



**Kamau v Muthoni & another (Environment & Land Case  
352 of 2017) [2023] KEELC 17668 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17668 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 352 OF 2017**

**BM EBOSO, J**

**MAY 30, 2023**

**BETWEEN**

**KESIA NJOKI KAMAU ..... PLAINTIFF**

**AND**

**COSMOS GAKUNYI MUTHONI ..... 1<sup>ST</sup> DEFENDANT**

**KEZIAH WAITHERA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Kesia Njoki Kamau [the plaintiff] is a sister-in-law to Keziah Waithera [2nd defendant], in the sense that Waithera's late husband, Muigai Kamau, was a brother to the plaintiff. Cosmos Gakunyi Muthoni [the 1st defendant] is a nephew to the plaintiff, born by the plaintiff's sister, Nancy Muthoni.
2. Through a plaint dated 21/3/2017, the plaintiff sued the two defendants seeking, among other reliefs, an order authorizing eviction of the defendants from land parcel number Kabete/Muthumu/T.267. Her case was that she was the registered proprietor of land parcel number Kabete/ Muthumu/T.267 [the suit property]. She contended that she, on humanitarian grounds, allowed the two defendants to build their houses on the suit property as they prepared to move into their own pieces of land. She added that the defendants subsequently refused to vacate the suit property.
3. The two defendants filed a defence and a counterclaim dated 23/5/2017, in which they contended that the suit property was purchased by and belonged to the late Cecilia Wangui Kamau who was their grandmother and mother-in-law respectively. They contended that the late Cecilia Wangui Kamau was mother to: (i) the late Muigai Kamau [the 2nd defendant's husband]; (ii) Nancy Muthoni [sister to the plaintiff and mother to the 1st defendant]; (iii) Michael Njuguna [brother to the plaintiff]; and (iv) Kesia Njoki [the plaintiff]. They contended that Cecilia Wangui Kamau died before transfer of the suit property had been processed and because Muigai Kamau had been involved in a road traffic accident and was hospitalized for long, the family agreed that the land was to be registered in the name of the



plaintiff to hold it in trust for the family of Cecilia Wangui Kamau. They added that the 2nd defendant had lived on the land from 1960 when she got married to Muigai Kamau, while the 1st defendant had lived on the land since he was born.

4. By way of counterclaim, the defendants prayed for, among other reliefs, a declaration that the plaintiff held the land in trust for herself and for the defendants.

### **Dismissal of Plaintiff's Suit**

5. It does emerge from the court record that on 21/11/2018, this court issued a notice to show cause why the suit should not be dismissed for want of prosecution. The court invited parties to attend court on 4/12/2018 to show cause why the suit should not be dismissed. There was no attendance by the parties on 4/12/2018. Consequently, this Court [Ongondo J] dismissed the plaintiff's suit but said nothing about the defendant's counterclaim. For the avoidance of doubt, the Judge made the following verbatim order:

“I have seen the notice to show cause dated 21/11/2018 and notices issued regarding Thika ELC service week. The plaintiff and counsel absent without reason. No cause shown by the plaintiff.

Under order 17 rule 17 (12) (1) [Civil Procedure Rules](#) 2010, the suit be and is hereby dismissed with no order as to costs.”

### **Hearing of Counterclaim**

6. Consequently, the defendants' counterclaim was heard on 16/11/2022. The plaintiff subsequently filed written submissions dated 16/1/2022 through M/s Njuguna Ng'ang'a & Associates. The defendants filed written submissions dated 8/12/2022 through M/s Wanjohi & Wawuda Advocates. Parties to the suit invited the court to render a judgment.
7. The plaintiff's suit having been dismissed on 4/12/2018 by Ongondo J, what falls for determination in this judgment is the defendants' counterclaim. Hearing of the counterclaim proceeded exparte on 16/11/2022, and the plaintiff subsequently elected to file written submissions without leading any evidence.

### **Defendants' Evidence**

8. Keziah Waithera testified as DW1. She adopted her witness statement dated 15/2/2018 as part of her sworn-evidence-in chief. She produced six (6) exhibits. In summary, her evidence was that the suit property belonged to her mother-in-law who purchased it from one Henry Gacheru. She further stated that she had lived on the suit land with her late husband since 1960 when she got married to him. She added that her mother-in-law died in 1990 before the land had been transferred to her name. Similarly, Henry Gacheru [the seller] died before transferring the land. It was her evidence that the widow of Henry Gacheru approached the family of Cecilia Wangui Kamau and offered to process the transfer in favour of the family of Wangui. At that point, the family of Cecilia Wangui Kamau [her mother-in-law] agreed that the land was to be transferred to Muigai Kamau to hold it in trust for the family of Wangui. However, this did not happen because, on the eve of the day they were to go to the Land Control Board, [Muigai Kamau] was hit by a vehicle and he lost his ID card. As a result of the accident, her husband was hospitalized. Consequently, the transfer was processed in the name of the plaintiff to hold the land as a trustee.



9. DW1 testified that the plaintiff was registered as proprietor of the suit property to hold it in trust for the family of Cecilia Wangui Kamau. She urged the court to determine the trust.

### **Analysis and Determination**

10. As observed earlier, the plaintiff neither led evidence nor cross-examined DW1. It is, however clear from the plaintiff's written submissions that an irregular attempt was made by the plaintiff, to adduce evidence through written submissions. Our civil legal system does not permit that.
11. I will not rehash the rival written submissions that were tendered. The key issue that falls for determination in the counterclaim is whether the plaintiff holds land parcel number Kabete/Muthumu/T.267 in trust for the beneficiaries of the estate of Cecilia Wangui Kamau.
12. The defendants led uncontroverted evidence explaining how the suit land was acquired. It does emerge from the uncontroverted evidence of DW1 that the suit land was purchased from Henry Gacheru by the late Cecilia Wangui Kamau who settled her family on the land. Wangui's family consists of: (i) Muigai Kamau [deceased husband of the 2nd defendant]; (ii) Nancy Muthoni [mother to the 1st defendant]; (iii) Michael Njuguna; and (iv) Kesia Njoki [the plaintiff].
13. It does also emerge from the uncontroverted evidence of DW1 that Wangui's family has occupied the land for more than 63 years. Indeed, it was the testimony of the 2nd defendant that when she got married to Muigai Kamau in 1960, she found the family of Wangui living on the land and the land has been her home since then. There was unchallenged evidence that title to the land was not processed in the name of Wangui during her lifetime although she had been given possession of the land by the seller, Henry Gacheru. DW1 testified that upon the demise of Wangui and Gacheru, the administrators of the estate of Gacheru approached the family of Wangui and offered to process a transfer of the suit property to the family of Wangui. The family settled on Muigai Kamau [the 2nd defendant's husband] as the person to hold the land in trust for the family of Wangui. However, this did not happen because Muigai was involved in a car accident leading to loss of his identification card and hospitalization. At that point, the family of Wangui settled on the plaintiff as the person to hold the land in trust for the family.
14. From the above uncontroverted evidence of DW1, it is clear that the suit property, though registered in the name of the plaintiff, is held by her in trust for the beneficiaries of the estate of the late Cecilia Wangui Kamau. Consequently, the court is satisfied that the defendants have proved to the required standard that the suit property is held by the plaintiff as a trustee of the beneficiaries of the estate of the late Cecilia Wangui Kamau. The court is further satisfied that as a widow of the late Muigai Kamau who is in occupation of Muigai's portion of the land, the 2nd defendant is not a trespasser on the land. The court further finds that the 1st defendant, as a son to Nancy Muthoni who has lived on the land since he was born and who lives on Nancy Muthoni's portion, is not a trespasser on the land.
15. The result is that the defendant's counterclaim succeeds to the extent of the above findings. The following disposal orders are accordingly made in tandem, with but not in the exact framing of, the reliefs that were sought in the counterclaim:
  - a. A declaration is hereby made that the plaintiff holds land parcel number Kabete/ Muthumu/ T.267 in trust for the beneficiaries of the estate of Cecilia Wangui Kamau.
  - b. An order is hereby made directing the Land Registrar to rectify the relevant land register to reflect the fact that the plaintiff holds the said land in trust for the beneficiaries of the estate of Cecilia Wangui Kamau.



- c. Beneficiaries of the estate of Cecilia Wangui Kamau shall be at liberty to initiate appropriate proceedings in the succession court for distribution of the estate.
- d. Because parties to this suit are relatives there will be no order as to costs of the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 30TH DAY OF MAY 2023**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Juma holding brief for Mr Njuguna for the Plaintiff

Court Assistant: Hinga/Osodo

