Wholly dismissing the appellant's claim.
 - c. Ordering his eviction from the suit property.
 - d. Upholding the counterclaim.
15. Accordingly, the appellant implored this court to allow the appeal with costs and set aside the impugned judgment with costs.

Submissions.

16. As directed by the court, the appeal was canvassed by written submissions. The law firm of M/s. Agina & Associates filed written submissions dated 14/06/2024. In them, counsel consolidated the grounds of appeal into 2- whether the trial court erred in law and fact by wholly dismissing the appellant's suit and allowing the respondent's counterclaim.
17. Despite being given timelines to file submissions, Mr. Ochanyo, counsel for the respondent did not comply and if at all he files his submissions, this court will consider them as having been filed out of time without leave and they shall be disregarded.
18. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the appellant's submissions on the particular issue and also consider provisions of the law and judicial precedents his counsel relied upon to advance the arguments.

Preliminary issue

19. Before I delve into the issues for determination, I must address an issue that arose in the appellant's submissions whereby the appellant introduced new evidence on appeal.
20. These new pieces of evidence dealt with the age of the appellant during adjudication, how pretrial directions were conducted by the trial court, matters of alternative dispute resolution, adverse possession, and customary trust by possession and occupation.
21. Crucially, the appellant's entire arguments as contained in his submissions on the consolidated ground of appeal of whether the trial court erred in law and fact in upholding the respondent's counterclaim all introduced new evidence.



22. If the appellant wanted to introduce new evidence on appeal, then he should have moved this court under the provisions of Section 78 (1) (d) of the [Civil Procedure Act](#) and Order 42 Rules 27, 28, and 29 of the Civil Procedure Rules.
23. This court's position is anchored in the Court of Appeal decision of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR where Asike-Makhandia JA stated that the only evidence that can be entertained by an appellate court was only that which formed part of the record.
24. Consequently, the appellant's line of arguments on these new issues will be disregarded. The import of this is that only portions of the 1st consolidated ground of appeal as advanced in the submissions will be considered while the 2nd consolidated ground will be ignored in totality.

Issues for determination

25. Being a 1st appeal, the power of this court is set out in Order 42 Rule 32 of the Civil Procedure Rules. Being steered by the principles enunciated in the well-cited case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, this court will not interfere with the impugned judgment save this court satisfies itself the learned trial magistrate misdirected himself and thus arrived at an erroneous decision, undoubtedly exercised his discretion wrongly and occasioned injustice by such erroneous exercise.
26. I have carefully considered the records, appellant's submissions, consolidated grounds of appeal, preliminary issue, judicial precedents cited and provisions of law relied upon and the following issues commend themselves for determination: -
 - a. Whether the trial court erred in law and fact by wholly dismissing the appellant's suit.
 - b. What orders should be issued?

Analysis and Determination

27. Since the outcome of issue (a) will determine the nature of the disposal orders that will be issued by issue (b), these 2 issues which had earlier been identified shall be dealt with together.
28. Section 24 (a) of the [Land Registration Act](#) states the registration of a person as the proprietor of land shall vest in that person the absolute ownership together with all such rights and privileges thereto. Nonetheless, Section 28(b) thereof expressly recognizes customary trusts as one of the overriding interests over land.
29. These rights are also compounded by Section 25 thereof which provides that a registered proprietor holds title to land subject to leases, charges, encumbrances, conditions, restrictions, liabilities, rights, and interests including overriding interests such as customary trusts that have been recognized by Section 28 (b) of the same Act.
30. By Sections 107 to 109 of the [Evidence Act](#), the onus was on the appellant to prove that it was the intention of the parties or family members that the suit property would be registered in the respondent's name to hold in trust for him. Once this onus is discharged, then the court will render its decision on the intent as the court never infers trust.
31. A party claiming customary trust must provide evidence to prove the existence of such a trust and once a positive determination is made, such a trust binds the registered proprietor. Because each case is unique, a case has to be determined on its own merits and the quality of the evidence presented before the court.



32. The Supreme Court of Kenya whose decision is binding upon this court settled the non-exhaustive principles of customary trust in the case of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR and on analysis of provisions of the Registered *Land Act* (Repealed), the current *Land Registration Act* and judicial precedents, the court held thus in paragraph 52 of its judgment: -

“...we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor...The categories of a customary trust are therefore not closed. ..Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.” Emphasis added.

33. In considering the issue of the existence or non-existence of a customary trust over the suit property, the learned trial magistrate correctly appreciated the law on this, and upon analyzing the evidence that was before him, the learned trial magistrate concluded that it was Musudia’s intention for each of the parties to own their respective parcels of land.

34. The appellant’s submissions have not challenged this reasoning by the learned trial magistrate. Instead, they introduced new issues. This court too cannot fault the reasoning of the learned trial magistrate.

35. In his pleadings, the appellant contended he had lived in the suit property from the 1950s meaning when the suit property and 1468 were being registered on the same date of 17/08/1978, he was conversant with the adjudication process.

36. The dates of registration of these properties affirm that Musudia intended for each of the parties to have their respective parcels of land and the alleged relocation of the respondent did not dislodge his customary rights over the suit property. I find this ground of appeal fails.

37. For the reasons stated above, I find the learned trial magistrate did not err in his findings. I arrive at the same conclusion as him that the appellant’s suit was ripe for dismissal.

38. Therefore, I will not disturb the learned trial magistrate’s judgment delivered on 17/11/2023. I uphold the judgment that dismissed the appellant’s case. It is trite law costs follow the event, since the parties have close relations and to foster reconciliation, each party shall bear their respective costs.

Orders accordingly.



DELIVERED AND DATED AT SIAYA THIS 21ST DAY OF NOVEMBER 2024.

HON. A. Y. KOROSS

JUDGE

21/11/2024

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Agina for Appellant

N/A for respondent

Court assistant: Ishmael Orwa

14 days right of appeal.

