



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA E054 OF 2021

M'ARIMI M'MARETE.....APPELLANT

VERSUS

GIKUNDA M'ARITHIRESPONDENT

JUDGMENT

A. Pleadings

1. The appellant had sued the respondent in the lower court claiming the respondent held 0.48 ha of Parcel No. Abothuguchi/Katheri/1511 in favour of him. The respondent denied the alleged claim and raised a defence that a land disputes tribunal had no jurisdiction for parcels of land falling under the Registered Land Act now repealed.

B. Testimony

2. The appellants' testimony was that the suit land was initially ancestral land from his great grandfather Mutua Kathoka but later was registered under his elder brother Kamunde M'Marete, who acquired parcel no. Abothuguchi/Katheri/1275 whereas the respondent acquired Parcel No.1511. The appellant averred he took the two brothers to the land dispute tribunal where he was excised 0.489 ha was excised for him by his elder brother but the respondent declined to give him his share hence the suit.

3. The appellant produced the green card for parcel no. Abothuguchi/Katheri/1511 and 3066, tribunal proceedings, judgment of the appeal, memorandum of appeal in HCA 40/05 and the notice to the respondent on the appeal as p. exhibit 1-6 respectively in support of his claim for 1 ½ acres of land since it had been registered in trust for him.

4. PW 2 told the court he gave out a portion of his land to his young brother but the respondent had declined to do so contrary to the wishes of their late father.

5. PW 3 told the court the appellant came back to their land after failing to acquire land at Kibirichia hence was entitled to a portion from respondent's land. According to pw 3 the suit land was initially registered with the respondent and his elder brother since the appellant had left for Kibirichia hoping to acquire land there out of the settlement scheme.

6. The respondent evidence was that the appellant was his uncle, a young brother to his late father. His testimony was that the suit land was registered under the name of Kamumbu M'Marete to hold in trust for him since his late father had no ID card at the time. Later on the respondent said he was registered as the owner of a portion, with Kamundi M'Marete retaining a larger share in 1963. He maintained the tribunal had no powers to determine a land dispute over registered land. He produced a green card for Parcel

No's 3060 & 1511 as p. exh 1 p. exhibit (1) & 2 respectively. The respondent was emphatic that what he acquired was a share of his father's land which did not belong to the appellant.

C. Grounds of Appeal

7. The appellant faults the trial court for failing to find he had proven his claim against the respondent; for misconstruing the evidence before it, hence arriving at a wrong decision and lastly ruling against the weight of the evidence.

D. Written submissions

8. In written submission dated 28.1.2022 the appellant stated he had met the threshold set out in *Isack M'Inanga Kiebia vs Isaaya Theuri M'Lintari and another (2018) eKLR* as to customary trust.

9. Reliance was also placed on *Francis Kithure vs Githonga M'Thambura M'Rukunga (2020) eKLR Kanyi vs Muthiora (1984) KLR 712 Gathiba vs Gathiba Patrick Gitonga M'Ikiara vs Ruthson Mangati M'Ikiara & 5 others (2020), Isaac Wanjohi & another vs A.K Mbwiria and another* given the appellant had adduced enough evidence in support of the claim for a customary trust.

10. On the other hand the respondent by written submissions dated 16.1.2022 stated that the legal burden lay with the appellant to prove the existence of a customary trust, in line with the ingredients set out in Kiebia case (supra) which he had failed to discharge as held by the trial court.

11. In the instant case the respondent submitted the root of the title and the intention thereof left no doubt there was no nexus or link to create any trust between the title holder and the claimant.

12. Further it was submitted by the respondent the court could not presume or infer trust under the circumstances and more so that the appellant had never lived or occupied the suitland. Reliance was placed on *Juletabi African Adventure Ltd and another vs Christopher Michael Lockley (2017) eKLR, Mbui Mukangu vs Gerald Mutwiri Mbui (2004), Alice Wairimu Macharia vs Kirigo Philip Macharia (2019) eKLR, Patrick Mbaso vs Meshack Odhiambo Mbaso & another (2020) eKLR* on the proposition that the appellant was not a designated family member.

13. This being a just appeal the court is enjoined by law to rehear, rehearse and reassess the lower court record, come up with independent findings and conclusions while alive to the fact that the trial court had occasion to see and hear the witnesses first hand *see Peters vs Sunday Post (1958) EA*.

E. Issues for determination

14. The issues commending themselves for determination are; if the appellant established any customary trust against the respondent and if the trial court applied the correct law and reached the appropriate decision.

15. The law relating to customary trust and the ingredients to establish and prove the same was set out in *Isack M'Inanga Kiebia vs Isaaya Theuri M'Lintari (supra)* as the land before registration belonged to family, clan or group; the claimant belonged to the said group clan or family; the relationship between the claimant and the title holder was not remote; the claimant could have been entitled to be registered as the owner were it not for some intervening circumstances and lastly the claim was directed against the registered owner who is a member of the family clan or group.

16. In this case the appellant pleaded the land initially belonged to their great grandfather, he was related to the respondent; his late father had three sons Kamundi Marete himself and M'Arithi M'Marete the father to the respondent.

17. He averred he left the ancestral land for a settlement scheme in Kibirichia area on condition that should he fail to acquire the land there his brothers who were holding the land in trust for him would eventually allocate him a portion.

18. The appellant pleaded and testified his elder brother Kamundi Marete transferred him a portion of land but his nephew the respondent had declined despite clan elders and land dispute tribunals decision to that effect.

19. A copy of record for Land Registration No. Abothuguchi/Katheri/1511 prohibited herein indicates the register was opened on 3.4.1963 and a title deed issued to the respondent on 23.12.1964 as a first registered owner. Thereafter it appears a portion measuring 0.50 acres was compulsorily acquired by the government in 1986.

20. There is no indication from the copy of records that the suit land prior to 1963 belonged to the appellant's great grandparents and or was ancestral in nature. There is no indication also that the suit land formed part of a larger parcel of land prior to 1963 in which the appellant held a share.

21. The appellant averred and testified that he left his brothers holding the land on his behalf to go and lodge a claim on settlement scheme at Kibirichia conditionally that should he fail to secure any land there then he would fall back to them to reclaim his share.

2. The appellant did not call for any evidence in support of such a promise or give details as to the time frame within which he was to reclaim or raise his stake on the suit land. Further given the respondent was not a party to the alleged promise the appellant led or tendered no evidence of the alleged promise or arrangement with his brothers and the basis of why such would be binding on the respondent.

23. Evidence was tendered that the respondent's father predeceased his grandfather. So the appellant gave no evidence or explanation for the delay reviving or claiming the suit land as soon as the title passed in favour of the respondent in 1963 or soon thereafter.

24. If the appellant alleged his two brothers were the ones holding the land in trust for him, once the said brother passed on and the land came into the name of the respondent obviously, whatever trust or arrangement if any, existed prior to the registration got extinguished or could not be binding on the respondent in the absence of any express documents or notice to that effect.

25. The appellant appears to have inordinately and without explanation awaited until he lodged land dispute tribunal claims which would not be sustained especially so late after the title deed was issued in favour of the respondent.

26. In my view, the appellant was bringing a claim against the respondent, nephew who though related could not possibly be liable for whatever arrangements if any were existing between the appellant and his late father.

27. Similarly, the intervening circumstances which made the appellant not to be registered as the owner of the suit land are not clear and evidence was not tendered to the satisfaction of the court why he would take such a risk and relinquish his ancestral rights and interests in favour of a settlement scheme at Kibirichia area.

28. Looking at the evidence tendered especially a copy of record for LR No. 2060 it is quite evident that the register was opened in 1997 as a subdivision of P.No. 1275 unlike parcel No. 1511 which was opened in 1963.

29. The fact that his elder brother's Kamundi Marete had shared some portion of his land to the appellant did not automatically mean the respondent had to accede to the request. Since the alleged trust was not binding on him as a nephew to the appellant.

30. A party basing his claim on trust must bring cogent, quality and consistent evidence. The legal rights must be clear with personal, physical and fiduciary relationship **see Isack Wanjohi & another supra.**

31. The purpose and circumstances of the registration in favour of the respondent do not point to any trust at all see **Peter Gitonga vs Francis Maingi M'Ikiara (2007) See Alice Wairimu Macharia vs Philip Macharia (2019) eKLR.**

32. In the premises I find the appellant failed to discharge the burden of proof for a claim of customary trust. The trial court was therefore right in finding the suit unmerited. The appeal herein lacks merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 27TH DAY OF APRIL, 2022

In presence of:

Mrs. Muia Mwanzia for appellant

Miss Soy for respondent

HON. C.K. NZILI

ELC JUDGE



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