



REPUBLIC OF KENYA



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**Muchiri v Muchiri (Environment & Land Case 212 of 2015)
[2023] KEELC 16583 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16583 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 212 OF 2015**

JO OLOLA, J

MARCH 28, 2023

BETWEEN

JOHN NDIRITU MUCHIRI PLAINTIFF

AND

ISAAC WANGONDU MUCHIRI DEFENDANT

JUDGMENT

1. This suit was initially filed on 23rd December, 2008 as Nyeri HCCC No. 181 of 2008. It was transferred to the Environment and Land Court on 23rd June, 2015 when it was given its current reference number.
2. By his Complaint dated 11th December, 2008 as amended on 18th February 2010, John Nderitu Muchiri (the Plaintiff) prays for:
 - (a) A declaration that the Defendant holds L.R Tetu/Kiriti/44 in trust for himself and the Plaintiff;
 - (b) That the said trust be terminated and the Plaintiff to get half share of L.R Tetu/Kiriti/44; and
 - (c) The costs of this suit and interest.
3. Those prayers arise from the Plaintiff's contention that both the Defendant and himself are the sons of one Harun Muchiri Wambugu (now deceased). The Plaintiff avers that ever since the land demarcation and first registration on 1st November, 1958 and until 6th March 1992, the deceased Harun Wambugu Muchiri was the registered proprietor of L.R No. Mahiga/Kihome/302 whereas L.R No. Tetu/Kiriti/44 was from 13th February, 1958 until 13th September, 1985 registered in the names of Ngumi Gachuguma (also now deceased).
4. The Plaintiff avers that their deceased father had during his lifetime entered into an agreement with the said Ngumi Gachuguma where they agreed that the Plaintiff's father would transfer his said parcel of land to Ngumi Gachuguma in exchange for Ngumi Gachuguma's stated parcel of land.



5. It is the plaintiff's case that pursuant to the said agreement, the Parties gave vacant possession of the respective parcels of land to each other but they both died before executing the necessary transfers. The Plaintiff avers that after his father's death, one Samuel Kiama Ngumi, the son and personal representative of the late Ngumi Gachuguma was on 6th March, 1992 registered as the proprietor of the plaintiff's father's L.R No. Mahiga/Kihome/302.
6. It is further the Plaintiff's case that on the advise of his mother, the said Samuel Kiama Ngumi transferred the exchanged L.R No. Tetu/Kiriti/44 into the name of the Defendant to hold the same in trust for himself and the Plaintiff. The Defendant who is the Plaintiff's elder brother has since refused to transfer a portion of the land to the Plaintiff claiming to be the absolute proprietor thereof.
7. But in his Statement of Defence dated 26th February, 2010 and filed herein on 1st March 2010, Isaac Wangondu Muchiri (the Defendant) denied the Plaintiff's claim. The Defendant denies that there was any agreement between the Plaintiff's father and the said Ngumi Gachuguma and asserts that if any such agreement was ever entered into, the same was null and void for lack of the relevant Land Control Board consent.
8. Further and in addition to the foregoing, the Defendant denies that their mother instructed the said Samuel Kiama Ngumi to transfer L.R No. Tetu/Kiriti/44 into the name of the Defendant to hold the same in trust for the Plaintiff and invites the Plaintiff to strict proof.

The Plaintiff's Case

9. In support of his case, the Plaintiff called a total of four(4) witnesses who testified in support of his case at the trial.
10. PW1 – John Nderitu Muchiri is the Plaintiff herein. He told the Court that the Defendant is his eldest brother and that their parents are deceased. He further told the Court his father was the proprietor of Othaya land Parcel No. 302 Mahiga measuring 2 ½ acres. When his father was alive, he agreed with his cousin Ngumi Gachuguma who owned land parcel number Tetu/Kiriti/44 to exchange the two parcels between them.
11. PW1 testified that both his father and the cousin died before the exchange was formalized. The two had agreed that because the Plaintiff's father's land was smaller, his father would pay an additional Kshs.10,000/- as consideration. Accordingly, when Ngumi Gachuguma's children started demanding to have their land back, the Plaintiff's mother gave them a cow worth Kshs.6,000/-. She also gave the Defendant Kshs.4,000/- in cash to take to Ngumi Gachuguma's son Samuel Mureru Ngumi who was utilizing the land.
12. PW1 further testified that his mother told him that the said Mureru then proceeded to transfer the title in his father's name to the Defendant's name on the instructions of the Plaintiff's mother. PW1 told the Court his mother had done so because she could not be registered as she had no identity card and women were not being registered. The rest of the siblings were still minors and the Defendant was to hold in trust for the rest of the family.
13. PW1 told the Court that before her death, his mother had stated that the Defendant would take one acre more than the Plaintiff because he was older. The remaining 3 acres were to be shared equally between them. After their mother died in 2008, they held a meeting with village elders on 29th March, 2008 where the Defendant stated that the land was 3.5 acres. They then agreed that the Plaintiff would have 1.25 acres while the Defendant would take 2.25 acres.



14. PW1 testified that the Defendant had since refused to transfer the 1.25 acres as agreed and that he had chased the Plaintiff away with a panga. After the Plaintiff filed the suit, the Defendant approved the Tetu Sub-County Peace committee seeking to have the issue resolved amicably. However after the Parties signed a consent on how to sub-divide the land, the Defendant again renegeed on the agreement.
15. On cross-examination, PW1 told the Court that before he moved to Othaya, he was living at home at Kinunga on the Parcel known as Tetu/Kiriti/83 measuring 4 acres. The land was registered in his father's name. His father had died in 1971 when the Plaintiff was 6 years old. That parcel of land was currently being utilized by the Defendant and the Plaintiff's sisters while Tetu/Kiriti/44 is solely utilized by the Defendant.
16. PW1 told the Court he knew Ngumi Gachuguma but he could not remember when he died. He was also unaware if there was any written agreement between his father and the said Ngumi in regard to the 2 parcels of land.
17. PW1 denied that the Defendant had bought any land from Ngumi Gachuguma's family. At the time their father died, the Defendant was in school in Form 1 and it was their mother who was cultivating the land.
18. PW2 – Samuel Kiama Ngumi alias Mureru is a son to the late Ngumi Gachuguma who was a cousin to the Plaintiff's father and formerly the proprietor of L.R No. Tetu/Kiriti/44. PW2 testified that he was aware his father exchanged that parcel of land with the Plaintiff's father who gave out L.R No. Mahiga/Kihome/302 in return due to the distance involved. The two cousins exchanged possession but titles were not transferred during their lifetime.
19. PW2 testified that because their land was bigger, the Plaintiff's mother was to pay him Kshs.10,000/-. PW2 told the Court the Plaintiff's mother gave him a cow worth Kshs.6,000/- in that regard and sent the Defendant with Kshs.4,000/- in cash to cater for the balance. After the payment was made in full, PW2 transferred L.R No. Tetu/Kiriti/44 to the Defendant's name on the instructions of the mother of the Plaintiff and the Defendant. That was because their mother had no identity card. PW2 told the Court it was not true that the Defendant had bought the land from himself.
20. PW2 further told the Court that Parcel No. 302 Mahiga is now registered in his name. The suit land should accordingly be shared between the Plaintiff and the Defendant as per their mother's wishes.
21. On cross-examination, PW2 told the Court he could not recall when the Defendant took to him the balance of Kshs.4,000/- from his mother. He told the Court he had not signed any transfer documents for the suit land in favour of the Defendant. He told the Court the sum of Kshs.4,000/- did not come from the Defendant but came from his mother.
22. PW3 – Wahitu Waititu alias Peter Waititu is a farmer from Othaya. He told the Court both Muchiri Wambugu and Ngumi Gachuguma were his clansmen and that he was aware after the two died, their sons had filed succession causes for their respective estates. By then the exchanges of land agreed on by the two were yet to be finalized.
23. PW3 told the Court that it was after the cases that the Defendant was registered as the proprietor of the suit property to hold in trust for the rest of the family. PW3 told the Court that a meeting was held on 29th March 2009 when it was agreed that the Plaintiff be given 1.25 acres while the Defendant would get 2.25 acres out of Parcel No. 44. No member of the family objected to the resolution.



24. On cross-examination, PW3 told the Court he lived in Mahiga although he used to reside in Kiriti in the 1980s. By then the Plaintiff's father was staying in Ngumi Gachuguma's land as that was where he had built his home. Currently it was only the Defendant on the land.
25. PW4 – Rebecca Wanjiru Gitau is a sister to both the Plaintiff and the Defendant herein. PW4 told the Court her father bought the suit property before he died in 1971. The family planted tea on the land. As at the time of their father's death, the Defendant was a Form 1 student at Kagumo High School and the tea account was in their mother's name. PW4 told the Court it was not true that it was the Defendant who planted the tea bushes.
26. PW4 testified that after their mother's death, the family held a meeting on 29th March, 2009 where it was agreed that the Plaintiff would get 1.25 acres and the Defendant 2.25 acres. The Defendant agreed to share the land as agreed but later reneged on the agreement. He later took the family to a meeting in the District Commissioner's office where it was again agreed that the land be shared out between the Plaintiff and the Defendant.
27. On cross-examination, PW4 told the Court the Defendant was the first born in the family while she is the third born. When their mother was alive, she lived on the suit land where the Defendant has built his home. She told the Court it was the mother who used to cultivate the land and that there was no dispute regarding the same before her death.

The Defence Case

28. On his part the Defendant called three (3) witnesses who gave testimony in support of his position at the trial.
29. DW1 – Isaack Wangondu Muchiri is the Defendant himself and a resident of Kinunga in Nyeri County. He told the Court the Plaintiff is his younger brother. DW1 testified that his father had 2 parcels of land. These were Tetu/Kiriti/83 and Mahiga/Kihome/302. Before he passed on, their father wrote a will in which he gave L.R No. Mahiga/Kihome/302 to the Defendant and L.R No. Tetu/Kiriti/83 to his mother and other siblings.
30. DW1 further testified that when he was ready to build on Parcel No. 302 he found Kiama Ngumi son of Ngumi Gachuguma had built on a small portion of the land. They agreed that Ngumi Gachuguma would exchange with him his parcel of land No. Tetu/Kiriti/44 which was bigger than DW1's parcel by 1 ½ acres. They exchanged the parcels by filing Succession Cause No. 240 of 1983 and 211 of 1996. Thereafter Parcel No. 44 was registered in DW1's name while the said Kiama Ngumi was registered as the proprietor of Parcel No. 302.
31. DW1 told the Court he inherited parcel No. 44 as his own without holding the same in trust for any family member. He is therefore the only family member cultivating the suit land on which he has built his home and rears livestock, planted tea and napper grass since 1983.
32. On cross-examination DW1 told the Court they had agreed to exchange the two parcels of land with Ngumi Gachuguma in 1982. His father and the family have always lived in Parcel No. 83. Sometime in 1982, his mother had told him that his father and the elders had agreed that he would inherit Parcel No. 302. DW1 then went to see Ngumi in 1983 and that is when they agreed on the exchange.
33. DW1 conceded that before her death, their mother used to pick tea on the suit property. He told the Court he had planted the tea in 1979 although the tea licence was in his mother's name. He further told the Court he was present in a meeting held on 29th March, 2009 in which it was agreed how the



2 properties would be shared. Parcel No. 44 was to be shared between himself (2.25 acres) and the Plaintiff (1.25 acres).

34. DW1 further told the Court that on 18th February 2016, they went before the District Commissioner and agreed that the suit property would be divided between himself and his brother. DW1 however told the Court that he appealed the decision.
35. DW2 – Ephantus Muthui is a member of the same clan with the disputants herein. He told the Court he used to visit the father of the Parties herein on his parcel of land known as Tetu/Kiriti/83 in the 1960s. The father to the Plaintiff and the Defendant used to tell him that his land Tetu/Kiriti/44 if it was changed to his name from Ngumi Gachuguma, it would be for his first born son who is the Defendant herein. When the Defendant’s father became sick, he told DW2 that if he dies, the parcel of land should go to the Defendant.
36. On cross-examination, DW2 testified that the father to the disputants discussed with him about the suit property in the 1960s. He however told the Court he does not know about Ngumi Gachuguma.
37. DW3 – Joseph Githae is a resident of Tetu and an acquaintance of the disputants herein. He told the Court the father to both the Plaintiff and the Defendant was his cousin. He used to visit him in the 1960s at his parcel of land Tetu/Kiriti/83. The late Muchiri Wambugu used to tell him that if he took land parcel number Tetu/Kiriti/44 from Ngumi Gachuguma, it would be for his first born son – the Defendant herein.

Analysis And Determination

38. I have carefully perused and considered the pleadings herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.
39. The Plaintiff and the Defendant herein are brothers – the two being the sons of Harun Wambugu Muchiri who passed away in 1971. The Plaintiff is the last born son while the Defendant is the first born. It is the Plaintiff’s case that their deceased father was on 1st November 1958 registered as the proprietor of a parcel of land known as L.R No. Mahiga/Kihome/302.
40. The Plaintiff told the Court that due to the distance of the said parcel of land from their home in Tetu, their father decided to exchange the said parcel of land with the suit property herein known as L.R No. Tetu/Kiriti/44 which was then registered in the name of their father’s cousin one Ngumi Gachuguma.
41. According to the Plaintiff, the two proprietors agreed to exchange the two parcels of land and proceeded to hand over possession thereof to each other. Before they could effect the necessary transfers to the two titles however, the two cousins passed away and it was left to their respective families to follow up on the necessary transfers.
42. It was the Plaintiff’s case that his father’s parcel of land was smaller than that of his cousin and it was agreed between them that an additional payment of Kshs.10,000/- would be paid by the Plaintiff’s father prior to the transfer. In this respect, the Plaintiff told the Court that following the death of Ngumi Gachuguma, his son Samuel Kiama Ngumi (DW2) was appointed the legal representative to the estate and that on 6th March 1992, the said Samuel was registered as the proprietor of L.R No. Mahiga/Kihome/302.
43. In order to complete the transfer for the suit property, the Plaintiff told the Court that his mother gave the said Samuel a cow worth Kshs.6,000/-. In addition, the Plaintiff told the Court that his mother had



- before her death in the year 2008 told him that she had also given the Defendant a sum of Kshs.4,000/- in cash to take to Samuel in order to complete payment of the agreed consideration for the exchange.
44. The Plaintiff told the Court that his mother then asked Samuel to have the exchanged land registered in the name of her first born son to hold in trust for the rest of the family as she had no identification card. The Defendant has however since the death of their mother refused to transfer a portion of the land to the Plaintiff as per their mother's wishes and a decision made by the clan members claiming to be the absolute proprietor thereof.
 45. On his part however, the Defendant denies that there was any such agreement between their father and the said Ngumi Gachuguma and or that he holds the title for the suit property in trust for his younger brother or any member of the family.
 46. Testifying at the trial herein, the Defendant (DW1) told the Court that his father had 2 parcels of land being Tetu/Kiriti/83 and Mahiga/Kihome/302. He told the Court that before their further passed on, he wrote a will in which he gave him L.R No. Mahiga/Kihome/302 while his mother and siblings were given the said L.R No. Tetu/Kiriti/83.
 47. It was further the Defendant's case that when he got ready to go build his house on the said L.R No. Mahiga/Kihome/302, he found that Kiama Ngumi (PW2) the son of Ngumi Gachuguma had built on a small portion of the land. They therefore agreed that the said Kiama Ngumi would exchange with him the suit property (Tetu/Kiriti/44) which was bigger than the Defendant's parcel by 1 ½ acres.
 48. According to DW1, they exchanged the two parcels by filing Succession Causes for their respective fathers estates one being Nyeri Resident Magistrates Succession Cause No. 240 of 1983 for the Estate of Ngumi Gachuguma and the other being Nyeri Resident Magistrates Succession Cause No. 211 of 1996 for the Defendant's father.
 49. The Defendant told the Court that pursuant to the Succession Cause, the suit property came to be registered in his name while the parcel that had been willed to himself by his father was registered in Samuel Ngumi Gachuguma's name. It was his case that he therefore inherited the suit property as his own and that he does not hold the property in trust for the Plaintiff or any other family member.
 50. It was however quite difficult for this Court to believe the Defendant's version of how he acquired the suit land. While he told the Court that his father wrote a will gifting to him the parcel of land that the exchanged for the suit property before his death in 1971, no such will was produced in evidence before the Court.
 51. Secondly, while the Plaintiff insisted that he exchanged L.R No. Mahiga/Kihome/302 as the owner thereof with Samuel Ngumi Gachuguma, the said Samuel Ngumi Gachuguma a.k.a. Mureru testified herein as the Plaintiff's witness (PW 2) and disowned the

Defendant's version of events.

52. According to PW2, it was his father who had long time back exchanged the parcel of land with his cousin who was the father to both the Plaintiff and the Defendant herein. PW2 further corroborated the Plaintiff's account that their parcel of land was bigger and that it was agreed that a sum of Kshs.10,000/- be paid prior to the completion of the transfer. In that respect, PW2 told the Court that the mother to the two brothers herein had as stated by the Plaintiff, paid to himself the sum by giving him a cow worth Kshs.6,000/-. PW2 further told the Court the sum of Kshs.4,000/- had been paid to him through the Defendant who was sent with cash money to deliver to himself.



53. As it were, PW2's version appeared to me quite rational and believable. His testimony was unwittingly supported by the Defendants own witnesses at the trial. One of the witnesses Ephantus Muthui (DW2) insisted that the Defendant's father used to tell him before his death that if the suit property was changed to his name from that of Ngumi Gachuguma's, he would give it to his first born son. That tale was repeated by Joseph Githae (DW3).
54. The two Defence witnesses did not give any particular reason why the said Muchiri Wambugu had such a great desire for the suit property if he had not indeed acquired the same. At any rate, their testimony appeared to suggest that the Defendant's father had gifted him the suit property and not L.R No. Mahiga/Kihome/302 which the Defendant claims to have been willed to himself. According to DW2, when the Defendant's father fell ill, he told DW2 that if he dies, the suit property should be

inherited by the Defendant.

55. That the Defendant is an untrustworthy and unbelievable witness can further be seen from the acrobatic turn he took from his recorded Statement herein. While in his testimony at the trial he claimed to have been willed L.R No. Mahiga/Kihome/302 by his father and that he exchanged the same with DW2 through filing a Succession cause, that was a complete departure from his Statement filed herein on 18th March, 2014.
56. In the said Statement, the Defendant claims that he bought the suit property from PW2 at a consideration of Kshs.22,000/-. It was further his case that when he was in Form 1 in 1971 following the death of his father, he was renting out the suit property at the sum of Kshs.1,000/- from PW2. It was his case that he leased the land as such from 1971 to 1978 before he started growing tea thereon.
57. In characteristic fashion, the Defendant changed his testimony in court claiming his mother is the one who advised him in 1982 that his father and the elders wanted him to inherit L.R No. Mahiga/Kihome/302. It was then his case that he went to the land and approached PW2 to exchange the land with his own.
58. As it were, it was unclear to me whether the Defendant included his siblings in the Nyeri Succession Cause No. 211 of 1996 for his father's succession. His mother was alive until the year 2008 and it was also unclear why the succession proceedings were filed in the Defendant's name.
59. It follows that I did not find any truth in the Defendant's testimony and evidence. On the other hand, I was persuaded that the Plaintiff had made out a case for the existence of a customary trust on the suit land.
60. There was evidence that their parents are the ones who had acquired the property much earlier and that their mother had been growing tea on the suit property. The Defendant indeed admitted that the tea licence for the suit property had been in his mother's name since 1979 long before he would build his house thereon in 1985.
61. In the premises, I am persuaded that the Plaintiff has proved his case on a balance of probabilities. Accordingly I hereby enter Judgment for the Plaintiff and make orders as follows:
- (a) A declaration is hereby made that the Defendant holds L.R. Tetu/Kiriti/44 in trust for himself and the Plaintiff.
 - (b) An order is hereby made that the said trust be terminated forthwith with the result that the Plaintiff is hereby entitled to a half-share of the said L.R No. Tetu/Kiriti/44; and
 - (c) The costs of this suit shall be borne by the Defendant.



JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 28TH DAY OF MARCH, 2023.

In the presence of:

Ms. Kimani holding brief Kabira Kioni for the Plaintiff

Mr. H. K. Ndirangu for the Defendant

Court assistant - Kendi

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J. O. OLOLA

JUDGE

