



REPUBLIC OF KENYA



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John & 5 others v Mugambi & 3 others (Environment and Land Case Civil Suit 45 of 2014) [2023] KEELC 327 (KLR) (25 January 2023) (Judgment)

Neutral citation: [2023] KEELC 327 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND CASE CIVIL SUIT 45 OF 2014
CK NZILI, J
JANUARY 25, 2023

BETWEEN

DAVID MUTHURI JOHN 1ST PLAINTIFF
SIMON MUTETHIA JOHN 2ND PLAINTIFF
ANDREW MUTETHIA JOHN 3RD PLAINTIFF
MARK BUNDI JOHN 4TH PLAINTIFF
PETER MUTHUIYA JOHN 5TH PLAINTIFF
JOSEPH THURANIRA JOHN 6TH PLAINTIFF

AND

DAVID MUGAMBI 1ST DEFENDANT
RICHARD MWONGERA NDUBAI 2ND DEFENDANT
LEON MURITHI NDUBAI 3RD DEFENDANT
LEENA MARGARET NDUBAI 4TH DEFENDANT

JUDGMENT

1. By a plaint dated February 24, 2014, the plaintiffs as sons and daughters of the late John Guantai Iringo sued the defendants for breach of customary trust over LR No's Ntima/Igoki/3380 to 3410, (herein after the suit parcels of land) which are resultant subdivisions of LR No Ntima/Igoki/567 a family or ancestral land passed over from their grandfather, to his elder son Stanley M'Mbogori M'Iringo and thereafter to John Guantai Iringo.



2. The plaintiffs averred that the 2nd, 3rd & 4th defendants as administrators of the estate of Benjamin Revel Ndubai (deceased) have continued holding the suit parcels of land in trust for them by virtue of inheritance, actual possession, occupation and developments thereon.
3. The plaintiffs sought for:
 - (a) Declaration that LR No Ntima/Igoki/567 now subdivided into 30 portions, as LR No's Ntima/Igoki 3380 to 3410 are customary, ancestral and or trust land to which the plaintiffs are entitled to a share.
 - (b) Declaration that any dealings over the suit parcels of land by the defendants otherwise without taking into consideration the plaintiffs' interests and rights are invalid, should be cancelled and the suit parcels of land to revert to its original number.
 - (c) Permanent injunction against the defendants, agents, servants and or employees from whatsoever dealing with the initial parcel number and its resultant sub-divisions in breach of the aforesaid customary trust.
4. The plaint was accompanied by authority to plead, list of witnesses, witnesses' statements and documents of the even date and issues for determination dated November 27, 2016.
5. The 1st defendant in a defense dated July 22, 2014 denied the claim and in particular averred that by an agreement dated February 7, 1979, he legally bought the entire land from one Guantai Irongo, which upon payment of the entire purchase price was legally transferred to him on August 6, 1979. He averred that he transferred half share of the land to Kariba Mbabu. Lastly, he averred that the suit was time barred and disclosed no known cause of action.
6. The 2nd, 3rd & 4th defendants filed a defence dated June 30, 2014 stating that LR No Ntima/Igoki/567 was bought by the deceased for value and with notice of any alleged customary trust or other interests by the plaintiffs. Further, the defendants denied any alleged adverse possession, occupation or developments by the plaintiffs on the suit land. Lastly, the 2nd, 3rd and 4th defendants averred that the suit was statute barred. The defendant's defenses were accompanied by a bundle of documents dated August 28, 2017, 1st defendant's case summary dated October 6, 2017, 2nd, 3rd and 4th defendants' case summary and issues dated March 24, 2017.
7. At the hearing, PW 1 adopted his witness statement dated April 1, 2019 as his evidence in chief and produced a copy of an ID for the late John Guantai Irongo as P Exh No (1), death certificate as P ExhNo (2), application for death certificate as P Exh No (3), agreement dated December 1, 2005 as P ExhNo (4), copy of search as P ExhNo (5) and a sale agreement dated February 7, 2019 as P ExhNo (6) respectively. He denied that the alleged land transfer by his late father to one David Mugambi as per P ExhNo (5) since the document had anomalies on the alleged consideration, non-involvement of the family members and for referring to a non-existent of an agreement to exchange the land with LR No Nitma/Igoki/454.
8. PW 1 told the court that in 2012, some people came to their land and gave them a 12 hours verbal notice to vacate the suitland to which they made a report to the area chief and eventually wrote a letter to the land registrar only to discover the alleged subdivisions. They later on moved to court.
9. In cross examination, PW1 maintained that the land was ancestral in nature in which Stanley Mbogori was his uncle. PW 1 also stated that even though the green card was silent on the customary trust, their



- consent to transfer the land and hand over vacant possession as per P ExhNo 6 was never sought for or obtained.
10. Further, PW 1 went on to state that four of their family members were buried on the land and that even though no restrictions were placed on the title deeds, he had made a report at the police station regarding the fraudulent transaction. He insisted that this late father could not have effected the sale and transfer without the family's consent or approval since the land was ancestral and or family land acquired by virtue of inheritance.
 11. PW 2 was one Godfrey Gitari, a young brother to the late Stanley Mbogori, who adopted his witness statement dated February 24, 2014 as his evidence in chief. His evidence was that Parcel No 567 was inherited by his late father from his grandfather M'Iringo. Regarding the alleged land exchange, PW 2 stated that the late John Guantai stayed on his land until he passed on in 2003 hence the land was irregularly transferred otherwise his late brother would not have been buried therein and lastly the plaintiffs could not have been in occupation throughout without being evicted.
 12. DW 1 adopted and produced his witness statement dated August 11, 2017 as his evidence in chief, alongside certificates of title for LR No 3380 - 3385 – 3388, 3393, 3395 – 3402 as D Exh's 1-17 and a copy of the green card for LR No 507 as D Exh No 9 respectively.
 13. In cross examination, DW 1 told the court that his late father bought the land, took vacant possession. He said that even though he had visited the suit land, he was not able to go around it in 2000. DW 1 confirmed that during that site visit, he was able to observe some occupied temporary structures on the land though he did not seek to evict the owner or make any report of trespass to the police. Additionally, DW 1 said that he was not aware of any burial sites of the plaintiffs' relatives on the suitland Despite the occupation, DW 1 admitted that he made a valuation report over the Suitland He did not avail a copy to the court. Similarly, DW 1 acknowledged that he had no sale agreement between his late father and the plaintiffs' late father. Even though D Exh No 19 was registered in 1979, DW 1 admitted that he only made a site visit to the land in 1999 and 2005 after which he took another charge over the suit parcels of land in 2013. There was no defence offered by the 1st defendant despite service with the hearing notice.
 14. At the close of the defence case, parties were directed to file written submissions by October 30, 2022. The plaintiffs have submitted that the issues for determination are; whether LR No 567 and its subsequent subdivisions formed part of their ancestral land and if they had proved the existence of the aforesaid customary trust.
 15. Relying on section 28 (b) of the *Land Registration Act* 2012, the plaintiffs submitted that as an overriding interest, the customary trust need not be noted in the register since it was an encumbrance running with the land reliance was placed on *Twalib Hatayan and another vs Said Saggat Ahmed Al Heidy and 5 others* [2015] eKLR, *Peter Ndung'u Njenga v Sophia Watiri Ndu'ngu* [2000] eKLR, *Peter Gitonga v Francis Maingi M'Ikiara, M'Inanga v M'Lintari & another* [2007] eKLR.
 16. As to whether the land was acquired legitimately by the defendants, the plaintiffs urged the court to find the documents of transfer were fraught with discrepancies as to the consideration paid, identity card numbers of the seller and for lack of taking vacant possession.
 17. On the issue of whether there was ancestral interest, the plaintiffs submitted that the evidence tendered was not challenged that the suit land was first owned by their uncle Stanley Mbogori who in turn transferred the property to the plaintiffs' father John Guantai Iringo. Similarly, it is submitted that the evidence of their continuous occupation of the land and the existence of burial tendered and not



- challenged was consistent with the ingredients set out in *Isaack M’Inanga Kiebia v Theuri M’Lintari & another* [2018] eKLR.
18. Lastly the plaintiffs submitted that the registration of the suit parcels of land in favor of the 2nd, 3rd and 4th defendants did not extinguish their customary rights. Reliance was placed on *Monica Mukulu Muteti v Mutava Maingi* [2019] eKLR, *Deborah Ann Kling Rooney & another v Rukia Njeri Kadidi* [2020] eKLR.
 19. The claim by the plaintiff is that the mother title to suit parcels namely LR No Ntima/Igoki/567 was initially held by their late father until he passed on June 27, 2003. They produced a copy of records giving the history of the suitland. The file was opened on January 8, 1970. Entry No 3 indicates that Stanley Iringo was issued with a title deed on October 17, 1975. Entry No 4 indicates that on November 11, 1977, Gwantai Iringo of ID No 18991061 registered an exchange of the land with LR No Ntima/454 for Kshs 15,000. The names and the ID No’s are markedly different from those of the registered owner Stanley M’Mbogori M’Iringo whose ID No 46447 appears on the records.
 20. Entry No 6 shows that on February 10, 1979 the parcel was transferred to the 1st defendant for Kshs 15000/=. Thereafter, on August 8, 1979, the parcel was shared equally with one Kariba Mbaabu. D Exh No (19) indicates at an entry No 9 that a land title certificate was issued on August 8, 1979 and a charge registered on August 20, 1979. Entry No 11 indicates that on February 16, 1982, the late Benjamin Revel Ndubai acquired the land for Kshs 50,000/=. He was issued with a title deed on February 19, 1982. Thereafter, entry No 13 indicates that on February 7, 1983, the file was closed for subdivisions to No’s 3380 – 3410. There were no records for the 30 subdivisions produced.
 21. The plaintiffs also produced D Exh 6 which was signed by their late father together with the 1st defendant. Their evidence was that the same was subject to their overriding customary rights. Similarly, the plaintiffs insisted that P ExhNo 4 was also subject to their customary rights given that there was no vacant possession handed over to the 2nd-4th defendants and or a consent from them authorizing the transactions.
 22. Exh No 4 was said to have been signed between the 2nd defendant and one Zaverie Kaumbuthu regarding P. No 3408, 3409 and 3410. At the time of the alleged transactions the 2nd defendant did not possess any confirmed letters of administration to the estate of the registered owner. Until a grant of letters of administration is confirmed, a party holding a limited grant has no capacity to dispose a deceased property to third parties. Any such transaction is void *ab initio* in line with sections 76 & 80 of the *Law of Succession Act*.
 23. In the case of *T. Mwangi Maina vs Davidson Kagiri Nyeri* Civil Appeal No 6 of 2011, the court held that equity detests unjust enrichment and suffered no wrong without a remedy especially where a party was using illegal means to defeat away claims that existed before the creation and registration of his title. The court held that tracing was an equitable remedy and equity shall trace the suit property for the end of justice to be saved.
 24. In *David Sironge Ole Tunkai v Francis Arap Muge & 2 others* [2014] eKLR, the court voided a land sale agreement where the requisite land control board consent had not been obtained. In this suit, P ExhNos. 4 & 6 were subject to the land control board consent. The plaintiff gave the history of the suit land. The 1st defendant pleaded that he acquired the suit parcels of land from Guantai Iringo and paid the full purchase price. P ExhNo’s 1, 2 & 3, indicates the full names and ID numbers of the deceased John Guantai Iringo. The details in P ExhNo 6 are materially different from the correct names of the deceased as appearing in P Exh(5). The 1st defendant failed to substantiate his defence by way of oral testimony. In absence of his evidence the defence dated July 22, 2014 remains a mere statement of facts.



25. The 1st defendant did not attach any list of documents in support of his defence nor call evidence to back his defence that he lawfully acquired the land in the first instance so as to be capable of transferring it to one Kariba Mbaabu. The copy of records produced herein was silent on how the suit property was later on acquired by the late Benjamin Ndubai from the 1st defendant and one Kariba Mbaabu.
26. DW 1 failed to produce any sale agreement, transfer forms and approved land control board consents to sustain his defence that the late Benjamin Revel Ndubai acquired a good title which was free of any encumbrances relating to the plaintiffs whose pleadings and evidence was consistent as to continuous possession and occupation prior to the sale and transfer to the defendants.
27. In *Mukangu v Mukangu* (ELC Case No 88 of 2015) [2022] KEELC 14787 (KLR) November 16, 2022) judgment this court held that the manner, character and the elements to found a customary trust as set out by the Supreme Court of Kenya in Kiebia case supra require that a party must ascertain that the land in question was before registration family land; the claimant belongs to that family; the relationship with the family was proximate; the claimant would have been the registered owner save for some intervening circumstances and that the claim was directed at the registered owner, a member of the family.
28. In *Omollo vs Oduor* (Civil Appeal) 46 of 2017 [2022] KECA 371 [KLR] 18 February [2022] Judgment, the court held that the evidence must be lead to prove the existence of a trust and that each case has to be determined on its own merits and the quality of evidence presented before the court.
29. What then must be the quality of evidence for a party to found a trust? In *Kambo vs Mwangi* (civil appeal) 186 of [2017] KECA 524 (KLR) (April 28, 2022) Judgment, the court made a finding that the original suit property was family land before registration and fell under distribution in line with the Kikuyu customary law among the male elements in the family and the unmarried daughters. The court said that the evidence tendered before it was sufficient to presume a customary law trust.
30. On the same line in *Karinga Gaciani & 11 others v Ndege Kabibi Kimanga & another* [2021] eKLR the court held that whether or not a party seeking customary was in possession or actual possession was immaterial. The court held that the registration and subsequent subdivision of the original title did not extinguish the rights under kikuyu customary law and neither did it relieve the person registered of his obligation and duties of trusteeship, unless the presumption was dislodged through evidence.
31. In this suit, PW1 & PW 2 were consistent that they have been in occupation of the suit land and were not aware of the alleged sale and transfer by their late father, and that even if it happened, the same, was subject to their intergenerational rights. The defence has not challenged the said evidence so as to sway this court or to dislodge the presumption of trust. There was no evidence tendered by the defence that the wife of the deceased and his children were summoned by the land control board and failed to attend
32. In *Mungai Njoroge & another v Kiarie Njoroge & another* [2020] eKLR, the court held that a customary trust could take many forms, the category was not closed and a court must decide on the basis of the evidence tendered
33. In this suit, the 2nd – 4th defendants as registered owners have not shown any evidence of taking up vacant possession. DW 1 said that he never enquired to know how the property was acquired in so far as who was in occupation at the time it was acquired DW 1 was unable to reasonably explain the alleged issue of exchange of land and particularly the issue that John Guantai never vacated his land until he passed on in 2003. Even though DW 1 obtained a title deed in 1979, it is not clear why he did not formally take up vacant possession so as to assert ownership and defeat the rights of the plaintiffs said to have been in occupation all throughout.



34. Similarly, the 2nd – 4th defendants were unable to explain why they did not order the plaintiffs to vacate the land if at all they were illegal occupants therein with no known rights to the land In *Charles Kabende Kinuthia & another vs Naomi Nyabae Kamuyu* (2019) eKLR the court cited with approval *Salesio M'Itonga vs M'Ariti M'Athara & 3 others* (2015) eKLR that the onus lay with the respondent to establish through evidence a claim for customary trust.
35. Applying the foregoing binding case law, the evidence on the record herein points out that the deceased was the absolute owner of the suit land. PW 2, a brother of the deceased was able to clarify that his late brother, the wife and two of the deceased children were buried on the suitland. Further evidence was tendered and not challenged that the deceased and the defendants were in occupation of the land up to 2012 when the defendants came to evict them on account of being title holders.
36. The evidence by the plaintiffs has been consistent as to not only the land being ancestral but also their rights to the family land prior to and after the demise of their late father in 2003. The defendants have not sufficiently countered this evidence to dislodge the presumption of trust.
37. In the premises I find the suit proved on a balance of probability. The plaintiffs are declared as entitled to the suit parcels of land by virtue of customary trust. The title deeds held by the defendants are hereby cancelled and the land registrar directed to revert the land to its original parcel number under the name of the deceased.
38. A permanent injunction shall also issue restraining the defendants their agents, servants or employees from dealing or interfering with the plaintiffs' occupation, use and quiet enjoyment of the suit premises and its resultant subdivisions.
39. Costs to the plaintiffs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 25TH DAY OF JANUARY, 2023

In presence of:

C/A: Kananu

Miss Gikundi for plaintiff

Wambua for 2nd & 3rd defendants

HON. C.K. NZILI

ELC JUDGE

