



**Kinyua v Karu & 2 others (Environment and Land Appeal
E008 of 2021) [2023] KEELC 18802 (KLR) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18802 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E008 OF 2021**

**JO OLOLA, J
JULY 14, 2023**

BETWEEN

MARY WANGARI KINYUA APPELLANT

AND

STANLEY MURIMI KARU 1ST RESPONDENT

ESTHER REGINA WANJIRU 2ND RESPONDENT

KABIRA KARU NGONGORO 3RD RESPONDENT

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable A Mwangi, Senior Principal Magistrate, delivered on February 11, 2021 in Karatina ELC Case No. 143 of 2019.
2. By a Plaint dated and filed in the trial Court on June 1, 2019, Stanley Murimi Karu, Esther Regina Wanjiru and Kabira Karu Ngongoro (the Respondents) sought for an order that LR No Iriaini/Kaguyu/604 be registered in the name of the Defendant as widow of Richard Kinyua Karu (deceased), Iriaini/Kaguyu/606 in the name of Kabira Karu Ngongoro and LR No Iriaini/Kaguyu/603 which was meant for Joseph Githaiga Karu (deceased) be sub-divided into four (4) equal portions between the Plaintiffs and the Defendant.
3. Those prayers arise from the Respondents' contention that the said Richard Kinyua Karu (deceased) was registered as proprietor of LR No Iriaini/Kaguyu/233 in trust for himself, Joseph Githaiga Karu (also deceased), Kabira Karu Ngongoro, Stanley Murimi Karu and Paul Wanjohi Karu (deceased).
4. The Respondents further contended that before his death the said Richard Kinyua Karu caused LR No Iriaini/Kaguyu/233 to be sub-divided into five (5) equal portions being Iriaini/Kaguyu/603, 604, 605, 606 and 607, with the intention of the same being transferred to himself and to his siblings. In furtherance of the trust, he did transfer parcel No 604 to himself; 605 to Esther Regina Wanjiru (widow



of Paul Wanjohi Karu); 603 to Joseph Githaiga Karu; 606 to Kabira Karu Ngongoro and 607 to Stanley Murimi Karu.

5. The Respondent asserted that the deceased died without leaving any surviving dependent except the four of them as the Respondents and the Appellant. The Respondents asserted that as a personal legal representative of the deceased, the Appellant had taken over the said trust on behalf of the deceased but had since refused to register the disputed parcels of land as per the trust and hence their suit.
6. But in her Statement of Defence dated and filed on August 14, 2019, Mary Wangari Kinyua (the Appellant) denied that the late Richard Kinyua Karu held LR No Iriaini/Kaguyu/233 in trust for the Respondents and one Joseph Githaiga Karu. It was the Appellant's case that the deceased acquired the said parcel of land on his own.
7. The Appellant further denied that the deceased caused LR No Iriaini/Kaguyu/233 to be sub-divided into five portions with the intention of transmitting the land to his siblings. The Appellant asserted that the deceased as the elder brother gifted three portions namely LR No Iriaini/Kaguyu/605, 606 and 607 to his brothers in the spirit of love and the need to help his less privileged siblings at the time. The deceased was otherwise the proprietor of the remaining portions being LR Nos Iriaini/Kaguyu/603 and 604 which ought to devolve to his wife and children as the rightful beneficiaries.
8. The matter was placed before the Honourable Anne Mwangi, Senior Principal Magistrate, who after hearing the Parties and in a Judgment delivered on February 11, 2021 did find that the Respondents had succeeded in establishing that the late Richard Kinyua Karu was registered as proprietor of LR No Iriaini/Kaguyu/233 as trustee for his brothers and that he also held LR Nos Iriaini/Kaguyu/603 in trust for Joseph Githaiga Karu and Iriaini/Kaguyu/606 in trust for Kabira Karu Ngongoro. The Learned Trial Magistrate however declined to order that LR No Iriaini/Kaguyu/603 be registered in the names of the Parties and directed that any interests that the Parties may have be processed through a succession cause.
9. Aggrieved by the said determination, the Appellant lodged the Memorandum of Appeal herein dated March 8, 2021 urging this Court to set aside the Judgment of the Learned Trial Magistrate on the grounds:
 1. That the Learned Magistrate erred in law and in fact by failing to appreciate that the burden of proof lay squarely on the Plaintiffs to prove the existence of a trust;
 2. That the Learned Magistrate (erred) in law and in fact in finding that a trust existed in LR No Iriaini/Kaguyu/603 yet there was no evidence adduced to that effect;
 3. That the Learned Magistrate failed to appreciate that there is a possibility that in the year 1959, a seventeen year old young man could have bought a piece of land;
 4. That the Learned Magistrate erred in law and fact in finding that LR No Iriaini/Kaguyu/603 belonged to the estate of the late Joseph Githaiga Karu;
 5. That in view of the circumstances set out hereinabove, the Learned Magistrate totally misdirected herself in delivering Judgment in favour of the Respondent by failing to consider and appreciate the evidence on record tendered on behalf of the Appellant; and



6. That in all the circumstances of the case, the findings of the Learned Magistrate are insupportable in law or on the basis of the evidence adduced.
10. This being a first appeal, it behooves this Court to re-evaluate, re-assess and re-analyse the evidence on record and then determine whether the conclusions reached by the Learned Trial Magistrate should hold.
11. By their Complaint dated and filed in the trial Court on June 1, 2019, the three (3) Respondents had sought an order that LR No Iriaini/Kaguyu/604 be registered in the name of the Appellant as the widow of the late Richard Kinyua Karu. The Respondents also sought an order that LR No Iriaini/Kaguyu/606 be registered in the name of Kabira Karu Ngongoro while LR No Iriaini/Kaguyu/603 which they said was meant for the late Joseph Githaiga Karu should be sub-divided into four (4) equal portions to be shared between themselves and the Appellant.
12. The basis of those prayers were the Respondent's contention that the original land parcel number Iriaini/Kaguyu/233 had been registered in the name of the said Richard Kinyua Karu (deceased) in trust for himself as well as his four (4) brothers, namely, Joseph Githaiga Karu (also deceased), Kabira Karu Ngongoro, Stanley Murimi Karu (now deceased) and Paul Wanjohi Karu (also deceased).
13. The Respondents told the Court that before his death, the late Richard Kinyua Karu did cause the said LR No Iriaini/Kaguyu/233 to be sub-divided into five (5) equal portions being LR Nos Iriaini/Kaguyu/603, 604, 605, 606 and 607 with the intention to transfer the portions to his siblings. On that account, they assert that the deceased caused parcel No 604 to be transferred to himself while he also held parcel No 603 and 606 in trust for his brothers Joseph Githaiga Karu and Kabira Karu Ngongoro respectively who passed on before the sub-divisions were done. In addition, the Respondents asserted that the late Richard Kinyua Karu who was the husband to the Appellant herein did transfer Parcel No 605 to Esther Regina Wanjiru who was the widow to his brother Paul Wanjohi Karu while Parcel No Iriaini/Kaguyu/607 was transferred to Stanley Murimi Karu who also passed on during the pendency of this suit.
14. The Respondents accused the Appellant who is the legal representative of the said Richard Kinyua Karu of refusing to register parcel No 606 in the name of Kabira Karu Ngongoro (the 3rd Respondent herein) and also to share with them equally parcel No 603 which was meant for Joseph Githaiga Karu who was said to have left no survivors.
15. On her part, the Appellant rejected the contention that the original parcel LR No Iriaini/Kaguyu/233 had been registered in the name of her husband in trust for his siblings. While conceding that at some point in time her husband did sub-divide the said parcel of land and that he proceeded to give the resulting sub-divisions being parcel numbers 605, 606 and 607 to his brothers, the Appellant told the Court her husband had done so merely as the eldest brother and in the spirit of love having seen the need to help his less privileged siblings.
16. It was the Appellant's case that her husband had solely acquired the original parcel of land and hence the remaining portions being parcel number 603 and 604 belonged solely to her husband and hence the same should devolve to herself as the wife together with their children as the rightful beneficiaries.
17. Having heard the Parties and considered the evidence, the Learned Trial Magistrate concluded as follows at Pages 5 and 6 of the impugned Judgment:

“PW1 indicated during cross-examination that Richard gave him his portion as part of their father's inheritance and that he did not refuse to give them when they asked for their



portions because he knew the land was not his but their father's. He further stated that Richard was registered while he was in class three and he did not have money to buy the land then. According to the green card for the land, Richard was registered in 1959. Since this matter is related to (Karatina) Succession (cause) No 158 of 2017 for the estate of Richard Kinyua Karu, I have considered the contents of the death certificate therein to ascertain when Richard was born for purposes of verifying PW1's claims that Richard did not have the money to buy the land during the registration. According to the death certificate, when Richard died in 2014 he was aged 72 years. This makes his date of birth 1942. In 1959 he was aged 17 years, not yet an adult and as such it is more probable that he was registered as trustee by virtue of him being the eldest son of the home rather than pursuant to him purchasing the property as alleged by the Defendant.

The Plaintiffs have succeeded in establishing that the late Richard Kinyua Karu was registered as proprietor of Iriaini/Kaguyu/233 as trustee for his brothers thus he holds Iriaini/Kaguyu/603 in trust for Joseph Githaiga Karu (deceased) (and) Iriaini/Kaguyu/606 in trust for Kabira Karu Ngongoro. The Defendant to cause the transfer of this property to Kabira Karu Ngongoro ...”

18. As it were, whether or not a customary trust existed in relation to the suit property was a matter of fact which had to be proved by evidence. As the Supreme Court stated in *Isack M'Inanga Kiebia -vs- Isaaya Theuri M'Lintari & Another* (2018) eKLR:

“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 *Kairie -vs- Kinuthia*, that what is essential is the nature of the holding of the land and the 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 circumstance; and
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

19. In the matter before me, the Appellant had contended that her husband the late Richard Kinyua Karu had solely acquired the parcel of land then known as LR No Iriaini/Kaguyu/233 and that therefore he did not hold the same in trust for his four (4) brothers. There was however very little by way of evidence that was placed before the trial Court in support of that contention. The Appellant neither produced a Sale Agreement nor did she in her testimony substantiate how her deceased husband came to acquire the property.

20. There was no dispute that the Appellant's husband was the eldest son in the family and that since his name was entered on the land register on February 3, 1959 the entire family including his four brothers



were all residing on the said LR No Iriaini/Kaguyu/233. That in my view was only possible because the entire family considered the land to be their own. Given that the Appellant's husband lived with his four (4) brothers on the land, it was not a mere coincidence that in 1985, he caused the land to be sub-divided into five (5) equal portions.

21. I was not persuaded that the sub-division of the land and the subsequent transfer of three portions thereof to his siblings was an act of kindness on the part of the Appellant's husband. It was apparent that he only caused himself to be registered as the proprietor of the LR No Iriaini/Kaguyu/604 which was one of the sub-divisions.
22. As it were, trusts including customary trusts are recognised as overriding interest within the provisions of Section 28 of the *Land Registration Act*. That being the case, it was not necessary that the same be noted on the land register as at the time the Appellant's husband was registered as the proprietor thereof.
23. In the circumstances herein I was persuaded that the Respondents had properly established the existence of a customary trust over the various sub-divisions of the parcel of land formerly known as LR No Iriaini/Kaguyu/233. I was therefore not persuaded that the Learned Trial Magistrate had misdirected herself as contended by the Appellants.
24. It follows that this Appeal fails and is dismissed with costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 14TH DAY OF JULY, 2023.**

In the presence of:

Ms Wandia Murimi for the Appellant

Ms Nancy Waruguru the 1st Respondent present in person

Ms Esther Regina Waruguru – 2nd Respondent present in person

Ms Lucy Wangari – 3rd Respondent present in person

Court assistant - Kendi

.....

J. O. OLOLA

JUDGE

