



REPUBLIC OF KENYA



**Gatuma v Mbai & 2 others (Environment & Land Case 21 of 2022)
[2025] KEELC 3012 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 3012 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 21 OF 2022**

MD MWANGI, J

MARCH 21, 2025

BETWEEN

GEORGE GITAU GATUMA PLAINTIFF

AND

JOHN MUKIRI MBAI 1ST DEFENDANT

AUGUSTINE MBAI GATUMA 2ND DEFENDANT

NANCY NJOKI NG'ONDA 3RD DEFENDANT

JUDGMENT

Background

1. This suit was initiated by a plaint dated 1st February 2005 filed in the High Court at Nairobi. The Plaintiff, George Gitau Gatuma had originally named his own brother Augustino Mbai Gatuma as the Defendant. The Plaintiff's claim was that the Defendant as the elder son in his father's house was registered as a trustee for himself, their deceased father and all the beneficiaries of the deceased in the parcels of land known as;
 - a. Dagoretti/Ruthimitu/12 – measuring 2.0 Ha.
 - b. Dagoretti/Uthiru/281 –measuring 4.1 Ha.
 - c. Dagoretti/Mutuini/T.209 –measuring 0.21 Ha.
 - d. Dagoretti/Ruthimitu/T.183
 - e. Dagoretti/Uthiru/T39
2. The Plaintiff alleged that the beneficiaries of their deceased father's estate had at all material times lived and occupied all that parcel of land known as Dagoretti/Uthiru/281 since demarcation and



consolidation save for James Muchene who had moved to Dagoretti/Ruthimitu/12, seven (7) years prior to the filing of the suit.

3. The Plaintiff alleged that the Defendant, in the year 2003 started committing acts of wastage in breach and abuse of the trust as tabulated at paragraph 9 of the plaint as follows:
 - a. Demanding that all the beneficiaries occupying land parcel Dagoretti/Uthiru/281 vacate and move to Dagoretti/Ruthimitu/12 or face the risk of being evicted.
 - b. Inciting and conspiring with his two step brothers, James Muchene and Lawrence Kungu to subdivide Dagoretti/Uthiru/281 amongst the three of them in total disregard of the interests of (all the other) seven beneficiaries.
 - c. Barring the family of one of the beneficiaries, the late Geoffrey Gichuru from burying the late Geoffrey Gichuru and his son Boniface Gatuma on parcel of land no. Dagoretti/Uthiru/281.
 - d. Attempting to subdivide Dagoretti/Uthiru 281 into three (3) parts of two acres, one acre and one acre with an intention of transferring two acres to himself, one acre to James Muchene and the other one acre to Lawrence Kungu purportedly as gifts to the two.
 - e. Attempting to subdivide Dagoretti/Ruthimitu/12 into three (3) equal parts and attempting to transfer them one to himself, another to James Muchene and the other to Lawrence Kungu purportedly as gifts to the two.
 - f. Attempting to transfer Dagoretti/Uthiru/T39 to himself, Dagoretti/Mutuini/T.209 to James Muchene and Dagoretti/Ruthimitu/183 to Lawrence Kungu purportedly as gifts to the two.
 - g. Attempting to sell the entire Dagoretti/Mutuini/T.209 without the consent of all the beneficiaries.
4. The Plaintiff's contention was that the trust created upon registration of the deceased's properties in the Defendant's name should be dissolved and properly distributed among all the beneficiaries in equal shares as all the beneficiaries are adults.
5. The Plaintiff prayed for judgment against the Defendant for an order dissolving the trust herein and authorizing the properties listed to be shared in equal shares among the ten (10) beneficiaries.
6. The Plaintiff was in the year 2023 amended pursuant to leave granted by the court. The Plaintiff substituted the Late Augustino Mbai with the administrators of his estate as Defendants and joined the National Land Commission as an Interested Party. The Plaintiff further amended the prayers sought to include an order declaring the properties listed in the amended plaint as belonging to the estate of the late Gatuma Kungu and a further order declaring the money generated from the compulsory acquisition of part of Dagoretti/Uthiru/281 part of the estate of Gatuma Kungu and therefore for distribution among the beneficiaries of his estate. Finally, the Plaintiff prayed for an order restraining the Interested Party from releasing the money generated from the compulsory acquisition of part of Dagoretti/Uthiru/281 to the Defendants or any other person save with the express orders of the court.

Statement of Defence by the Defendants

7. The Defendants in their statement of Defence dated 23rd November 2023 denied the Plaintiff's claim in their entirety and the averments in the amended plaint putting the Plaintiff to strict proof. They denied that the late Augustino Mbai was registered as a trustee of his siblings as alleged by the Plaintiff putting him to strict proof. They therefore asserted that there was no trust to be dissolved as sought by the Plaintiff.



Evidence adduced at the hearing

8. This case proceeded to full hearing. The Plaintiff called 3 witnesses in his case. The Defendant on its part did not call any witness.
9. The Plaintiff testified as PW1. He adopted his witness statement dated 4th December 2023 as his evidence in chief. He further produced as exhibits the 16 documents listed on his list and bundle of documents of even date.
10. PW1 reiterated that Augustine Mbai was registered as a trustee on behalf of other family members.
11. Responding to questions put to him in cross-examination, PW1 stated that his father was Gatuma Kung'u. Augustino Mbai was his elder brother.
12. PW1 stated that he was not aware of the ruling by the Land Registrar in the year 2004. Augustino Mbai died in the year 2006.
13. PW2 was one George Kungu, a brother to the Plaintiff. He adopted his witness statement dated 4th December 2023 as his evidence in chief.
14. PW2 stated that the late Augustino Mbai Gatuma was his step brother. They were all sons of the late Gatuma Kungu. All the 5 parcels of land listed in the plaint belonged to the late Gatuma Kungu but the titles were registered in the name of the elder son, Augustino Mbai Gatuma to hold in trust for all other family members.
15. It was PW2's testimony that they all live in the parcel No. 249; meaning all the children of the late Gatuma Kungu. The late Gatuma Kungu was also buried on the land. His wives too, were all buried in the land. Some of his deceased siblings too and their children who are deceased are buried in that land too.
16. According to PW2, the reason for registration of the land in the name of the elder son of the elder Gatuma Kungu was because Gatuma Kungu was deceased at the time of land demarcation in 1958. The widows of the deceased agreed on the issue of registration of Augustino Mbai as the trustee on behalf of the entire family of the late Gatuma Kungu.
17. In the year 2003, PW2 cautioned the title to the land when Augustino Mbai attempted to subdivide it without their consent.
18. PW3 was one Grace Wanjiru, wife of Geoffrey Gichuru Gatuma –deceased brother to the Plaintiff. She testified that her husband died in the year 2004. He was buried in the suit property. Her two sons who had passed on were also buried in the suit property, parcel No. 281. Her matrimonial home is on the suit property.
19. The Defendant did not call any witness. The National Land Commission too which had been joined into the suit as an interested party did not call any witness.

Court's directions.

20. Upon close of the hearing, the court directed parties to file written submissions. Both parties complied and filed their respective submissions which now form part of the record of this court. The court has had the opportunity to read the submissions and consider them in writing this judgement.



Issues for determination

21. Having considered the pleadings filed in this case, the evidence adduced as well the submissions by the parties, the issues for determination in this case in the court's considered opinion are;
- i. What is effect of the failure by the Defendants to call witnesses in this case?
 - ii. Whether the Plaintiff has established the existence of a trust.
 - iii. Whether the Plaintiff is entitled to the orders sought.
 - iv. What orders should issue on costs?

A. What is the effect of the failure by the Defendant to call witnesses in this case?

22. The failure by the defence to call evidence means that the evidence adduced by the Plaintiff remains uncontroverted and therefore unchallenged; I find support for this position in the Court of Appeal decision in the case of Edward Mariga suing through Stanley Mobisa Mariga –vs- Nathaniel David Shutler and ano (1979) eKLR, where the court stated that,

“The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

23. In the case of CMC Aviation Limited –vs- Crusair Limited (No. 1) (1987) KLR 103, Madan J (as he then was) affirmed the above position.

24. In this case, the consequence of the Defendant's failure to call evidence is that the evidence adduced by the Plaintiff is uncontroverted and unchallenged.

II. Whether the Plaintiff has established the existence of a trust.

25. The concept of trust as observed by the Court of Appeal in Peter Ndungu Njenga –vs- Sophia Waitiri Ndungu is not new in Kenya. Trust though is a question of fact that has to be proved by evidence. The Supreme Court of Kenya in the case of Isaac M' Inanga Kiebia –vs- Isanya Theuri M'Lintari & ano (2018) eKLR, determined on the issue of customary trust holding that;

“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 of Section 28 of the Registered *Land Act*....the content of such a trust can take 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 the construction of houses and other amenities by youths graduating into manhood. The categories of 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”.

26. The Supreme Court of Kenya pronounced the tests to be applied as follows:
- i. The land in question was before registration, family, clan or group;
 - ii. The claimant belong to such family, clan or group;



- iii. 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;
 - iv. The claimant could have been entitled to be registered as an owner or other beneficiaries of the land but for some intervening circumstances; and
 - v. The claim is directed against the registered proprietor who is a member of the family.
27. In this case there is overwhelming evidence in support of the Plaintiff's claim for a customary trust. The Plaintiff and the deceased Augustino Mbai were brothers. Though the deceased was registered as proprietor of the suit properties, including Dagoretti/uthiru/281, he was so registered, to hold the same in trust for himself and his siblings. It is on record that J.B Ojwang' J (as he then was) in the year 2005 allowed the Plaintiff to bury his daughter in the parcel of land, Dagoretti/Uthiru/281. He made an observation that has been proved true and which I find to be correct that the prima facie merits of the case dictate that the Plaintiff be allowed to proceed with the burial of his daughter. The Plaintiff has proved that family members were born on the disputed land and have continued to live therein over the years. The reality of the matter is that the late Augustino Mbai was only a trustee of the land rather than the absolute holder of the titles to the family properties. His argument on the indefeasibility of his title holds no water. The title was subject to customary trust. Augustino Mbai was holding the title in trust for himself and other members of the family of Gatuma Kungu.
28. The court holds and finds that the Plaintiff has proved his case on a balance of probabilities. The suit properties;
- a. Dagoretti/Ruthimitu/12 – measuring 2.0 Ha.
 - b. Dagoretti/Uthiru/281 –measuring 4.1 Ha.
 - c. Dagoretti/Mutuini/T.209 –measuring 0.21 Ha.
 - d. Dagoretti/Ruthimitu/T.183 and
 - e. Dagoretti/Uthiru/T39, are properties belonging to the estate of the late Gatuma Kungu.
29. As to how the properties are to be shared amongst his dependents, I leave it to the Succession Court under the *Law of Succession Act*.
30. The money too generated from the compulsory acquisition of part of Dagoretti/Uthiru/281 being part of the estate of the late Gatuma Kungu belongs to the estate. It falls under the jurisdiction of the succession court too.
31. The National Land Commission is therefore barred from releasing the money to the Defendants or to any other person save as may be determined by the Succession Court.
32. On the issue of costs, considering that the contestants are family members, the court orders that each bears his own costs as a way of attempting to promote reconciliation.

Final disposition

33. The final disposition therefore is that the Plaintiff's case against the Defendants succeeds. The court enters judgement in favour of the Plaintiff against the Defendants in the following terms;
- a. An order be and is hereby issued declaring the properties Dagoretti/Ruthimitu/12, Dagoretti/Uthiru/281, Dagoretti/Mutuini/T.209, Dagoretti/Ruthimitu/T.183 and Dagoretti/Uthiru/



T39 as belonging to the estate of the late Gatuma Kungu to be distributed under the *Law of Succession Act*.

- b. An order be and is hereby issued declaring the money generated from the compulsory acquisition of part of Dagoretti/Uthiru/281 part of the estate of Gatuma Kungu and therefore for distribution among the beneficiaries of his estate to be distributed under the *Law of Succession Act*.
- c. An order be and is hereby issued restraining the National Land Commission from releasing the money generated from the compulsory acquisition of part of Dagoretti/Uthiru/281 to the Defendants or any other person save with the express orders of the court.
- d. Each Party shall bear his own costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 21ST DAY OF MARCH 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. King'oo Wanjau for the Plaintiff

N/A for the Defendants & Interested Party

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

