



Kimani & 2 others v Kimani & 5 others (Environment and Land Appeal E001 of 2020) [2023] KEELC 770 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KEELC 770 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E001 OF 2020**

JM MUTUNGI, J

FEBRUARY 17, 2023

BETWEEN

**JAMES MUTHEE KIMANI 1ST APPELLANT
JOHN MARAKA KIMANI 2ND APPELLANT
PETER KARIUKI KIMANI 3RD APPELLANT**

AND

**JOSEPH MBURU KIMANI 1ST RESPONDENT
EUNICE WAWIRA MBURU 2ND RESPONDENT
NANCY WANJAGI MBURU 3RD RESPONDENT
JAMES KARIUKI MBURU 4TH RESPONDENT
JOHN KIMANI MBURU 5TH RESPONDENT
JANET WAMBUI MBURU 6TH RESPONDENT**

(Arising from Judgment Delivered by the Hon. A. K. Itbuku – Chief Magistrate in Kerugoya CMELC NO. 23 OF 2018 ON 30th April, 2020)

JUDGMENT

1. This Appeal by the appellants who were the plaintiffs before the subordinate court, is against the Judgment delivered by the Hon. A. K. Itbuku, Chief Magistrate in Kerugoya CMELC No. 23 of 2018 on April 30, 2020 whereby the Learned Trial Magistrate dismissed the applicants suit with costs and upheld the counter claim by the respondents who were the defendants in the suit before the lower court.



2. The brief facts of the matter are that the appellants, as the plaintiffs in the lower court, filed the suit claiming that the 1st respondent was registered as proprietor of land Parcel Gichugu/Settlement/Scheme/835 (the suit land) to hold in trust for himself and the appellants who were then minors. The Appellants averred that the 1st respondent caused the suit land to be subdivided into 9 portions namely Gichugu/Settlement/Scheme/4806 to 4814 and registered variously amongst the 1st respondent and the 2nd to 5th respondents who were the 1st respondent's children. The Appellants pleaded the 6th respondent was a purchaser from the 1st respondent though no particulars of the portion of land purchased were given. The appellants in the court below sought Judgment against the respondents for:-
 1. An order cancelling land parcel numbers Gichugu/Settlement Scheme/1406 to 4814 and the same to revert back to Land Parcel No. Gichugu/Settlement/Scheme/385.
 2. A declaration that land parcel number Gichugu/Settlement/Scheme/385 was registered in the name of the 1st defendant (now 1st respondent) as a trustee for himself and the plaintiffs (now appellants) and an order compelling the 1st defendant to subdivide into equal portions Land Parcel Gichugu/Settlement/Scheme/835 and to register the subdivisions and transfers in favour of the plaintiffs and the 1st defendant respectively.
 3. Costs of the suit.
3. The respondents filed a joint statement of defence. the 1st respondent asserted that he was registered as absolute proprietor of land parcel Gichugu/Settlement/Scheme/385 and denied he had been registered as a trustee. The 1st respondent stated that he had only permitted the appellant's mother use of a portion of the land now parcel Gichugu/Settlement/Scheme/4808 which did not extend to the other parcels of the land. The respondents asserted that the appellants acts on the other parcels of land other than land parcel 4808 constituted trespass and by the Counter Claim sought the eviction of the Appellants from land parcels Gichugu/Settlement/Scheme/4806,4807,4809,4810, 4812, 4813 and 4814.
4. During the trial before lower court the three appellants testified as PW1, PW2 and PW3 respectively in support of their case. The 1st and 4th respondents testified as DW1 and DW2 respectively in support of the respondent's case. The evidence as adduced by the parties is briefly set out here under.
5. The appellant's evidence was to the effect that they came to the suit land from Embu and found their brother, the 1st respondent who showed them where to settle on the suit land. The suit land belonged to their deceased father but the 1st respondent had according to them been registered to hold the land in trust for himself and for the appellants.
6. PW1 stated they had lived on the land for 25 years. PW2, the 2nd respondent testified that he entered into the land in 1993 when he was aged about 4 years and has lived on the land ever since. He testified that he had built a house on the land and that when one of his children died he was buried on the land. He stated that the 1st respondent had agreed to give each of them (appellants) one acre each but he later backtracked and secretly sub divided the land and obtained titles of the subdivision. He stated the 1st respondent showed him where to bury his child and maintained the 1st respondent held the land in trust for them. The evidence of PW3 was more or less the same as that of PW1 and PW2. He affirmed he got to the land in 1993 and has lived thereon ever since. He averred the 1st respondent was holding the land in trust for them.
7. On the part of the respondents DW1 Joseph Mburu Kimani (1st respondent) gave evidence he was registered as owner of land parcel number Gichugu/Settlement/Scheme/835 absolutely and not as a trustee for anybody. He stated his father died in 1966 when he was about 2 years. He stated his mother



remarried soon after his father's death and went to live with her new husband. He stated he had a step brother, Peter Mburu Kimani, from his father's 1st wife and that he and his said brother were jointly registered as owners of the suit land while they were minors but that he was registered as sole owner in 1979. The 1st respondent explained that after his mother remarried he remained with his step mother and that he was educated by his Uncle who was in Embu.

8. The 1st respondent gave evidence that his mother came back in 1997 after about 30 years after the marriage to her new husband got strained. He stated when the mother came back he decided to give her a portion of ½ Acre on the suit land to reside and live on but when the appellants who were her children from her failed marriage followed her, he allowed them to stay on the portion he had given his mother but they wanted to have the suit land shared with them even though they were not his brothers from his late father. He maintained the appellants were not entitled to any share of the suit land, as they were not children of his late father.
9. The 4th respondent a son to the 1st respondent testified as the 2nd witness on behalf of the Respondents. He affirmed he was the registered owner of land parcel Gichugu/Settlement/Scheme/4807 a subdivision from parcel 385. He stated the land was transferred to him following a court case in 2014 presided over by Olao, J involving the suit property. He asserted the appellants were not part of their family at the time his grandfather died. He further gave evidence that his father got land parcel Gichugu/Settlement/Scheme/835 while his Uncle got land parcel Gichugu/Settlement/Scheme/834. At the time the grandfather's land was shared, he stated the grandmother had left as she had remarried.
10. The Learned Trial Magistrate reviewing and evaluating the evidence came to the conclusion that the appellants had not proved the 1st respondent was registered as trustee to hold the suit property on his own behalf and on behalf of the appellants. The Learned Trial Magistrate concerning whether a customary trust had been proved by the appellants stated as follows:-

“ 18. The question in the instant case is whether customary trust has been proved. Customary trust is a matter of fact. It had to be proved by way of tangible evidence. The uncontested evidence on record is that the 1st defendant was registered as the owner of the suit land in 1979. At this time his mother who is also the mother of the plaintiffs had been remarried elsewhere. The plaintiffs were not the children of the defendant's father who was the original owner of the suit land. When the father died, the Plaintiffs did not and could not inherit his property because they were not his children and were not living on the land. Their mother returned to his son almost three decades later. By this time her former husband was long dead”

11. The Learned Trial Magistrate found that the 1st respondent on humanitarian grounds gave his mother a ½ acre parcel of land further holding that there was no expectation that his mother having remarried and he having been the only son to his deceased father, there would have been any other children such as the respondents who would be entitled to have any claim to his deceased father's property. The Learned Trial Magistrate in conclusion held as follows:-

“ 20. As a result of the findings above I am convinced that the intergenerational equity that is supposed to be served by customary trust is not violated in this case. The Plaintiffs do not have a lineage that should be protected. They could have claim where the mother was married. I am therefore of the considered view that the plaintiffs have not established a customary trust”.



12. The Learned Trial Magistrate accordingly held the appellants have not proved the suit on a balance of probabilities and dismissed the same with costs. He held the respondents had proved the Counter Claim to the required standard and entered Judgment in favour of the respondents and awarded the costs of the Counter Claim to the respondents.
13. The appellants aggrieved and dissatisfied with the decision of the Learned Trial Magistrate lodged an Appeal to this court and vide the Memorandum of Appeal dated October 23, 2020 listed 11 grounds of Appeal as hereunder:
 1. That the Learned Magistrate erred in fact and in law by holding that the Respondents had proved their case as required by the relevant law to warrant granting of the order sought.
 2. That the Learned Magistrate erred in law and fact by holding that the 1st Respondent herein did not hold land Parcel No. Gichugu/Settlement/Scheme/835 in trust under customary law for themselves and the appellants whereas there was sufficient evidence tendered to prove the same.
 3. That the Learned Magistrate erred in law and fact by finding that the relationship between the respondents and the appellants was very common and general to give rise to a customary trust.
 4. That the Learned Magistrate erred in law and fact by basing his Judgment on extraneous matters not pleaded and not supported by evidence and relevant law.
 5. That the Learned Magistrate erred in law and fact by failing to consider that the evidence tendered supported the plaintiff's case.
 6. That the Learned Magistrate erred in law and fact in failing to consider that there was an overriding interest of customary trust over the subject matter property where all the parties live and have developed.
 7. That the Learned Magistrate erred in law and fact by allowing the counterclaim and dismissing the plaintiff case.
 8. That the Learned Magistrate erred in law and fact by not complying with order 11 of the *Civil Procedure Rules* and proceeding to hear the Counterclaim which was in the same matter as the plaintiff.
 9. That the Learned Magistrate erred in law and fact by holding that the Counterclaim filed by the respondents was not defended without satisfying himself whether the same had been served upon the defendant.
 10. That the Learned Magistrate erred in law and fact by allowing the Counterclaim despite no evidence tendered in support thereof.
 11. That the entire proceedings were a mistrial since the purported amended defence and Counterclaim was never served upon the appellants who only came to know of its existence after reading the Judgment.
14. The appellants seek to have the Appeal allowed and the Judgment of the lower court set aside and to be awarded the Costs of the Appeal and of the lower court.
15. This court as an appellate court of first instance is obligated to reconsider and re-evaluate the evidence and reach its own conclusions, and/or findings. The court is not bound by the findings of fact and/or conclusions reached by the Trial Magistrate. The court in re-evaluating the evidence places itself in the



position of the trial court with the objective of affirming whether or not the decision reached by the trial court was justified on the basis of the evidence adduced. The Court of Appeal in the case of *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123 established the principles that an Appellate Court should apply while considering an Appeal and stated thus:-

“..... This court is not bound necessarily to accept the findings of fact by the Court below. An Appeal to this court is by way of retrial and the Principles upon which this court acts in such an Appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect....”

16. The parties canvassed the Appeal by way of written submissions. The Appellants submissions dated September 19, 2022 were filed on September 22, 2022. The respondents submissions were equally dated September 19, 2022 and were filed on September 20, 2022.
17. The appellants broadly submitted on two grounds:
 - a. Whether the Trial in the lower court was a mistrial.
 - b. Whether the appellants met the minimum grounds for determination of a customary trust in land.
18. In regard to the ground relating to mistrial, the appellants contended that they had not been served with the amended defence and Counterclaim and thus submitted that they were denied the chance to fully present their case. The Appellants submitted that the trial proceeded without pre-trial directions being taken in compliance with order 11 of the *Civil Procedure rules* 2010 and that this prejudiced their right to a fair trial as envisaged under article 50(1) of the *Constitution*. In support of this submission the appellants placed reliance on the case of *SM v HGE*(2019) eKLR where Musyoka, J allowed the appeal on the basis that the trial was conducted in a deficient manner and there was concern respecting the integrity of the lower court record.
19. The appellants further submitted that the trial court’s failure to ascertain the amended statement of defence and Counterclaim had been served on the appellants led to the trial proceeding when a vital pleading had not been served which was an affront to the appellants rights of a fair hearing. They urged the court to hold there was mistrial before the lower court.
20. On the issue whether a customary trust was established the appellants faulted the learned trial magistrate for not finding that the 1st respondent held the land in trust for himself and the appellants by virtue of being brothers. The appellants relied on Supreme Court case of *Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another* (2018) eKLR where the court held that whether or not a customary trust exists has to be determined on a case to case basis and that not every claim of a right to land will qualify as a customary trust. The court set out some of the elements that would qualify one as a trustee as follows:
 1. That 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 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.
21. The respondents in their submission reiterated the facts of the case before the lower court. They maintained the appellants were not the biological children of the 1st respondent's father having been born after he died in 1966 out of another union following the remarriage of the 1st respondent's mother to another man. The respondents contend the appellants were not entitled to any inheritance from the 1st respondent's deceased father as they were not his children. The respondents further contend notwithstanding that the 1st respondent had agreed on humanitarian grounds to give his mother a portion of ½ acre of land, the appellants were not entitled to such gesture since they were not siblings from the 1st respondent's father having been born long after the 1st respondent's father had died to the person who remarried the 1st respondent's mother.
22. The respondents supported the findings and Judgment by the Learned Trial Magistrate and averred that contrary to the averments by the appellants, the appellants were served with all the pleadings and maintained that the trial before the lower court was fairly and procedurally conducted and urged the court to dismiss the Appeal as it lacked any merit.
23. On the issue whether or not the trial before the lower court was a mistrial as contended by the appellants, I have perused the Appeal record and the original record of the lower court. The court record shows that Olo, J on 19/10/2017 directed the parties to appear before the Deputy Registrar for pre-trial directions on 14/11/2017 where the Deputy Registrar noted the parties had not complied with Order 11 of the *Civil Procedure Rules* and directed a further mention on 5/12/2017 when he certified the matter to be ready for trial. The matter was however on 5/3/2018 transferred to the lower court. On December 20, 2018 the lower court granted the appellants leave to amend the Plaintiff to inter alia introduce additional parties (5th and 6th respondents). The amended Plaintiff was filed on January 29, 2019.
24. After being served with the amended Plaintiff, the respondents filed a joint statement of defence and Counterclaim dated February 12, 2019 on February 15, 2019. The court record shows the defence and Counterclaim was indeed paid for and a receipt issued on the same date. Further, the record shows an affidavit of service made by one Isaiah Mbogo Robert, a Process Server sworn on March 26, 2019 and filed on the same date indicated that the Appellants were served with an Amended Statement of Defence and Counterclaim on March 20, 2019. The matter after that date came up for mention, hearing on several days, on 4/4/2019, 20/6/2019, 18/7/2019, 22/8/2019 and 31/10/2019 before being heard on 30/1/2020 during which occasions all the parties were present. The issue of service of any documents was never raised by any party. In the premises I am not persuaded by the appellants contention that they were never served with the Amended Defence and Counterclaim. The parties were all unrepresented and were entitled to peruse the court record wherever they desired. The appellants simply omitted to file a Defence to the Counterclaim perhaps through inadvertence.
25. On the question whether or not the Learned Trial Magistrate ought to have found there was a Customary Trust, I have re-evaluated the evidence adduced and I find no basis upon which I could fault the Learned Magistrate. The evidence that the appellants were not the children of the 1st respondent's deceased father who was the original owner of the suit property was not disputed. That the appellants and also the 1st respondent's mother was remarried soon after the death of the 1st respondent's father in 1966 and did not return for nearly 30 years equally was not in issue. The appellants were undoubtedly born long after the death of the 1st respondent's father and were definitely not part of the 1st respondent's family at the time the 1st respondent's father died. On what basis therefore would customary trust apply in their favour so that they become entitled to a share of the suit land that



belonged to the 1st respondent's father? They were neither in occupation of the land and neither had the 1st respondent's father adopted them as his sons at the time of his death. By remarrying, the mother of the 1st respondent had in fact cut all links with the family of her former husband and she became a member of the family of the husband who married her. The fact that the son whom she left when he was hardly 2 years accepted her back and gave her a place to reside cannot entitle the children she got in another marriage to become beneficiaries of what rightly the 1st respondent was entitled to inherit. In my view when the 1st respondent was registered as the owner of land parcel Gichugu/Settlement/Scheme/835 there could have been no intention that he was to hold the property in trust for himself and the Appellants. The appellants were unknown to him and were not part of his family. There was no expectation that they could lay claim to his deceased father's land, they having not been his children. Even applying the guidelines laid by the Supreme Court in the case of *Isack M'inanga & another v Isaaya Theuri M'inanga & another* (supra) the appellants do not qualify to benefit under customary trust as they are not part of family or clan of the 1st respondent's deceased father. They would properly belong to the family and/or clan of the 2nd husband of their mother after she remarried following her 1st husband's death.

26. Upon re-evaluation and analysis of the evidence adduced before the lower court, I am satisfied the Learned Trial Magistrate reached the correct determination and I find no basis upon which I could interfere with his determination. The Appeal lacks any merit and the same is ordered dismissed with costs to the respondents.

Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 17th DAY OF FEBRUARY 2023.

JOHN M. MUTUNGI

E.L.C - JUDGE

