



**Midega v Midega & another (Environment & Land Case E003 of 2023)
[2024] KEELC 7349 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7349 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIIAYA
ENVIRONMENT & LAND CASE E003 OF 2023
AY KOROSS, J
NOVEMBER 7, 2024**

BETWEEN

ELIZABETH ANYANGO MIDEGA PLAINTIFF

AND

JOSHUA ANYANGA MIDEGA 1ST DEFENDANT

JAPHETH MIDEGA ANYANGA 2ND DEFENDANT

JUDGMENT

1. All the parties to this suit have close family relations. The 2nd defendant is a polygamous man and has 3 wives- The 1st wife is Priska Akinyi Midega (Priska), 2nd wife is Susma Okwacho Midega (Susma) who is the mother of the 1st defendant and 3rd wife is the plaintiff.
2. The parcel of land at the heart of contention is land parcel no. Siaya/ Kokwiri/3007 (suit property) that was at 1st registration registered in the 2nd defendant's name. The 2nd defendant subsequently transferred the suit property to the 1st defendant.

Plaintiff's case and evidence

3. In the further amended plaint dated 8/08/2023 filed by the law firm of M/s. Anyanga Wasamba Advocates, the plaintiff pleaded customary trust and sought the following reliefs from this court: -
 - a. A declaration the suit property is both family and ancestral land and encumbered by a trust.
 - b. A surrender of the suit property's title deed by the 1st defendant to the Land Registrar Bondo.
 - c. A cancellation of the title to the suit property and an order that it reverts to the 2nd defendant for purposes of subdivision and transfer.
 - d. No orders as to costs.



4. The plaintiff testified as PW1 and her evidence was led by James Waka Apandu who testified as PW2. PW1 adopted her witness statement and produced documents in support of her case.
5. It was her evidence that at one time, all the co-wives lived in another homestead which they all entered during their respective dates of marriage to the 2nd defendant- Priska in 1968, Susma in 1974, and herself in 1979. However, in September 2008, the 2nd defendant relocated her and Susma from this previous homestead.
6. According to her, she was disgruntled because on 1/07/2009, the 2nd defendant without her knowledge, transferred the suit property to the 1st defendant and she was apprehensive she and her daughter would be disinherited or thrown out of the suit property by the 1st defendant.
7. She averred that all her co-wives had been given land by the 2nd defendant except her.
8. Therefore, it was her evidence that she was entitled to her share of the suit property that she occupied and the 2nd defendant had assured her the 1st defendant held the suit property in trust for her.
9. PW2 testified the 2nd defendant transferred the suit property to the 1st defendant because he was Susma's only son and since Susma and the plaintiff had homes on the suit property, it sufficed the 1st defendant held the suit property in trust for them.
10. He also testified that the 2nd defendant had also informed him he registered the suit property in the 1st defendant's name to wade of strangers who had eyed it and for him to hold it in trust for Susma and the plaintiff's household.

1st defendant's case and evidence

11. In a defence dated 18/09/2023 filed by the 1st defendant who acted in person, he asserted the plaintiff's claim was anchored on apprehensions.
12. It was his case the 2nd defendant was registered as the owner of other properties which were for the benefit of his wives-Siaya/Kokwiri 1151 and 1149 for Priska; the suit property for Susma and Siaya Kokwiri 1159 for the plaintiff.
13. The 1st defendant testified as DW1 and his evidence was led by Susma and his wife Florence Awuor Anyanga who respectively testified as DW2 and DW3. He relied on his witness statement and the documents he produced in support of his case.
14. It was his testimony that he was to hold the suit property in trust for the 2nd defendant's lineage through Susma. According to him, in Luo culture, husbands put up separate homes for their wives and that was why Priska had her own homestead on another parcel of land. He stated the plaintiff was yet to be allocated her own homestead and in the meanwhile, she was being hosted by Susma's household.
15. It was his testimony the plaintiff and Susma have adjacent homes in the suit property but each one of them had separate portions that they tilled and that he also lived there. He was categorical that he never held the suit property in trust but it was a gift and the other family parcels of land were utilized by his brothers George and Asa Midega.
16. He asserted the 2nd defendant was at liberty to deal with his properties as he deemed fit including gifting the suit property to him. He testified that when the 2nd defendant was gifting him the suit property, he only gave him one condition- not to claim any other land. It was his testimony that notwithstanding his registration status, he would never eject the plaintiff or Susma from the suit property.



17. DW2 asserted that the transfer to the 1st defendant was intended to avert family conflicts that arose in 2008 which eventually led to her and the plaintiff's relocation to the suit property. DW3 testified that she and the 1st defendant lived on the suit property.

2nd defendant's case and evidence

18. The 2nd defendant who acted in person filed a defence dated 23/08/2023 and averred he transferred the suit property to the 1st defendant for him to hold in trust for Susma and the plaintiff's households.
19. In his testimony as DW4, he testified due to love and affection, he transferred the suit property to the 1st defendant with the hope he would take care of him and pay his hospital bills. It was his evidence he was free to settle his wives in any parcel of land he deemed fit and he had settled Susma and the plaintiff on the suit property.
20. It was his testimony that he informed his sons that they would get their respective shares from their mother's parcels of land. He stated he inherited the suit property from his father. He asserted that the 1st defendant should transfer a portion to the plaintiff during his lifetime so that she could derive income from it, and get an access road and a burial site.

Parties' submissions

21. As directed by the court, all parties filed written submissions. The plaintiff's submissions dated 10/06/2024 identified 2 issues for resolution- whether the 2nd defendant held the suit property in customary trust and whether customary trust arose from a 2nd registration.
22. The 1st defendant's submissions dated 4/07/2024 identified 3 issues for determination- whether the plaintiff had locus to institute the suit on her own behalf and on behalf of other family members, whether this court had jurisdiction to entertain the suit, and whether the plaintiff had proved the 1st defendant held the suit property in trust.
23. The 2nd defendant's submissions were dated 22/08/2024 and identified a single issue as arising for resolution- whether he held the suit property in trust for the plaintiff.
24. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the respective parties' arguments on the particular issue and also consider provisions of law and authorities they relied upon to advance their arguments.

Undisputed facts

25. Certain undisputed facts arose during the hearing. The defendants, Susma and the plaintiff all reside on the suit property with homes and cultivated lands therein.
26. The suit property was before 1st registration family land and the 2nd defendant who was the 1st registered owner transferred it to the 2nd defendant and the consideration was love and affection.
27. Further, the 2nd defendant has distributed land to his sons from Priska's and Susma's homes. However, the plaintiff was not blessed with a son hence no land could be transferred to her lineage by sonship.

Issues for determination, Analysis, and Determination

28. I have considered the pleadings, evidence adduced by the parties, as well as rival submissions. Being guided by the provisions of law and judicial precedents that have been well cited, I shall now proceed to consider the merits or otherwise of the plaintiff's claim and conceivably the issues for resolution are;



- I. Whether the plaintiff's claim of customary trust over the suit property was proved.
 - II. What orders should this court issue including an order as to costs?
29. The issues that were earlier identified as arising for determination are related and shall be handled jointly.
 30. 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.
 31. 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.
 32. By Section 107 to 109 of the [Evidence Act](#), the persons claiming trust have the onus of proving it, and the court can never imply trust but give effect to the intention of the parties to create such trust for the benefit of a group of other family members.
 33. 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.
 34. The Supreme Court of Kenya whose decision is binding upon this court settled the 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.
35. Customary trust devolves property from one generation to another as was held in the case of *Mbui Mukangu v. Gerald Mutwiri Mbui* (Civil Appeal 281 of 2000) [2004] KECA 155 (KLR) (10 December 2004) (Judgment) in the following words: -
- “It is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations.”
36. At the outset, since claims of customary trust over land are usually against the registered owner, the claim against the 2nd defendant is unsustainable as he had long relinquished his rights over it.
37. The circumstances of this case are unique since this court has not been called to interrogate land that was a 1st registration which usually involves ascertaining if a family member was registered as trustee for other family members who could have been at the particular time of registration, incapacitated either by age or were absent during the land demarcation or adjudication, hence unable to be registered as the owners.
38. In this case, the plaintiff is challenging family land that has been transferred by the 1st registered owner to his son.
39. From the evidence, it is clear that the 2nd defendant was at 1st registration registered as the proprietor over 4 parcels of land which included the suit property and Siaya/Kokwiri 1151, 1149, and 1159.
40. It emerged that although all these other parcels of land are still registered in the 2nd defendant’s name, they were either occupied or tilled by Priska or her sons to the exclusion of Susma or the plaintiff who had since 2008, occupied the suit property to the exclusion of Priska and her children.
41. It emerged from the evidence that during the exodus from the previous homestead, to the suit property, Susma’s and the plaintiff’s children were all adults and the only child who moved with them to the suit property was the 1st defendant as he is an only son from these 2 homesteads. It is noteworthy the plaintiff has only 1 daughter.
42. The presence of the 1st defendant during the exodus was not an accident. It emerged from DW4’s evidence that in Luo culture, sons inherit from their fathers and it was expected that during the father’s lifetime, the son would not only take care of him but also the father’s wives, particularly those who did not have sons.
43. In appreciating the intergenerational nature of customary trust over the suit property, the 2nd defendant voluntarily transferred the suit property to the 1st defendant as a gift. In other words, it was a gift *inter vivos* that was ascribed to Luo customs where customarily, land was inherited by sons.
44. As testified by DW1, the gifting was on the understanding that he (1st defendant) would not inherit any other property from the 2nd defendant.
45. An application of the principle of integrational equity as enounced in *Mbui Mukangu* (Supra) shows the transfer had significant ramifications as it removed the suit property from the control of the 2nd defendant and opened an opportunity for the 1st defendant’s heirs to claim customary rights over it.
46. Therefore, I find it is not tenable for the plaintiff to have an absolute share in the suit property. I find the suit property cannot be reverted to the 2nd defendant.



47. The question that then arises is what happens to the plaintiff who is in occupation and possession of the suit property together with the defendants and Susma but cannot have an absolute share in the suit property? Is she left without a remedy?
48. The answer to this lies in the plaintiff's undisputed customary rights of occupancy and possession which is derived from being a wife to the 1st defendant's father (2nd defendant's wife).
49. When faced with customary rights of occupancy and possession, the decision of Mbui Mukangu (Supra) which I hereby affirm, had this to say concerning a son's customary rights of occupancy and possession over customary land that was registered in his father's name: -

“...we think a trust arose from the possession and occupation of the land by Gerald...”

50. In my humble view, justice and good conscience require that her right of occupancy and possession is protected as it would be inequitable for the 1st defendant as the registered owner of the suit property, to exclude the plaintiff from such rights during her lifetime.
51. Although the plaintiff's apprehensions were baseless and it appeared her main concern was that no family land was registered in her name, I find because of her customary rights of occupancy and possession, she could only claim a life interest over the suit property and no more.
52. This life interest cannot survive her demise so as to pass it on to her daughter, and any other children, grandchildren or lineage by way of probate proceedings or otherwise.
53. It is my ultimate finding the plaintiff was successful in her claim. It is trite law costs follow the event. The plaintiff and defendants are close relatives and to foster reconciliation, there shall be no orders as to costs. I hereby issue the following disposal orders: -
- a. The plaintiff's suit against the 2nd defendant is hereby dismissed.
 - b. A declaration that the plaintiff shall have a life interest on the portion of land parcel no. Siaya/Kokwiri/3007 that she occupies and or possesses.
 - c. During the plaintiff's lifetime, a permanent injunction is hereby issued restraining the 1st defendant, his servants and/or agents, or any other person claiming through him from entering into, trespassing into, and/or encroaching into the portion of land parcel no. Siaya/Kokwiri/3007 that is occupied or possessed by the plaintiff.
 - d. There shall be no orders as to costs.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 7TH DAY OF NOVEMBER 2024.

HON. A. Y. KOROSS

JUDGE

7/11/2024

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

In the Presence of:

Miss. Nyaseme for the plaintiff

1st defendant



N/A for 2nd defendant

Court assistant: Ishmael Orwa

