



REPUBLIC OF KENYA



**Thuo & 2 others v Muigo (Environment & Land Case 7 of 2014)
[2023] KEELC 19100 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19100 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 7 OF 2014**

JO OLOLA, J

JULY 28, 2023

BETWEEN

JOHN WANJAU THUO 1ST PLAINTIFF

JAMES KIRAGU KARURUMBA 2ND PLAINTIFF

PAUL GITHETHWA MUIGO 3RD PLAINTIFF

AND

STEPHEN WANJOHI MUIGO DEFENDANT

JUDGMENT

Background

1. By their plaint dated December 18, 2013 as amended on February 4, 2014, John Wanjau Thuo, James Kiragu Karurumba and Paul Githewa Muigo (the Plaintiffs) pray for a declaration that:

(a) Plot 68 at Gakindu market belongs to the Defendant and 13 others, namely;

1. Jeneva Wanjiku Gichingiri
2. Muchiri Gakuru
3. Susan Nyambura Muriu
4. Kabau Ndonga
6. Michael Muigo Kabaria
7. Cherestine Mwangi Gathuita
8. John Wanjau Thuo
9. James Kiragu Karurumba



10. Faustino Munyaga Kahenya
11. Celestine Ngiabi
12. Kiige Kabiru
13. Paul Githethea Muigo and that the Defendant holds the same in trust for himself and the 13 above;

- (b) The trust be determined and the names of the Plaintiff and others be recorded at the offices of the County Council of Nyeri as respects Plot 68 at Gakindu Market;
- (c) The Defendant be restrained from disposing of the said Plot 68 without the knowledge or consent of the Plaintiffs and other persons who are owners of the said plot;
- (d) The Defendant do pay the costs of this suit.

2. Those prayers arise from the Plaintiffs' contention that the said Plot No 68 was allocated to the Defendant's father one Robert Muigo Kiambi (now deceased) on behalf of himself and the Plaintiffs as well as the listed persons all of whom were from the same area. It is the Plaintiffs case that the deceased and themselves intended to have the said plot together with Plot No 37 Gakindu Market developed and that the same were to be registered in their names in the offices of the then County Council of Nyeri
3. The Plaintiffs further aver that following the death of his father on May 5, 1970, the Defendant filed Succession Cause No 7 of 2007 at the Resident Magistrate Court at Othaya and a Grant of Letters of Administration was issued to him whereby the said Plot No 68 Gakindu market was solely registered in his name.
4. It is the Plaintiff's case that although the said Plot No 68 was solely registered in the name of the deceased Robert Kiambi, the developments thereon had been carried out jointly with him, the Plaintiffs and the said listed persons' and hence the registration thereof was in trust for himself and the others.
5. In his Statement of Defence dated and filed herein on February 27, 2014, the Defendant denies the Plaintiffs' claim and avers that both plot Nos 37 and 68 were allocated solely to his father and not on behalf of the Plaintiffs or other persons. The Defendant further denies that his deceased father had the intention to register the plots of land in the names of the Plaintiffs and/or other persons as contended.
6. The Defendant further avers that the Plaintiffs are young men who could not have participated in acquiring of the Plots at the time his father was allocated the same. It is his case that the changes in regard to the ownership of Plot No 68 were done recently after the death of many people and the same were irregular and done without following the due process of succession.

The Plaintiffs' Case

7. The trial herein commenced before the Honourable Justice Lucy Waithaka in the year 2017. The Plaintiff called one witness.
8. PW1 – John Wanjau Thuo is the 1st Plaintiff and a farmer and businessman in Othaya. He told the Court the Defendant and himself come from the same village and that they had grown up together.



9. Relying on his Statement dated December 18, 2013 as filed in Court on January 13, 2014, he told the Court that he knows as a fact that many years ago when no title deeds were issued to Africans for land, the local authorities used to give people the right to own plots in various market places in the rural areas.
10. PW1 testified that because of lack of ability and the trust that people had in one another, a group of people would join together and have one or some of them allocated a plot in a market and they would later jointly develop or carry out business therein or let it out. PW1 told the Court that in the instant case Plot Nos 37 and 68 located at Gakindu Market were allocated to the Defendant's father Robert Muigo Kiambi by the Nyeri African District Council on behalf of himself and a number of people in the locality, including the Plaintiffs herein. The plot owners thereafter developed them and used them to get money which they shared amongst themselves.
11. PW1 further told the Court that Plot No. 168 in that regard belongs to 14 people many of whom have since died save for the three named Plaintiffs and one Celestine Ngiabi. In the year 2007, the Defendant filed a Succession Cause at the Resident Magistrates Court at Othaya for the purpose of administering his father's estate and the said Plot No 68 was registered as his own.
12. PW1 further told the Court that in the year 1973, all the Partners except one Faustina Munyanga had taken a photograph outside the said Plot No 68 Gakindu Market and they had each kept a copy of the photograph. They had been doing audited accounts of the Partnership upto the year 2001 and had paid rates to the County Council up to the year 2015. They have been annually sharing the process of the Partnership business which includes rent paid by the tenants.
13. On cross-examination, PW1 testified that Plot No 68 was allocated in 1968 to a group of individuals by the District Council through the Area Chief. The Plot was registered in the name of the Defendant's father to hold in trust for the others as during that time, only one person was picked to represent the rest of the group.
14. PW1 told the Court that in 1997, they approached the Council and filed a form indicating the plot belonged to all of them but the Defendant filed succession proceedings without their knowledge. The Partners had been carrying on the business of selling hides and skins on the land although all rates and licences were paid for in the name of the Defendant's father.
15. PW1 further testified that they did not effect registration of their names during the Defendant's father's lifetime because they did not have prior knowledge that they could do so. He conceded that the process of changing the names at the County Council offices was irregular. He told the Court they were not aware of the succession proceedings filed by the Defendant and that after they learnt of the same, they had not applied for the revocation of the grant.
16. PW1 testified that they had filed this suit on behalf of all the 14 Partners and that he has their mandate although he did not file any authority to plead on their behalf.

The Defence Case

17. The Defendant Stephen Wanjohi Muigo (DW1) also testified as the sole witness in his case. He told the Court he is a farmer and that he knows the Plaintiffs.
18. DW1 testified that around 1947, his father Robert Muigo Kiambi was allocated Plot No 37 at Gakindu Market by the Local Native Council. Some villagers at Karuthi later approached his father and requested him to allow them to demolish the mud house thereon and put up a stone one. His father allowed the villagers to do so but the plot remained his father's. The seven (7) villagers contributed



building materials and after the building was complete, they together with Defendant's father started selling hides and skins thereon using the licence issued to the Defendant's father.

19. DW1 further testified that around 1968, his father was allocated Plot No 68 to use for drying hides and skins. The group then decided to be drying the hides and skins in Plot No 68 and then they would store them in Plot No 37. At this time three more people joined the group in the business and contributed in construction of a building. As the years went on, many members of the group died. The Defendant's father was the first to die and today none of the original members of the group is alive.
20. DW1 told the Court that in the year 2007, he filed a Succession Cause and Plot No 68 was transmitted to himself while Plot No 37 went to his brother.
21. On cross-examination, DW1 testified that the Plot No 68 was allocated as an empty plot in the year 1968 to his father. The father then invited a few friends and they contributed to the construction. DW1 denied that his father took advantage of his friends due to the fact that he was the only one who was literate to apply for the plot to be registered in his name.
22. DW1 admitted that the hides and skins business was run by his father and the other people. It was however not true that the proceeds from the sale of the skins is what was used to pay for the land rates. DW1 told the Court his father paid for the rates with his own money.
23. DW1 told the Court that when the hides and skins business started to fail, they closed the business and constructed more rental houses at the back of the plot which they let out to some people. The father's friends continued paying DW1's father the sum of Kshs 135/- per month for the use of the land. He denied that his father had held the land in trust for his business partners.

Analysis and Determination

24. I have carefully perused and considered the pleadings filed herein, the testimonies of the two witness as well as the evidence adduced at the trial. I have similarly perused the written submissions and the authorities to which I was referred by the Learned Advocates representing the Parties herein.
25. By their Plaint as amended on February 4, 2014, the three Plaintiffs urge the Court to declare that Plot No 68 Gakindu Market belongs to the Defendant together with themselves as well as 10 other people listed in the Plaint and that the Defendant holds the said Plot in trust for himself as well as the 13 listed people. The Plaintiffs urge the Court to determine the said trust and to have the names of all the 14 owners entered in the records of the Nyeri County Council offices as the joint owners of the said plot of land. In addition, the Plaintiffs pray that this Court makes an order restraining the Defendant from disposing of the said Plot No 68 without the knowledge and/or consent of the other 13 owners thereof.
26. Those prayers arise from the Plaintiffs' contention that the Defendant's father one Robert Muigo Kiambi was previously registered as proprietor of the said Plot No 68 Gakindu Market in trust for himself and the 13 other people.
27. In support of that position, the Plaintiffs called the 1st Plaintiff – John Wanjau Thuo (PW1) who testified on their behalf. Relying on his Statement dated December 18, 2013, PW1 told the Court the suit property was allocated to the Defendant's father on behalf of himself and the thirteen other people who also include the Plaintiffs.
28. PW1 told the Court that in the year 2007 the Defendant filed a Succession Cause at the Othaya Law Courts wherein the said Plot No 68 was listed as his property. He told the Court that the plot belonged to all of them and that they had carried out business of selling hides and skins thereon over the years while sharing profits therefrom.



29. On his part, while admitting that the said Plot came to his name by way of transmission upon filing the Succession Cause at Othaya Law Courts, the Defendant insisted that the suit property had been solely allocated to his father the late Robert Muigo Kiambi and that it was his father who had invited other village mates of his own to come and join him to carry on business in the plot.
30. While admitting that there were some people who had been doing business with his father on the two plots he owned at Gakindu Market being Plot Nos 37 and 68, the Defendant told the Court that while a number of people did business with his father, the two plots of land had remained solely his father's and the Plaintiffs had therefore no claim thereto.
31. As it were, it is trite law that he who alleges must prove. In civil cases, the standard of proof is the balance of probabilities. As Lord Denning MR stated in *Miller-vs- Minister of Pensions* (1942) 1 All ER 372:
- “The ... standard of proof is well settled. It must carry a reasonable degree of probability ... If the evidence is such that the tribunal can say “we think it is more probable than not”; the burden is discharged, but if the probabilities are equal, it is not.”
32. In the matter before me, the Plaintiffs asserted that the suit property was registered in the name of the Defendant's father in trust for themselves. It was their case that the allocation was done in the name of an individual but they jointly contributed and were operating a partnership of selling hides and skins from the said Plot No 68 situated at Gakindu Market.
33. Asked during his cross-examination at the trial whether or not they had anything to show the joint allocation, PW1 told the Court they had no document to demonstrate that although he insisted that that was a common practice at the time.
34. From the material placed before the Court, it was apparent that the said Plot No 68 was allocated to the Defendant's father some two (2) years before his death in 1970. There was also evidence that long after the death of the Defendant's father, a group of people styling themselves as Gakindu Hides and Skins continued to operate the business on the suit property.
35. That much was indeed conceded by the Defendant. According to the Defendant, upon being allocated the land, his father had invited fellow villagers and they together contributed and started running the business together. Among the original ten (10) people that started the business the Defendant conceded that it was his father who died first and that all the members of the original group have all since passed away.
36. It was conceded further by the Defendant that once the hides and skins business collapsed, the Partners built more rental houses at the back of the plot. There was however nothing to demonstrate that in allowing a joint venture in constructing the premises and running the business in partnership, the Defendant's father had ceded the ownership of Plot No 68 to the new comers.
37. As it were, the Plaintiffs did not place any evidence of what consideration each or any one of them gave to the initial allottee of the land to entitle them to the ownership of any portion thereof. While it was true that a partnership agreement can be oral, there was nothing placed before me to prove a common purpose or joint venture other than heaps of receipts said to have emanated from the business of selling hides and skins.
38. It was further apparent that while the suit filed by the three (3) Plaintiffs was said to have been brought in the name of 10 other people whose names are listed at paragraph 8 of the Amended Complaint, there was no evidence that the said 10 people were aware of or had given their mandate and authority to the Plaintiffs herein to institute the suit and to plead on their behalf. It was further apparent that while



the registration of the Defendant was the result of a decision made in Othaya RM's Succession Cause No 7 of 2007, the Plaintiffs had not taken any steps to have the grant issued therein revoked despite conceding their knowledge of the same.

39. In the circumstances herein I was not persuaded that the plaintiffs had proved their case on a balance of probabilities as by law required. In the premises this suit is dismissed.

40. Each Party shall bear their own costs.

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

In the presence of:

Mr. Mindo for the Plaintiffs

Mr. K. Wachira for the Defendant

Court assistant – Kendi

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J. O. Olola

JUDGE

