



**M'Iburi & 4 others v Iburi (Environment & Land Case E004 of 2024)
[2024] KEELC 13208 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13208 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E004 OF 2024**

CK NZILI, J

NOVEMBER 13, 2024

BETWEEN

**SAMSON MUREGA M'IBURI 1ST PLAINTIFF
PAUL MPUThIA M'IBURI 2ND PLAINTIFF
SUSAN KATHURE 3RD PLAINTIFF
CHARLES KIRIGIA M'IBURI 4TH PLAINTIFF
DAVID RUKARIA IBURI 5TH PLAINTIFF**

AND

DANIEL RUKARIA IBURI DEFENDANT

JUDGMENT

1. The plaintiffs, through a plaint dated 26.3.2024, sued the defendant their brother, who is the registered owner of their late father's L.R No. Abothuguchi/Gaitu/41 measuring approximately 12 acres. It was averred that the suit land initially belonged to the late M'Ibwi Nkure, who, before his death, had registered the suit land in the name of the defendant to hold in trust for himself and the plaintiffs.
2. The plaintiffs averred that prior to the father's demise, the defendant had subdivided and greed to transfer to the plaintiffs their portions on the suit land measuring 2/3, 2/2, 1, and 2 acres, respectively, of that they contributed money and gave it to the defendant to process their resultant titles but unfortunately the same was not done.
3. Similarly, the plaintiffs averred that they have been in possession, occupation, and utilization of the suit land since the 1940s, having immensely developed the same by building a homestead, planting seasonable crops, indigenous and exotic trees, and putting up a fence around the suit land.



4. In breach of the trust, the plaintiffs averred that the defendant fraudulently and in collusion with land officers forged their documents and registered himself as the absolute owner of the land so as to deprive them of their land and an apprehensive that he might evict them from the land, out of which they live and eke a living.
5. The plaintiff pray for:
 - a. The declaration that L.R No. Abothuguchi/Gaitu/41, registered in the name of the defendant, was subject to customary and beneficial trust, in favor of himself and the plaintiffs as brothers.
 - b. An order directing the deputy registrar of this court to execute the instruments of subdivisions, transfer, and registration of the land shares as per the wishes of their late father.
 - c. Permanent injunction restraining the defendants from interfering with the enjoyment of their portions of the suit land.
5. The defendant was duly served with the summons to enter an appearance and hearing notices to attend court but failed to respond to or attend the hearing. Affidavits of service were duly filed, including the one sworn on 9.10.2024 by Koome B. Kaithu.
6. At the trial, Samson Murega M'Iburi, Paul Mputhia and Charles Kirigia M'Iburi testified as PW1, 2 & 3. All of them relied on witness statements dated 26.3.2024, as their evidence in chief.
7. The plaintiffs told the court that L.R No. Abothuguchi/Gaitu/41, measuring 12 acres, came under the name of the defendant to hold in trust for himself and the other family members since it was family land, initially belonging to the late father, M'Ibwi Nkure.
8. PW 1, 2 & 3 testified that the late grandfather had subdivided the land in 2, 3, 2, 2 & 1 in favor of Samson Rukaria, Susan, Paul, and Charles Kirigia, with each occupying possession and developing the respective portion since 1940. Unfortunately, and while aware of the wishes of the deceased, the plaintiffs said that the defendant has been promising to transfer the shares to them in vain.
9. The plaintiffs termed the acts of the defendant to transfer the land to himself as fraudulent, unlawful, wrongful and contouring to Article 40 of *the Constitution*. Further, the plaintiffs testified that they have extensively developed the respective portions, including erecting homesteads, planting seasonal crops, assorted trees and putting up a fence all around the land in support of the claim.
10. PW 1 produced a copy of an official search certificate dated 11.3.2024 and a demand letter dated 19.2.2024 as P. Exh No's. (1) and (2), marking the close of their case.
11. The conceptual context and the law relating to customary trust were discussed and set out in *Kiebia vs M'Lintari & another Civil Case No. 10 of 2015 (2018) KESC 22 (KLR) (5th October 2018) (Judgment)*. The court held that the doctrine of implied, resulting and constructive trust were part of Kenya's law. Further, the court said that the rights of a person, being in possession or actual possession which subsisted at the time of the first registration, derive validity, arise and were rooted in the African customary law. The court said that such rights have no equivalent either at common law or in equity, adverse possession, or prescription.
12. The court observed that such rights a clothed to a person under customary law and practice and a legally valid. The court declared such rights as long as they are proved to subsist as one of the trusts to which a registered person was subject under the repealed Section 28 of the Registered *Land Act*, now replaced with Section 28 of the *Land Registration Act*. The court gave categories such of customary



- trust; as land reserved for family or clan uses such for burials and other traditional rites, and future uses such as the construction of houses and other amenities by youth graduating into manhood.
13. To establish such trust, the court set out the elements inter alia as:
 - i. The land in land in question was before registration, family clan or group land.
 - ii. The claimant belongs to such a family clan or group.
 - iii. The relationship of the claim to such family, clan, or group.
 14. Customary trust, as held in *Muthuita vs Muthuita* (1982-1988) KLR 42, is proved by leading evidence. The intention of the parties to create a trust must be clearly determined before a trust is implied. See *Peter Ndung'u Njenga vs Sophia Watiri Ndu'ngu* (2000) eKLR, and *Juletabi African Adventure Ltd & another vs Christopher Michael Lockley* (2017) eKLR.
 15. In *Kaungi vs Machaki & another (Civil Appeal 106 of 2018)* (2024) KECA 1250 (KLR) (20th September 2024) (Judgment), the firstborn son, without the consent of the beneficiaries, subdivision the suit land into three portions. He denied the claim for the cancellation and subdividing of the land among the claimants. The appellant had termed the concept of trust as inapplicable and no-actionable, for he was an absolute exclusive owner of the land, saying that to give his step-brothers a portion was absurd.
 16. The respondent's father, according to their mother, one of the claimants, had died before demarcation occurred and she, therefore, handed the name of the firstborn son to the clan elders, for purposes of registration on behalf of the family of her late husband.
 17. The trial court had found that the conduct of the appellant was that of a trustee who ought to share the land equitably. Further, the court held that the registration of the land in the name of the appellant was as a trustee, to hold it in trust for the family and did not extinguish the rights of the respondent under Embu customary law.
 18. In *Khaseke and others vs Maurice & another (Civil Appeal E270 of 2023)* (2024) KECA 649 (KLR) (7th June 2024), (Judgment) at issue was the effect of Sections 28 and 62 of the *Land Registration Act*. The court said that overriding rights were unregistered interests that affect registered land, though they are not shown on the register and bind both the registered proprietors and any person who acquires an interest in the property.
 19. As to Section 62 thereof, the court observed that anybody seeking to mount a claim premised on overriding interests successfully must satisfy the prerequisites set out under the Section, that is; the interest if it is unregistered or enforceable and was subject to which the deceased proprietor held the land, lease or charge.
 20. In *Geoffrey Mugambi and others vs David K. M'Mugambi & others* (1992) eKLR, the court cited *Maria Wambui & others vs Kuria Ndiwi NRB C. A No. 97 of 1997*, that it was a principle of Kikuyu customary law, that a man distributes his property equally between his sons and was also so among the Meru.
 21. The trial court had made a finding that under Section 3 (3) of the *Judicature Act*, a person has to lay the basis for the application of customary law and that under Meru customs, a man was not entitled to render some of his children landless, by giving the whole of his land or a large chunk of it to his



few selected children, leaving the rest landless. On appeal, the court cited Chapter 4, page 30 of His Restatement of African Law Vol 2, which covers the Meru and the Tharaka customs:

“Inheritance under Meru law is patrilineal. The pattern of inheritance is based on the equal distribution of a man's property among his sons, subject to the proviso that the eldest son generally gets a slightly larger share. In a polygamous household, the distribution of land is by reference to the house of each wife equally, irrespective of the number of sons in the house”.

22. The appellate court affirmed the holding of the trial court, that it was entitled to take juridical notice of the relevant Meru customary law of land distribution as held in *Kimani vs Gikunga* (1965) E.A 735. That where African customary law was neither notorious nor documented, it must be established for the court's guidance by the party, intending to rely on it unless it is capable of being judiciously noticed for which cases it would be proved by evidence or expert opinion adduced by the parties as provided under Section 59 and 60 (1) (a) of the *Evidence Act*.
23. Applying the foregoing case law in the instant case, the plaintiffs have laid the basis that they were on the suit land as children of the late M'Imbwi Nkure, before the land was registered in the name of the defendant on 30.3.1969, going by P. Exh No. (1). The title deed was issued to the defendant on 26.3.2021 during the occupation, possession and development of the land by the plaintiffs.
24. The plaintiffs, in their pleadings, captured the circumstances leading to and following the registration after their late father had shared the suit land. Trust is a matter of fact to be proved by the quality of evidence tendered. The facts and evidence tendered to prove those facts have not been challenged or rebutted by the defendant, that there was no intention to establish a trust.
25. In my view, the plaintiffs have satisfied the elements in the *Kiebia vs M'Lintari* (supra). The upshot is that I find them entitled to the reliefs sought.
26. The court declares that the defendant holds the title in trust for the plaintiff as per the respective shares. He shall subdivide and transfer the suit land as per the shares within 2 months from the date hereof, in default the Deputy Registrar of the court to execute the same. A permanent injunction is also issued restricting the defendant from interfering with the plaintiffs' quiet occupation of their respective shares.
27. Costs of the suit to the plaintiffs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 13TH NOVEMBER, 2024

HON. C K NZILI

JUDGE

In presence of

C.A Kananu

No appearance

