



**Kaugi v Machaki & another (Civil Appeal 106 of 2018)
[2024] KECA 1250 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1250 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 106 OF 2018
P NYAMWEYA, LK KIMARU & AO MUCHELULE, JJA
SEPTEMBER 20, 2024**

BETWEEN

DICKSON NYAGA KAUGI APPELLANT

AND

CHARITY MACHAKI 1ST RESPONDENT

BERNARD NGARI KAUGI 2ND RESPONDENT

(An appeal from the Judgment and Decree of the Environment and Land Court at Embu (Y. M. Angima J.) delivered on 15th March 2018 in ELC Case No. 77 of 2014)

JUDGMENT

1. On 15th March 2018 the Environment and Land Court (ELC) at Embu (Y.M. Angima J.) delivered a judgment in Embu ELC Case No. 77 of 2014 in favour of Charity Machaki and Bernard Ngari Kaugi (hereinafter “Charity” and “Bernard”, respectively), the 1st and 2nd Respondents herein, in terms of the following orders:
 - a. The subdivision of Title No. Gatari/Githimu/16 and any subsequent transfer and resultant titles are hereby annulled and or cancelled and the land restored to its original number.
 - b. The suit property i.e. Gatari/ Githimu/16 shall be subdivided and distributed as follows:
 - i. Charity Machaki Kaugi -1 acre
 - ii. Bernard Ngari Kaugi -3 acres
 - iii. Dickson Nyaga Kaugi -3 acres
 - iv. Loise Gicuku Njue -3 acres on behalf of Gaitano Njue
 - c. Each party shall bear own costs.



2. Charity and Bernard had instituted the suit in the ELC against Dickson Nyaga Kaugi (hereinafter “Dickson”), who is the Appellant herein and was the defendant in the ELC. Charity and Bernard averred that on or about the year 1961, Dickson, who was then a toddler, was given a parcel of land number Gaturi/Githimu/16 measuring approximately 10 acres by Iruma Clan as the first born of his family, to hold in customary trust for himself, his mother and other siblings since his father died before the land could be demarcated. They further averred that Charity, who was Dickson’s mother, contributed materially towards the acquisition of the said parcel, but it could not be registered in her name since Embu customary law did not allow women to be registered as owners of land. She asserted that she gave birth to two other sons other than Dickson who lived and cultivated on the suit land. One of the two sons, Gaitimo Njue, had since died and was buried on the suit land and had left his wife and children thereon.
3. However, that Dickson, without consent of the beneficiaries, subdivided the suit land into three namely; Gaturi/Githimu/ 9245, 9246 and 9247. Charity and Bernard therefore prayed that the subdivision of the suit land and any subsequent transfer be annulled and or cancelled and it is restored to its original number Gaturi/Githimu/16, and that the land parcel number Gaturi/Githimu/16 be subdivided and shared as follows - Charity gets 1 acre; Bernard gets 3 acres; Dickson gets 3 acres; and the wife and children of the late Gaitimo Njue get 3 acres.
4. Dickson opposed the suit and averred that the issue of customary trust as pleaded was non-actionable, the doctrine of trust did not exist in this particular matter and the allegation had no basis whatsoever. Further, Charity and Bernard had failed to disclose that despite Dickson having absolute rights of ownership exclusive to anybody else, he had considered his step-brothers and given them a portion, and the proposal on distribution was absurd. It was his position that Charity and Bernard had neither locus nor legal basis to demand distribution of the registered land, and his title to Gaturi/Githimu/ 16 was indefeasible and in upholding the sanctity of title, the Court could not alter the state bestowed upon him by the *Registered Land Act* and the *Constitution*. Further, he did not need consent from anybody to decide on how to distribute his property, in any event, it was purely on equity and gratuity.
5. The trial Judge (Y.M. Angima J.) after considering the pleadings, the submissions and hearing the witnesses found that the evidence was clear that Charity’s husband died before land demarcation was done and it was Charity who handed the name of Dickson as the eldest son of the family, to the clan elders for the purpose of allocation of clan land on behalf of the family of the late Kaugi. Further, that Dickson conceded that it was his mother who gave his name to the elders and that she was the one who took him to a committee of elders for verification. His conduct accordingly showed that he was aware that the suit property was family land and that he was registered on his own behalf and on behalf of the rest of the family members, and the existence of a trust had been established. In addition, that his duty as trustee arose from the moment his name was entered in the adjudication register on behalf of the family of his late father. Therefore, given that he was a trustee, he was in no position to “dole out small portions of the suit property as he may please” to the beneficiaries. The trial Court therefore held that the suit property should be shared equitably as sought by Charity and Bernard, and granted them the reliefs they had sought.
6. Dickson, being aggrieved by this decision, filed the instant appeal. He has raised twelve (12) grounds of appeal in his Memorandum of Appeal lodged on 2nd July 2018, which revolve around three issues, namely whether there was a valid cause of action in the suit filed in the trial Court, whether Dickson held the suit property in trust for the other family members, and lastly whether the orders sought of the sharing of the suit property could be granted. Dickson accordingly seeks orders that his appeal be allowed, the Judgment and Orders of the trial Court in ELC Cause no 77 of 2014 be set aside entirely, judgment be entered in his favour, and the costs of this appeal be provided for.



7. We heard the appeal on this Court’s virtual platform on 5th March 2024, and learned Counsel Mr. Guantai was present appearing for Dickson, while learned Counsel Mr. Joe Kathungu appeared for Bernard, and informed the Court that Charity died on 16th May 2022. Both counsel highlighted their written submissions dated 20th September 2023 and 21st December 2023, respectively. In commencing the determination of the appeal, we are mindful of the duty of this Court as a first appellate court, as reiterated and set out in the decision of *Selle & Another v Associated Motor Boats Co. Ltd & Others* (1968) EA 123. We shall accordingly reconsider the evidence adduced in the trial Court, evaluate it and draw our conclusion of facts and law. In addition, we will only depart from the findings by the trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as was held in *Jabane v Olenja* (1968) KLR 661, or where its discretion was exercised injudiciously as held in *Mbogo & Another v Shah* (1968) EA 93.
8. On the first issue as regards the existence of a cause of action, Mr. Guantai submitted that that Charity and Bernard based their argument on customary trust, a principle alien to the Court and which could not hold water as it was based on a minor being bestowed with responsibility of holding a property in trust for others. Further, that there were no settlement documents or executed declarations of trust identifying the settlor, trustee and beneficiary or the terms of the trust. Counsel urged that no cause of action nor triable issues were raised in the plaint filed in the ELC and, and the pleading ought to be struck out.
9. Reliance was also placed on section 7 of the *Limitation of Actions Act* to submit that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued. It was the counsel’s claim that the title deed to the suit property was procured in 1981, yet an action for the impugned land was brought in 2011, thirty (30) years since the alleged cause of action. Therefore, that the ELC was deprived of the capacity to hear the matter since no leave was sought for extension of the limitation period.
10. Mr. Kathungu’s response was that the argument that the suit be struck out for not disclosing any cause of action was rejected by the trial Court in a ruling delivered on 8th August 2013, where the trial Judge emphasized that the pleadings disclosed a serious dispute that ought to go to trial. In addition, that Dickson did not appeal against the said ruling and the issue of the suit disclosing a cause of action was therefore settled by the ruling and could not be challenged in this appeal. Furthermore, the assertion that the Plaint was filed out of time and without leave of the Court was an afterthought, since Dickson did not raise the same in the trial Court for determination, neither did he raise it in his pleadings and submissions. He was therefore estopped from raising new issues before this Court, and reliance was placed on the decision in the case of *Adan Chuda Sode v Madina Oshe Jira & Another* [2021] eKLR, where the Court declined to consider grounds of appeal that were based on issues that were never pleaded or raised before the trial Court.
11. We have perused the record, and note that indeed an application filed by Dickson dated 20th September 2011 seeking to strike the suit in the ELC for disclosing no cause of action was dismissed by the trial Court (B. Olao J.) in a ruling delivered on 8th August 2013, which was not appealed. This issue was also not a subject of determination in the judgment appealed from, and this Court therefore lacks jurisdiction to address the issue. Likewise, Dickson did not raise the defence of limitation of action in his pleadings filed in the ELC, nor was this question addresses in the judgment rendered by the trial Court, and cannot therefore be raised for the first time on appeal.
12. The second issue is whether Dickson was registered as trustee of the suit property in trust of the other family members. Mr. Guantai’s position was that reference is made to Section 13 of the *Environment and Land Court Act*, No. 19 of 2011 which outlined the jurisdiction of the Court and the powers



which the Court exercises, which did not include the power to subdivide property on behalf of the beneficiaries of a deceased's estate. It was his argument that the trial Court had no power to distribute the estate of the deceased to the alleged beneficiaries, and should have left such actions to a succession process.

13. In reply, Mr. Kathungu detailed the evidence by witnesses that demonstrated that Dickson was registered as proprietor of the suit land while he was a toddler to hold in customary trust for himself, his mother and other siblings, and submitted that Dickson failed to convince the trial Court how the suit land was registered in his name absolutely while he was a toddler at the time of the said registration. Counsel further submitted that Dickson failed to explain why he had not taken any action to evict his mother, brother and their family members from the suit land where they had been staying for over 50 years with his knowledge. Reliance was placed on the case of *George Mbiti Kiebia & Another v Isaya Theuri M'Intari & Another* [2014] eKLR where the Court upheld the judgment of the Trial Court in which a claim to land by virtue of a customary trust was recognized.
14. The law as to when a customary trust arises is now settled. In *Mbui Mukangu v Gerald Mutwiri Mbui* (2004) eKLR, this Court (O'kubasu, Githinji & Waki, JJA) in embracing the concept of a customary trust, stated as follows:

“It cannot be argued too strongly that the proper view of the qualification or proviso to Section 28 is that trusts arising from customary law claims are not excluded in the proviso. Such claims may stem from possession and occupation of part of the registered land which strictly it (sic) may not be an overriding interest under Section 30(g), it nevertheless gives rise to a trust which is capable of protection under the Act.”

15. The Supreme Court of Kenya, after comprehensively analysing various judicial decisions on customary trusts, in *Isack M'inanga Kiebia v Isaaya Theuri M'Intari & Another* [2018] eKLR, set the law as follows:

52. Flowing from this analysis, 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, is subject under the proviso to Section 28 of the *Registered Land Act*. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. 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.”

16. As regards the legal position on customary trusts after the repeal of the *Registered Land Act*, the Supreme Court held as follows:

58. What are we to make of these changes? Several interpretations are plausible. It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the *Registered Land Act* (now repealed), in Section 25 of the Land Registration Act, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the *Registered Land Act*, have now been subsumed in the “customary trusts” under Section 25 (b) of the *Land Registration Act*. Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land...”

17. In the present appeal, Charity and Bernard testified as PW1 and PW4 respectively and called two witnesses. Charity’s testimony was that when land was being demarcated her husband had already died, and she contributed money to the Iruma clan to be given land. However, since the customs did not allow women to be registered as owners of land, she gave the clan Dickson’s name so that the land could be registered in his name on her behalf. Bernard on his part testified that he had built a permanent residence on the suit land and was brought up on the land by his mother, Charity. Nguuri M’riua (PW2) a resident of Irima testified that during the land demarcation, Dickson was a young boy and his father was deceased, the clan members agreed that he be registered as the owner of the land since it was the norm for women not to be registered as land owners. This position was also reiterated by Mutero Kagane (PW3) who adopted his statement that Dickson was registered in place of his mother to hold the suit land in trust for her and her other children.

18. Dickson on his part insisted that he was the owner of the suit land, having been so registered and was opposed to any sharing of the land, having already given out portions to Bernard’s son. He however admitted that he was three years old at the time of registration of the suit land in his name, and that Charity and Bernard were residing in the suit land. He did not call any witnesses. It is evident that all the elements necessary to establish a customary trust as set out in *Isack M’inanga Kiebia v Isaaya*



Theuri M'lintari & Another [*supra*) were demonstrated by Charity and Bernard, and particularly, that the suit land was previously clan land and that Dickson who was a son and brother respectively, held the land on behalf of the family. We are accordingly satisfied that the evidence adduced established that the registration of the land in the name of Dickson under the repealed Registered Land Act was as a trustee, to hold the land in trust for his family, and did not extinguish the rights of Charity and Bernard under Embu customary law.

19. On the last issue as regards whether the orders on sharing of the suit property could issue, Mr. Guantai made reference to section 13 of the *Environment and Land Court Act* on the jurisdiction and powers of the ELC, to submit that the powers of the Court do not include the power to subdivide property on behalf of the beneficiaries of a deceased's estate, and it had no power to distribute the estate of the deceased to the alleged beneficiaries. The trial Court should have left such actions to a succession process, the Court with the proper jurisdiction and powers to distribute the estate of the deceased.
20. Mr. Kathungu submitted that the trial Court had jurisdiction to make a declaration on how to share land registered under the *Registered Land Act*, pursuant to Article 162 (2) (b) of the *Constitution* of Kenya, 2010 and the *Environment and Land Court Act*, and in any event the issue of jurisdiction was never pleaded and or raised before the trial Court. In addition, that Charity and Bernard did not challenge Dickson's title to the suit property since he was registered as a proprietor of the suit land in trust of his mother and two brothers, and that is why they did not plead fraud, misrepresentation or material non-disclosure during the process of the first registration. Furthermore, contrary to Dickson's assertion that his first registration was annulled, the trial Court only cancelled the subdivision of Gaturi/Githimu/16 and restored the land to its original number. The trial Court then ordered that the suit land be subdivided and distributed into four parcels as proposed by Charity and Bernard which was more equitable and reasonable compared to the formula proposed by Dickson.
21. Our findings on this issue are brief. Under Article 162 (2)(b) of the *Constitution* and section 13(2) of the *Environment and Land Act*, the ELC has jurisdiction to hear and determine any dispute relating to use, occupation of and title to of land, and section 13(7) of the Act provides that the ELC shall in exercise of its jurisdiction have power to make any order and grant any relief as the it deems fit and just. It is notable in this respect that the claim by Charity and Bernard was in relation to the use and occupation and title to land arising from a customary trust, and not arising from the death of the registered owner, who in this case was Dickson. This issue therefore, which is a red herring, also fails.
22. All in all, we find no merit in this appeal, which is hereby dismissed in its entirety. Since this is a family dispute, each party shall bear their costs of the appeal.
23. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

P. NYAMWEYA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original Signed

DEPUTY REGISTRAR.

