



**Kirigia & another v Marangu (Environment and Land Appeal E047 of 2022)
[2024] KEELC 13336 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13336 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E047 OF 2022
CK NZILI, J
NOVEMBER 20, 2024**

BETWEEN

SALESIO GITUMA KIRIGIA 1ST APPELLANT

FESTUS MARANGU MBUI 2ND APPELLANT

AND

JOSEPH MWITI MARANGU RESPONDENT

*(Being an appeal from the judgment of Hon. J.M Njoroge –
CM in C.M.CC ELC No. 16 of 2020 delivered on 3.8.2022)*

JUDGMENT

1. The 1st appellant, who was the plaintiff at the lower court, had, by a plaint dated 6.2.2020, sued the respondent as the defendant for trespass to his land, L.R No. Nyaki/Kithoka/5077 and 5078, starting December 2019. He sought eviction orders.
2. By a defense and counterclaim dated 16.6.2020, the respondent denied the claim, terming the registration of the suit parcels of land in the name of the appellant as done secretly and fraudulently.
3. As the plaintiff, in the counterclaim, the respondent sued the 1st appellant and his father the 2nd appellant as defendants, who was the initial registered owner of L.R No. Nyaki/Kithoka/1404, hereinafter the ancestral land, held in trust for his benefit and that of his children and siblings, which in 2016, was subdivided into L.R No's 5069 - 5078. The respondent averred that the ancestral land initially belonged to his grandfather, M'Ikiara Mungania, then was transmitted to the legal representatives Tabita Kiringo, Silas M'Ikiara, before it was passed on to the 2nd appellant to hold in trust for himself and children or the siblings.
4. The respondent averred that as an acknowledgment of the trust, the 2nd appellant allowed him an uninterrupted possession of part of the said land. The respondent averred that in breach of the



- said trust, the 2nd appellant subdivided the land into L.R No's. Nyaki/Kithoka/5069 – 5078 and fraudulently and in collusion transferred a portion to the 1st appellant, while aware of his occupation of the L.R No. Nyaki/Kithoka/5077, so as to defeat his interest, therein without his knowledge, consent, or approval, only to turn around and start threatening him with an eviction.
5. The respondent's counterclaim prayed for:
 - a. The declaration that L.R No. Nyaki/Kithoka/5077 was ancestral land held by the 2nd respondent in trust for him and hence was unavailable for alienation to the 1st appellant.
 - b. Cancellation of the title held by the 1st appellant.
 6. At the trial, Salesio Gituma Kirigia testified as PW 1. He relied on a witness statements dated 27.5.2021 and 21.8.2024 and told the court that he was the registered owner of L.R No's. Nyaki/Kithoka/5077 & 5078, which he bought from the 2nd appellant, paid consideration and after he transferred the land only for a son of the 2nd appellant, the respondent herein, to trespass into the land in December 2019 and erect a semi-permanent house therein, despite warnings not to develop the land.
 7. PW 1 said that the land was vacant when he bought it only for the respondent to enter and destroy his constructions therein and was charged in Criminal Case No.577 of 2020. PW 1 relied on copies of title deeds as P. Exh No. (1) & (2) issued on 7th & 4th June 2019, respectively.
 8. Again, PW 1 stated that the respondent had refused to vacate the suit parcels of land. In cross-examination, PW 1 denied that the two acres of land formed part of the appellant's ancestral land; otherwise, the seller used to farm the land before the sale. Equally, PW 1 confirmed that there was an unoccupied house before he bought the land.
 9. Festus Marangu Mbui, the 2nd appellant, testified as PW 2. He told the trial court that the respondent was his son. He confirmed selling and transferring the suit parcels to the 1st appellant, who paid all the consideration. PW 2 said that the respondent had an alternative share of the ancestral land and hence lacked a basis to interfere with the 1st appellant's land, which he should have taken possession of and developed.
 10. In cross-examination, PW 2 told the trial court that the suit parcels of land were a subdivision of L.R No. Nyaki Kithoka 1404, initially owned by his stepfather, Silas Kiara Mungania, who had filed a succession cause and obtained it as a beneficiary.
 11. Further, PW2 said that the other beneficiaries of the estate, including the respondent, occupied, the extensive ancestral land. PW 2 said that entry into the land by the respondent occurred in December 2019.
 12. Joseph Moti Ndirangu testified as DW 1. He relied on a witness statement dated 16.6.2020 as his evidence in chief. He told the court that he was a son of the 2nd appellant and owner of L.R No. Nyaki/Kithoka/1404, an ancestral land initially owned by his grandfather, the late Silas M'Ikiara Mungania. DW 1 told the court that upon the death of his grandfather, the land was transmitted to a legal representative, Tabitha Kirigo Silas M'Ikiara, before it came under the name of the 2nd appellant to hold for his benefit and that of his entire family. DW 1 told the court that he was born and brought up and has developed part of the suit lands, with the knowledge of his father, the 2nd appellant, especially the portion now composed of L.R No. Nyaki/Kithoka/5077, where he lives with family and has been tilling the land.
 13. DW 1 told the court that he only came to know that his land had been transferred to the 1st appellant, when he was served with summons to enter an appearance.



14. He added that he caused some investigations to confirm the status of the land. DW 1 told the court that the transfer to the 1st appellant's name was aimed at defeating his interest in the land and was also in breach of customary trust. He prayed for the reliefs sought in the counterclaim. DW 1 relied on a copy of the record for L.R No. Nyaki/Kithoka/5077 as D. Exh No. (1). DW 1 insisted that his father never told him about the sale and transfer to the 1st appellant's name. He said that before Tabitha Kirigo and his father subdivided the land, he had already moved to the suit land. DW 1 said that it was his father who gave him parcel L.R No.5077, just like he gave his brothers other parcels of the ancestral land. Therefore, DW 1 denied that the was a trespasser on the suit parcel of land.
15. Following a judgment dated 3.8.2022, the trial court dismissed the appellant's suit and allowed the 1st respondent's counterclaim.
16. The appellants, through a memorandum of appeal dated 23.8.2022, complain that the trial court erred in fact and law in:
 - i. Finding that the 1st appellant was a purchaser for value without notice of L.R No's. Nyaki/Kithoka/5077 and 5078.
 - ii. Misconstructing the appellant's evidence by finding that the suit land was ancestral land when the contrary was true, hence arriving at the wrong finding.
 - iii. Finding that the respondent had proprietary rights over the suit land yet he had none at all.
 - iv. Deciding the entire suit against the weight of the evidence and the law.
17. This appeal was canvassed by way of written submissions. The appellants relied on written submissions dated 4.10.2024. It was submitted that the 1st appellant bought two parcels of land from the 2nd appellant and took vacant possession only for the respondent, a son to the seller who was occupying a neighboring parcel of land, given to him by his father to move his temporary house to the suit parcels of land upon suing for eviction, the 1st appellant submitted that the respondent filed a defense and a counterclaim against him and his father, claiming the land was ancestral in nature, held in trust for him.
18. The 1st appellant submitted that he did due diligence with no one objecting to the sale, including the respondent; hence, his sale was above board and legally undertaken.
19. Similarly, the 1st appellant submitted that he called as a witness the 2nd appellant, denying the concept of trust raised by an ungrateful son of the respondent. The above being the available evidence, the appellants submitted that it was surprising of the trial court to decide the issue against that law and the evidence tendered; otherwise, the respondent had not raised any ground as to the cancellation of the appellant's title deed.
20. Additionally, the 1st appellant submitted that the complaint by the respondent was not directed to him but to the 2nd appellant; otherwise, he was a bonafide purchaser for value without notice. The appellants submitted that there was an error apparent on the part of the learned magistrate to refuse to grant the 1st appellant the relief of eviction and instead to cancel the title deed without any basis.
21. The respondent relied on written submissions dated 18.10.2024 and submitted that through his pleadings and evidence, he pleaded and proved the elements of customary trust as required under Sections 24, 25, 27 and 28 of the *Land Registration Act*, 2012 and as set out in the case law of Isack M'Inanga vs Isaya Theuri M'Lintari & another (2018) eKLR, Mbui Mukangu vs Gerald Mutwiri Mbui (2004) eKLR and Kanyi vs Muthiora (1984) KLR, 712.



22. Again, the respondent relying on *Selle & another vs Associated Motor Boat Co. Ltd & others* (1968) 1 EA 123 and *Mwangi vs Wambugu* (1984) KLR 453 submitted that an appellate court would only interfere with the findings of fact by the trial court if it is based on no evidence or there was representation of the evidence or where the court failed on some material point to take account of particular circumstance or probabilities material to an estimate of the evidence.
23. In this case the respondent submitted that he led evidence showing that the land was ancestral, he had been in occupation of it since he was born after attaining the age of majority and developed part of it with the knowledge of the 2nd appellant, who later advised him to shift his development on the parcel comprised of L.R No. Nyaki/Kithoka/5077.
24. The respondent submitted that his evidence was that the 2nd appellant had not sought his consent and that of other family members before disposing of the land to the 1st appellant, hence the sale was subject to overriding rights which could not be defeated in favour of the 1st appellant.
25. In addition, respondent submitted that the 1st appellant was not an innocent purchase for value without notice, since he unprocedurally and without carrying out due diligence to establish existing customary rights over the land, including his possessory and development rights over the land. Reliance was placed on *Katende vs Harindar & Co. Ltd* (2008) 2 EA 173, *Lawrence Mukiri vs AG & another* (2013) eKLR and *Alice Chemutai Too vs Nickson Kipkurui Korir & others* (2015) eKLR.
26. The respondent submitted that under Section 3 (3) of the *Law of Contract Act*, transactions involving agricultural land require a land control board consent and in this case, the sale was hurriedly done to keep away the same out of the respondent and other family members; and that is why consent was not sought, hence the suit land was acquired irregularly and through a corrupt scheme thus the title held by the 1st appellant is not protected by the law. Reliance was placed on *Alice Chemutai Too vs Nickson K. Koriri and others* (supra) *Esther Ndegi Njiru and another vs Leonard Gatei* (2014) eKLR and *Eunice Grace Njambi Kamau & another vs the Hon. AG & others Civil Suit No. 976 of 2012*.
27. The respondent submitted that an intending purchaser is ordinarily expected to carry out due diligence to verify the details and particulars of the property which extend beyond official searches, inspection and survey records and ground verification.
28. Therefore, the respondents submitted that the trial court was right to dismiss the 1st appellant's suit and allow his counterclaim, hence this appeal lacks merits and should be dismissed with costs as provided under Section 27 of the *Civil Procedure Act*.
29. Section 78 of the *Civil Procedure Act* provides that the mandate of a first appellate court is to re-examine and re-evaluate the evidence on record and arrive at its conclusion, bearing in mind that it neither saw nor heard the witnesses testify. See *Susan Munyi vs Keshar Shiani* (2013) eKLR, *Abok James Odera and Associates vs John Patrick Machira t/a Machira & Co. Advocates* (2013) eKLR and *Selle & another vs Associated Motor Boat* (supra).
30. It is trite that parties are bound by their pleadings and issues for the court's determination flow from the pleadings. See *IEBC & another vs Mutinda Mule* (2014) eKLR. Submissions concretize and focus on each side's case. Submissions are not evidence on which a case is decided. See *D.T Moi vs Mwangi Stephen Muirithi & another* (2014) eKLR and *Ng'anga & another vs Owiti and another* (2008) 1 KLR (EP) 749. Equally, at the appellant stage, matters not canvassed by the parties and which the trial court did not get a chance to pronounce itself upon are not available for consideration. In *Frera Engineering Co. Ltd vs Morris Mureithi Mutembei* (2020) eKLR, the court said that only in



exceptional circumstances and with leave, an appellate court may not determine new issues, lest it becomes a trial court.

31. Having perused the record of the trial court, the grounds of appeal and written submissions, the issues calling for my determination are:
 - i. If the 1st appellant proved trespass to the suit parcels of land to be entitled to the relief of eviction.
 - ii. If the respondent pleaded and proved customary trust against the appellants.
 - iii. Whether the appeal has merits.
32. Trespass under Section 3 (1) of the *Trespass Act* occurs where any person who, without reasonable excuse, enters into or remains upon or erects any structure on or cultivates or tills on private land without the consent of the owner, with no justifiable reason. See *KPLC vs Eunice Ringera* (2020) eKLR.
33. The 1st appellant had pleaded that the respondent made entry into his two parcels of land in December 2019. The evidence produced by the appellants was that the sale and transfer of the two parcels of land took place on 7.6.2019 and 4.6.2019. In his counterclaim, the respondent made admissions that L.R No. Nyaki/Kithoka/1404 registration, transfer, and subdivisions into the names of his father occurred in 2016 and that the 2nd appellant was to hold the land in trust for him and the rest of the family. He averred that he had been in the occupation or possession of the suit land and especially L.R No. Nyaki/Kithoka/5077, since child hood. The respondent averred that he had extensively developed the suit land and it there he lived with his family.
34. One of the grounds raised by the appellants on appeal is that the 1st appellant was a bonafide purchaser for value of the two parcels of land without notice, which facts the trial court failed to hold and instead erroneously held that the respondent had proprietary rights over the suit land by virtue of trust.
35. Customary trust is one of the overriding interests that is not registered in the title to land under Section 28 of the *Land Registration Act*.
36. The elements to prove to establish a customary trust were set out in *Kiebia vs M'Lintari* (2018) eKLR. They include:
 - a. The land in question was before registration, family, clan or group land.
 - b. The claimant belongs to such family, clan, or group.
 - c. The relationship of the claimant to such family, clan, or group is not remote or tenuous.
 - d. The claimant could have been entitled to be registered as an owner or beneficiary but for some intervening circumstances.
 - e. The claim is against the registered proprietor, who is a member of the family, clan or group.
37. The legal burden to prove the elements rests with the one asserting a right under customary trust. See *Alice Wairimu Macharia vs Kirigo Macharia* (2019) eKLR. The facts and evidence must point at a customary trust. A trust is never implied by the court unless there was an intention to create one in the first place. See *Muthuita vs Muthuita* (1982-1988) 1 KLR 42 and *Njenga Chogera vs Maria Wanjira Kimani & others* (2005) eKLR.
38. In this appeal, the respondent relied on D. Exh No. (1) to show that L.R No. Nyaki/Kithoka/1404 was the mother title before the resultant suit parcels of land were created. Other than that piece of



- evidence, the respondent failed to produce the proceedings in High Court Meru Succession cause No. 154 of 1999, to show who were the beneficiaries to the estate of Silas M'Ikiara. Further, DW 1 failed to produce copies of the record for L.R No. Nyaki/Kithoka/1404 to establish who were the other beneficiaries and or registered owners of the suit parcels of land.
39. The appellants had pleaded that the respondent and his brothers had been allocated other parcels of land forming part of the ancestral land. The respondent failed to discount the evidence that he was a beneficiary of an alternative parcel of land that he had been occupying before he encroached onto the suit lands in December 2019. The sale and transfer took place in June 2019, before the alleged trespass in December 2019. So it means that the suit parcels of land were vacant at the time the 1st appellant acquired titles to the same.
40. The appellants testified that the respondent was ordered by the 2nd appellant to vacate the suit land and move to his land. The respondent failed to plead when exactly he settled on L.R No's 5077 and 5078. The nature and status of his developments must have been visible to the 1st appellant, were not pleaded. The respondent also failed to call evidence from his siblings or to support his averments that he was in occupation of the suit parcels of land before the subdivisions occurred in 2016.
41. In *Gathua vs Wainaina ELC E011 of 2023 (2024) KEELC 4082 (KLR) (9th May 2024) (Judgment)*, facts were similar to the instant appeal, where a father had pleaded that he had bequeathed each of his sons, including the appellant, alternative parcels of land. The father had testified that none of his other children were dissatisfied with the manner in which he had distributed his land and that the applicant was on a frolic of his own and was disgruntled and apprehensive about reasons for his dissatisfaction, apart from a trust. The respondent had denied the existence of any valid cause of action disclosed against him by his son based on *D.T Dobie & Co. (K) Ltd vs Muchina (1982) eKLR*. The court further cited *Kiebia vs M'Lintari (supra)* that not every claim of a right to land will qualify as a customary trust, for it depends on the merits and quality of evidence. In *John Ndungu Murithi vs Gedion Karegwa Ndung'u and others HCC No. 94 of 2004*, the court observed that the applicant had displayed unmitigated greed and utter selfishness by haranguing his aging father to court, over his parcel of land by seeking to inherit his father's land while still alive against the value of human dignity, equity and social justice.
42. In *Weston Gitonga & others vs Peter Rugu Gikanga and another (2017) eKLR*, the court cited the Black's Law Dictionary that a bonafide purchaser was one who buys something for value without actual or constructive notice of any defects or deformities, claims or equities against the settlers title, one who has in good faith paid valuable consideration for the property, without notice of prior adverse claims. In *Katende vs Harindar & Co. Ltd (supra)* the court observed the court held a bonafide purchaser must prove that:
- i. He purchased the property in good faith.
 - ii. He did not know about the fraud.
 - iii. He purchased it for valuable consideration.
 - iv. The vendor had an apparent valid title.
 - v. He purchased without notice of any fraud.
 - vi. He was not a party to any fraud.
43. In my considered view, I think the evidence of the respondent fell short of proving fraud, misrepresentation, corrupt scheme, or existence of the customary trust. See *Esther Ndegi Njiru &*



another vs. Leonard Gatei (supra) Circumstances surrounding registration must point to the existence of a trust. See *Peter Gitonga vs Francis Maingi M'Ikiara Meru HCC No. 146 of 2000*. The intention of the parties to create a trust must clearly be determined before a trust is implied. See *Juletabi African Adventures Ltd vs Christopher Michael Lockley (2017) eKLR*.

44. The upshot is that I find the appeal with merits. It is allowed. The lower court verdict is set aside and substituted with an order allowing the 1st appellant's suit with costs. The respondent's counterclaim is dismissed with costs. Costs of the appeal to the 1st appellant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 20TH NOVEMBER, 2024

In presence of

C.A Kananu

Parties

Miss Riungu for Kiara for the appellants

Mrs. Mutegi for Arithi for the respondents

HON. C K NZILI

JUDGE

