



Kareithi (Suing as the legal representative/administratrix of the Estate of David Githaiga Methu) v Methu & another (Environment & Land Case 4 of 2023) [2023] KEELC 19942 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19942 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 4 OF 2023
A OMBWAYO, J
SEPTEMBER 21, 2023
IN THE MATTER OF LAND TITLE NUMBER NAKURU
MUNICIPALITY BLOCK 7/634
AND
IN THE MATTER OF DECLARATON OF A TRUST

BETWEEN

JENNIFER WANGECHI KAREITHI (SUING AS THE LEGAL REPRESENTATIVE/ADMINISTRATRIX OF THE ESTATE OF DAVID GITHAIGA METHU) PLAINTIFF

AND

JAMES MWANGI METHU 1ST DEFENDANT

MARGARET MUTHONI METHU 2ND DEFENDANT

RULING

1. Jeniffer Wangechi Kareithi suing as the legal representative of the estate of David Githaiga Methu has come to court against James Mwangi Methu and Margaret Muthoni Methu. The plaintiff in a nutshell prays that it be declared that the 2nd defendant herein is holding the property title number Nakuru Municipality Block 7/634 in trust for themselves and on behalf of the plaintiff herein who represents the estate of David Githaiga Methu deceased and therefore the 1st defendant ownership is subject to the plaintiffs existing overriding interest in the said property. She further prays that the plaintiff is entitled to a share of land title number Nakuru/Municipality Block7/634 which measures approximately 5 acres for the benefit of the Estate of David Githaiga Methu (deceased). The plaintiff ultimately prays for an order that the defendants do transfer a share belonging to the estate of David Githaiga Methu (deceased) to the plaintiff to hold the same on behalf of the said estate.



2. Accompanying the suit is an application dated July 25, 2023 seeking for a temporary order of injunction pending the hearing and determination of the suit and an order that the Chief Land Registrar to register a caution on the register of the suit property. The defendants opposed the application on grounds that the 2nd defendant was the previous owner of the land and sold part of the same to cater for medical costs and rent for the plaintiff's husband who is deceased.
3. The suit parcel of land was subject to a court case thus NKR HCCC No 211 of 1981 and at that time it was LR No 455/3Danson Ville Nakuru Municipality measuring 10 acres. The court delivered its judgment on the July 29, 1998 and the property was divided into two portions of five acres each. Ultimately, the property was subdivided into Nakuru/Municipality/7/634 and Nakuru/Municipality/7/635 and LR No 435 ceased to exist. Nakuru/Municipality/634 was registered in the names of the defendant and 635 in the names of Mary Wangare Ikaari.
4. The defendants deny that there was any trust between the 2nd defendant and the plaintiff.
5. I have considered the application and the affidavits on record and rival submissions and do find that the fact that the 2nd defendant sold part of the land for the benefit of the husband of the plaintiff for medical reasons and rent establishes a prima facie case that there exists a trust otherwise why would the 2nd defendant sell part of the suit-land for the benefit of the plaintiff's husband. Though the plaintiff's husband was not in possession and actual occupation of the suit-land, there is some scintilla of evidence that need to be verified that the plaintiff's husband had an interest in the land.
6. The High Court in *James N Kiarie v Geoffrey Kinuthia & Another* [2012] eKLR stated as follows and do agree:-

“...While occupation may be relevant and has been found to be relevant in some cases in raising the inference of a trust, it is not ... a necessary ingredient for a trust to be established.
7. The relevance of this decision is that for a trust to be implied, occupation and possession is not a necessary ingredient and I add that possession and occupation per se is does not imply a trust as there must exist facts establishing a trust.
8. In the case of *Njenga Chogera v Maria Wanjira Kimani & 2 Others* [2005] eKLR, which quoted with approval the holding in the case of *Muthuita v Muthuita* [1982 – 88] 1 KLR 42, the Court of Appeal held that :-

“customary trust is proved by leading evidence. Trust is a question of fact, which must be proved by whoever is claiming a right under customary trust. A trust can never be implied by the Court, unless there was intention to create a trust in the first place.”
10. In *Peter Ndungu Njenga v Sophia Watiri Ndungu* [2000] eKLR, the Court held,

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”



11. In *Juletabi African Adventure Limited & Another v Christopher Michael Lockley* [2017] Eklr, the Court also held that

"It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:- "The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied."

12. In *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & Another* [2018] Eklr the Supreme Court of Kenya held as follows:-

"Flowing from this analysis, 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 to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several 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 construction of houses and other amenities by youths graduating into manhood. The categories of a 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."

13. 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 *Kiarie v Kinuthia*, that what is essential is the nature of the holding of the land and 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 circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group."

14. Whether the plaintiff is likely to suffer irreparable loss if an injunction is not granted, I do find that the plaintiff has established so because if the suit land is sold and the plaintiff succeeds then the orders would be made in vain.

15. Moreover, the defendant have not demonstrate that they can compensate the plaintiff.

16. On balance of convenience, I do find that it tilts towards granting an order to preserve the *status quo* and therefore I do grant an order that pending the hearing and determination of the main suit there be a temporary injunction restraining the defendants/respondents by themselves, their agents, servants



or anybody claiming under them from subdividing, selling, dealing with or in any way interfering in whatsoever manner with land Title number Nakuru Municipality Block7/634. I do decline to grant prayer number 4 because the same is superfluous and that prayer number 3 is sufficient. Costs of the application in the suit.

RULING SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 21ST DAY OF SEPTEMBER 2023.

A O OMBWAYO

JUDGE

