



REPUBLIC OF KENYA



KENYA LAW
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**Chivilili v Molenje & another (Environment & Land Case 23 of 2018)
[2023] KEELC 15788 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15788 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 23 OF 2018
DO OHUNGO, J
FEBRUARY 28, 2023**

BETWEEN

JAPHETH M. CHIVILILI APPLICANT

AND

SARAH MASANGA MOLENJE 1ST RESPONDENT

ALFRED MOLENJE CHIBILILI 2ND RESPONDENT

JUDGMENT

1. By Originating Summons (OS) dated March 8, 2018, the applicant who claims 4.0 acres of the parcel of land known as North Kabras/Malava/3297 (suit property) as part of his inheritance, sought determination of the following issues:
 1. Whether the respondent holds title for 4.0 acres of land parcel number North Kabras/Malava/3297 in trust for the applicant under the customary law.
 2. Whether the respondent's title to 4.0 acres of land parcel number North Kabras/Malava/3297 should be cancelled and a new title for the same be issued to the applicant.
 3. Whether the applicant is entitled to 4.0 acres of land parcel number North Kabras/Malava/3297 as part of his inheritance from his late father.
 4. Who shall bear the costs of this application.
2. The Originating Summons was supported by an affidavit sworn by the applicant who deposed that he is the only son of the late Molenje Murunga who was the registered owner of land parcel number North Kabras/Malava/1758. That when the applicant's father married his mother, she came with the second respondent herein and that due to customs, the applicant's father bought a parcel of land for



- the second respondent to settle in since he could not settle him on land parcel number North Kabras/Malava/1758 which was ancestral land. That when the applicant's father gave the second respondent KShs 4,000 to buy land from one Albert Bibu Muyaka and the that second respondent acquired land parcel number North Kabras/Malava/1519, settled therein in 1975 and was issued with title in 1986. He added that later, the second respondent bought another parcel of land in Trans Nzoia and relocated to Trans Nzoia with his family where he still resides while the applicant continued to reside on the ancestral land with his mother.
3. The applicant further deposed that he assisted his mother to obtain letters of administration in respect of his late father's estate comprising land parcel number North Kabras/Malava/1758 in Kakamega High Court Succession Cause No 229 of 1992 and that upon the grant being confirmed, the first respondent took the whole share and subsequently sub divided land parcel number North Kabras/Malava/1758 into three portions, sold six acres and remained with 4.1 acres for herself and the applicant. That the first respondent remained with the suit property in which the applicant was entitled to 4 acres as part of his inheritance while the first respondent retains 0.1 acres. The applicant added that he has been using the suit property until the second respondent started leasing the same without his authority.
 4. The second respondent opposed the OS through a replying affidavit which he swore on September 8, 2020 and deposed that the applicant is his younger brother, that their deceased father had two wives and that both the applicant and the second respondent are children of the union between Molenje Murunga and the first respondent, both deceased. That the second respondent is the registered proprietor of all that parcel of land known as N/Kabras/Malava/3297 measuring approximately 1.64 hectares while the applicant is the registered proprietor of parcel of land known herein as N/Kabras/Malava/3299 measuring approximately 1.20 hectares, which parcels were gifts from their parents and are subdivisions of parcel number N/Kabras/Malava/1758. The second respondent further deposed that they both inherited from their deceased mother's portion since she subdivided parcel number N/Kabras/Malava/1758 and gifted her sons parcel numbers N/Kabras/Malava/3297 and N/Kabras/Malava/3299. That the applicant is seventeen years younger than him and as such it is quite surprising for the applicant to claim that the second respondent was not born of the union between their deceased parents and further deposed that the applicant has since sold his portion. That the applicant has never been in occupation of or developed the suit property but on the other hand, the second respondent has developed the suit property, resided thereon, and occupied it for a long time and is the registered proprietor.
 5. Directions were given that hearing proceeds by way of oral evidence. On February 25, 2019, counsel for the plaintiff/applicant told the court that the first defendant/respondent had passed away. He proceeded to withdraw the suit against the first defendant/respondent.
 6. Hearing of the matter started on March 10, 2022. The plaintiff/applicant testified as PW1 and adopted his witness statement dated April 8, 2021 as his evidence in chief. He stated that since the second respondent was not sired by their deceased father, he cannot culturally settle on parcel number North Kabras/Malava/1758, hence their deceased father bought the second respondent a separate parcel of land number North Kabras/Malava/1519 where he briefly settled in and later sold the land and moved to Trans Nzoia Kitale where the second respondent resides to date. He further testified that he was left in land number North Kabras/Malava/1758 and that the first respondent who was their mother subdivided land number North Kabras/Malava/1758 into parcel numbers 3297, 3298 and 3299. That parcel number 3298 was registered in the name of a buyer and parcel number 3299 in the applicant's name whereas parcel number 3297 is currently registered in the second respondent's name. The applicant went on to state that he transferred parcel number 3299 to one Elias Eronde and that



- although parcel number 3297 was in their late mother's name, it belonged to him since their deceased father left it for him. That the second respondent fraudulently obtained title to the suit property despite the applicant lodging a caution therein and that the applicant resides on the suit property and does agricultural activities therein while the second respondent has never lived on the suit property.
7. The applicant further testified that he was born in 1963 while the second respondent was born in 1946. He added that he is claiming the suit property since it is ancestral land yet the second respondent is not a biological son of their deceased father and as such ought not to culturally reside in the suit property. He also stated that he has never lodged any criminal case of acquiring the suit property through fraud against the second respondent and that when their father was alive, their father lived with the second respondent in the family homestead as he was considered a son by the deceased.
 8. Benjamin Songa Masi testified as PW2 and adopted his witness statement dated April 8, 2021 as his evidence in chief. He stated that the late Molenje Murunga was his nephew and that the suit property belonged to the late Molenje Murunga who left it to his wife Sarah Molenje (deceased). That the applicant was residing on the suit property with his late mother who was buried in the suit property and that due to culture, the second respondent was bought for a parcel elsewhere and settled therein. PW2 added that the second respondent is not entitled to any portion of land in the suit property since the it belongs to the applicant upon their mother's demise. He further stated that he was present when Molenje Murunga (deceased) distributed his land in 1979 and that the land was given to the applicant.
 9. The plaintiff/applicant's case was then closed.
 10. During defence hearing, the second respondent testified as DW1 and adopted both his witness statement dated June 25, 2021 and his replying affidavit filed on September 10, 2020 as his evidence in chief. I have summarized the contents of the replying affidavit earlier in this judgment. The witness statement was essentially a rehash of the affidavit. DW1 went on to testify that he was born in 1946 and that in 1975 while working as a teacher, he purchased land parcel number North Kabras/Malava/1519. That his parents never gifted him land parcel number North Kabras/Malava/1519. He added that his parents gave him the suit property in 2007 and the applicant lodged a caution against it and despite being summoned by the land registrar three times, the applicant ignored the summons and that the land registrar ultimately lifted the caution and issued title to DW1 on May 10, 2018. That the applicant got parcel number 3299 and their late mother got parcel number 3298 while the second respondent was given the suit property and further that the applicant does not reside in the suit property. He stated that he was in possession and exclusive use of the suit property as at the date of his testimony.
 11. Hayilamu Nyamu Chibilili testified as DW2 and adopted his witness statement dated June 25, 2021 as his evidence in chief. He stated that he is a brother to the late Molenje Murunga Chibilili and that the applicant's allegations that the second respondent was born out of wedlock are untrue. That the second respondent is born out of the union between the late Molenje Murunga Chibilili and the first respondent.
 12. The defence case was then closed. Parties thereafter filed and exchanged written submissions.
 13. The applicant submitted that the first respondent was to hold land parcel number North Kabras/Malava/1758 in trust for the applicant and other siblings and that upon subdividing it, the first respondent was equally to hold the suit property in trust for the applicant and his siblings. That the second respondent fraudulently transferred the suit property to himself and removed the caution placed on it during the pendency of this case, to defeat the applicant's claim. He urged the court to allow the OS.



14. The second respondent argued that the suit land is currently registered in his name following transmission from the first respondent through a succession cause in which each family member got a share from the original parcel. That the applicant acquired parcel number 3299 in the transmission and that consequently, it is not shown when the alleged trust was established. The second respondent therefore urged that the suit be dismissed with costs.
15. I have carefully considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether trust has been established and whether the reliefs sought should issue.
16. There is no dispute that the second defendant/respondent is the registered proprietor of the suit property, and that title was issued to him on May 10, 2018. In terms of Section 25 of the [Land Registration Act](#), he holds the suit property subject to such liabilities, rights and interests as are recognised in law, but which do not require registration.
17. Section 25 of the [Land Registration Act](#) provides:
- Rights of a proprietor.
- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –
- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
18. Section 28 (b) of the [Land Registration Act](#) recognises trusts including customary trusts as overriding interests which do not require registration.
19. Whether or not trust exists is a question of fact which must be proven through evidence. In [Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another](#) [2018] eKLR, the Supreme Court stated as follows:
- 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.
20. The key considerations are therefore the nature of the holding of the land and intention of the parties.
21. There is no dispute that the applicant and the second respondent are brothers, being children of the first respondent. The plaintiff contends that he is claiming the suit property because the second defendant was a not a biological son of his father. That is an issue that he ought to have raised in the presence of his mother in Kakamega High Court Succession Cause No 229 of 1992. I note that even as he makes the allegations on paternity, he conceded in his testimony that his father lived with, brought up, educated, arranged for the circumcision of the second defendant and generally considered the second defendant a son. Thus, it is safe to state that the applicant and the second respondent shared a father.
22. It is further not in dispute that the plaintiff/applicant collaborated with the first respondent to obtain letters of administration in respect of his late father's estate in Kakamega High Court Succession Cause No 229 of 1992 as a result of which the first respondent became the sole registered proprietor of land parcel number North Kabras/Malava/1758. The first respondent later subdivided land parcel number North Kabras/Malava/1758 into three parcels with the full knowledge and support of the plaintiff/applicant. The first respondent, the plaintiff/applicant and the second respondent acquired a parcel each from the subdivisions. In his wisdom, the plaintiff/applicant opted to sell his parcel.
23. As shown above, the applicant was at the core of the process through which his mother obtained title to land parcel number North Kabras/Malava/1758. He was fully aware of what was going on and ought to have raised any claims of trust over land parcel number North Kabras/Malava/1758 in the succession cause. Having helped his mother to get confirmed grant upon which his mother subdivided the parcel in September 2007, the applicant cannot turn around over 11 years after the subdivision and after his mother's death, to start claiming the suit property. He has failed to establish that the nature of the holding of the suit property by the second respondent is of trust in his favour or even that there was any intention to create trust. In short, the plaintiff/applicant has not established trust. Consequently, he is not entitled to the reliefs sought.
24. I find no merit in the plaintiff/applicant's case and I therefore dismiss it. In view of the relationship between the parties, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 28TH DAY OF FEBRUARY 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

The plaintiff/applicant

No appearance for the defendants/respondents

