



**Gitara v Gitari (Environment & Land Case E040 of 2021)
[2023] KEELC 21820 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21820 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E040 OF 2021
BN OLAO, J
NOVEMBER 23, 2023**

BETWEEN

ESTHER NGONYO GITARA PLAINTIFF

AND

DOMNIC CHEGE GITARI DEFENDANT

JUDGMENT

1. If Dominic Chege Gitari (the Defendant) has ever read the Bible, then he probably misread the Book of Proverbs 31:31. It says the following about a mother:

“Honour her for all that her hands have done, and let her works bring her praise at the City gate.”

Lest the Defendant accuses me of favouring mothers, he can also read Exodus 20:12 which says:

“Honour your father and your mother that your days may be long in the land which the Lord your God gives you.”

However, the focus of this dispute is between him and his mother Esther Ngunyo Gitara (the Plaintiff). I will therefore also refer him to the quote by Amit Kalantri which reads:

“A mother is your first friend, your best friend, your forever friend.”

And if the Defendant reads the Quran, it is written there that:

“We have commended people to be good to their parents; their mothers carried them with strain and it takes two years to wean them. Give thanks to me and to your parents.”



Perhaps I may not have been writing this judgment if the Defendant had taken even a cursory look at the above scriptures and quotes. But he did not because he was blinded by the allure to grab land from his mother.

2. The Plaintiff approached this Court vide her plaint dated 22nd July 2021 and filed herein on 27th July 2021 seeking judgment against the Defendant with respect to the land parcel No Bukhayo/Bugengi/2504 (the suit land) in the following terms:
 - a. An Order of cancellation of title to the land parcel No Bukhayo/Bugengi/2504 and the same be registered in the name of Esther Ngonyo Gitara in trust of her family.
 - b. Costs of the suit.
 - c. Any or other relief that this Honourable Court may deem fit and just to grant.
3. As already stated above, the Plaintiff is mother to the Defendant and her claim is that in or around 1991 she purchased the suit land from one James Githakwa Wairagu at a consideration of Kshs 30,000 which she paid in instalments. On 8th July 1991, she entrusted the Defendant to pay the final instalment on her behalf. The Defendant however, proceeded to unlawfully transfer the suit land in his names in breach of that trust particulars whereof are pleaded in paragraphs 6 (a) to (e) as follows:
 - a. The Plaintiff bought parcel of land solely from the initial owners and without any financial input from the Defendant and despite that, he caused the suit land to be transferred to himself.
 - b. The Defendant is the Plaintiff's son who was still in college training as a welder at the time of the said registration.
 - c. The Plaintiff was the sole signatory of the land sale agreement.
 - d. The Plaintiff was staying in Kakira as a business lady hence necessitating the sending of the Defendant to pay the final instalment.
 - e. The Plaintiff has other children who depend on the parcel of land in question.

That the transfer of the suit land into the name of the Defendant was done in secret without the knowledge or consent of the Plaintiff thus amounting to breach of trust. The Defendant took advantage of the Plaintiff's illiteracy and trust to transfer the suit land in his name yet the Plaintiff had entrusted him to pay the last instalment on her behalf.

4. The particulars of breach of trust on the part of the Defendant are pleaded in paragraph 8(a) to (d) as follows:-
 - a. Transferring land parcel No Bukhayo/Bugengi/2504 without the Plaintiff's knowledge and/or consent.
 - b. Threatening to sell the suit land.
 - c. Dealing with the suit land contrary to the interests of the Plaintiff and her entire family.
 - d. Threatening the Plaintiff's development and only source of income.

Upon discovery of the defendant's intention to dispose of the suit land, the Plaintiff registered a caution on it in order to protect the interest of the entire family. She subsequently filed this suit.

5. Together with the plaint, the Plaintiff filed her statement dated 22nd July 2021 together with those of her following witnesses:



1. Paul Mugi Gitara (PW2)
 2. Patrick Wairagu Kioko (PW3)
 3. Mary Magdaline Wangoi (PW4) and
 4. Kennedy Otieno Ogutu
6. In her statement which is a rehash of her pleadings, the Plaintiff confirms that the Defendant is her son and that in or about 1991, she purchased the suit land from one James Githakwa Wairagu at a consideration of Kshs 30,000 which she paid in instalments. On 8th July 1991, she entrusted the Defendant to deliver the last instalment to the vendor which was a new Television set. The Defendant however, in breach of that trust, unlawfully transferred the suit land to himself. He has now planned to sell the suit land having taken advantage of the Plaintiff's illiteracy. To protect the suit land, the Plaintiff has placed a caution thereon having discovered that the Defendant had intentions of disposing it.
 7. In his statement also dated 22nd July 2021, Paul Mugi Gitara (PW2) who is the Plaintiff's son and Defendant's brother, states that he was living with the Plaintiff at Kakira Uganda in 1991 when she decided to purchase the suit land. She paid the purchase price in instalments and the vendor agreed to be paid the last instalment in the form of a Television set which Plaintiff bought in Uganda and entrusted the Defendant to deliver to the vendor and also sign the transfer documents in the name of the Plaintiff. The Defendant however unlawfully and in breach of trust transferred the suit land in his name.
 8. Patrick Wairagu Kiemo (PW3) is brother-in-law to the Plaintiff and uncle to the Defendant. He recorded a statement dated 31st October 2022 in which he confirmed that he was aware the Plaintiff came to Busia in the 1990's and purchased a plot which she paid for in instalments. That part of the purchase price was paid in the form of a Television set which was delivered by the Defendant who also executed the transfer documents on behalf of the Plaintiff but instead registered the land in his names. On discovery of the irregular transfer of the suit land, they sat as a family and tried to settle the matter but although the Defendant surrendered the land by word of mouth, he refused to transfer it to the Plaintiff.
 9. Mary Magdalene Wangui (PW4) is a daughter to the Plaintiff and sister to the Defendant. She recorded her statement dated 22nd July 2021 in which she stated that in 2004, her parents advised her to make use of the suit land because it was vacant and the Defendant had started selling family property including a plot next to the suit land. She therefore decided to establish a school by the name Mary Hill Kindergarten on the suit land. Around that time, the family discovered that the Defendant had transferred the suit land in his name in breach of trust and secretly. That despite efforts to settle the dispute at family level, the Defendant has refused to co-operate.
 10. Kennedy Otieno Agutu (PW5) states in his statement dated 31st October 2022 that he is a mason who has been working for the Plaintiff and her daughter at the Mary Hill School which is on the suit land since 2013 when the foundation was started. That as far as she is aware, the Plaintiff and her daughter are the owners of the suit land.
 11. In support of her case, the Plaintiff filed two lists of documents dated 22nd July 2021 and 3rd June 2022.
 12. The list dated 22nd July 2021 had the following documents:
 1. Copies of land sale agreements dated 8th July 1991, 14th March 1991 and 19th May 1991 with acknowledgment.



13. The list dated 3rd June 2022 contained the following:
 1. Transfer of Land Form dated 17th September 1991.
 2. Copy of title deed to land parcel No Bukhayo/Bugengi/2504 in Defendant's name.
 3. Letter dated 31st May 2021 from the Chief Angoromo Location.
 4. Copy of title deed to the land parcel No Bukhayo/Bugengi 2504 in the name of James Gitaru Wairagu be cancelled to insert the Defendant's name.
14. In response to the Plaintiff's claim, the Defendant filed a defence and counter-claim dated 10th June 2022. He admitted that he is a son to the Plaintiff but denied that the Plaintiff purchased the suit land from one James Githaka Wairagu adding that she did not even have the capacity to do so. He also denied that the Plaintiff had entrusted him with any payments for the suit land.
15. The Defendant similarly denied that the suit land was registered in his name irregularly or that he holds the title to the same in trust as pleaded and put the Plaintiff to strict proof thereof. He pleaded that there is another case where he is seeking the eviction of Mary Wangui from the suit land.
16. In his counter-claim, he pleaded that the Plaintiff has put a third party on the suit land thus causing him stress and anxiety.
17. He therefore sought judgment against the Plaintiff in his counter-claim as follows:
 1. The Plaintiff's suit be dismissed.
 2. An order of permanent injunction restraining the Plaintiff by herself, agents, workers or tenants from entering, using, occupying or dealing in any way with the land parcel No Bukhayo/Bugengi/2504.
 3. Costs
18. The Defendants filed his statement and those of his witnesses Simon Kamau Macharia, Ann Wangari Mwangi And John Kiemo Gitara. However, only Ann Wangari Mwangi (DW2) testified in support of his case.
19. In his statement dated 10th July 2022, the Defendant confirmed that the Plaintiff in his mother but added that he is the sole proprietor of the suit land having purchased in 1991 from one James Githakwa Wairagu after which he obtained the title deed and built two houses thereon since he was working in Uganda, he left his cousin one Simon Kamau to take care of it.
20. When his sister Mary Wangui fell into arrears with her rent, he allowed her to live in one of the two houses. However, she converted one house into a Kindergarten and carried out some extension. He therefore instructed his advocates to demand that she vacates the suit land.
21. He insists that the suit land belongs to him as he has the title deed thereto and he denied having been sent by the Plaintiff to pay of it adding that the Plaintiff's intention is to sell the suit land having placed his sister Mary to run a school thereon.
22. His witness Ann Wangari Mwangi (DW2) recorded a statement dated 24th June 2022 stating that she knew the Defendant in 1996 when she was living in one of his houses and taking care of his property upto 2003. That during that period, neither the Plaintiff nor anyone else interfered with her until she left. Thereafter, Mary Wangui took possession and started running a school.



23. She added that the Plaintiff has no right whatsoever to the suit land and that in 2015, Mary Wangui had approached her seeking advice on how she could acquire the title deed which was being kept by the Plaintiff.
24. The Defendant did not file any documentary evidence.
25. The Plaintiff filed a reply to defence and defence to the counter-claim on 26th October 2022. She reiterated the contents of her plaint and denied that the Defendant is a bonafide proprietor of the suit land. She added that the Defendant breached the trust which she had in him in the transactions involved in purchasing the suit land. She also denied causing the Defendant any stress or installing a third party on the suit land and urged the Court to dismiss the Defendant's counter claim with costs.
26. The hearing of both the Plaintiff's and Defendant's case was done on 5th July 2023 after which the parties filed their submissions. During the hearing, the parties and their witnesses adopted as their evidence the contents of their respective statements referred to above. The Plaintiff also produced as her documentary evidence the documents filed herein.
27. Submissions were thereafter filed both by Mr Okutta instructed by the firm of Ouma-okutta & Associates Advocates for the Defendant and by Mr Okeyo instructed by the firm of Okeyo Ochiel & Company Advocates for the Plaintiff.
28. I have considered the evidence by the parties and the submissions by counsel.
29. It is not in dispute that the suit land is currently registered in the names of the Defendant. It is also common ground that the Plaintiff is the mother to the Defendant. I consider the following to be the issues that call for my determination in this dispute:
 1. Whether the Defendant holds the title deed to the land parcel No Bukhayo/Bugengi/2504 in trust for the Plaintiff and if the same should now be determined and the title deed registered in the Plaintiff's name.
 2. Whether the Plaintiff, her agents workers or tenants should be enjoined permanently from dealing with the land parcel No Bukhayo/Bugengi/2504
 3. Who bears the costs.

Is the defendant a trustee holding the title No Bukhayo/Bugengi/2504 in trust for the plaintiff?

30. The answer to the above does not pose any difficulties at all. In paragraph 3 of his statement the Defendant states that:

3: "I am the sole proprietor of land parcel known as Bukhayo/Bugengi/2504 measuring approximately 0.5Ha which I bought from James Gitahakwa Wairagu in the year 1991 and acquired a title deed of some under my name."

In support of her claim, the Plaintiff produced two land sale agreements dated 14th March 1991 and 8th July 1991 executed between her and one James Githakwa Wairagu for the purchase of the suit land. The agreements are in Kiswahili language and ideally they should have been translated in English. However, neither the parties, their counsel nor this Court had any difficulties understanding the contents of the said agreements notwithstanding that they are in Kiswahili language. In any case, Kiswahili is the National Language of this Country as per Article 7 of the *Constitution* of Kenya 2010 and as I stated in *Simon Khaemba v Jamin Wasike Khaemba & another* Bungoma ELC Case No 28 of 2013 [2020 eKLR], this Court can admit and consider such an agreement as part of the evidence more so when



all the parties and the Court are conversant with the language. Both agreements are clear, and I did not hear the Defendant claim otherwise. That the purchaser of the suit land was the Plaintiff and the vendor was one James Githakwa Wairagu cannot be disputed. Their identity card numbers as well as their addresses are captured and there is no doubt that what was being purchased was the suit land. It cannot therefore be true, and this Court must dismiss the Defendant's allegation, that he purchased the suit land as his sole property in 1991. If indeed that was the position, then the agreement should have been in his names and not in the names of the Plaintiff. This Court is persuaded that the Defendant, having been entrusted by the Plaintiff to make the last instalment for the suit land by way of a Television set, took advantage of her illiteracy and had the same registered in his names. That was a breach of trust.

31. The Defendants' counsel Mr Okutta has submitted on the issue of trust that:

“Nothing in the register ever suggests that the Defendant was holding search title in trust for any family member including the Plaintiff. Indeed all transfer documents reflect that the initial owner willingly transferred his interest upon the Defendant and no one else.”

A claim in trust is among the overriding interests recognized under Section 28 of the Land Registration Act which clearly provides that such an interest need not be “noted on the register.” A similar provision was found in the repealed Registered Land Act which was the law when the suit land was registered in the name of the Defendant.

32. Counsel has added further that the Plaintiff's suit is time barred. He has submitted that:

“However, even in (*sic*) with that venture, we submit she would find herself in trouble due to Limitation of time as she is statutorily barred from such. This claim was filed 30 years after initial acquisition by the Defendant.”

Section 20(a) of the Limitation of Actions Act makes it clear that no period of limitation prescribed therein shall apply:

“In respect of fraud or fraudulent breach of trust to which the trustee was a party or privy ...”

The funds for the purchase of the suit land were produced by the Plaintiff. She has pleaded breach of trust on the part of the Defendants who, having been entrusted with the responsibility of paying the last instalment of the purchase price, fraudulently registered the suit land in his name rather than in the name of the Plaintiff. I cannot think of a clearer breach of trust than that.

33. The trust is hereby determined and the suit land be registered in the name of the Plaintiff to hold in trust for her family.

Whether The Plaintiff Should Be Permanently Injuncted From The Land Parcel No Bukhayo/Bugengi/2504

34. The evidence which cannot be disputed shows that the Plaintiff is the proprietor of the suit land. She purchased it through her own funds. She did not inherit it from any party. It would be absurd for any Court to injunct her, her agents, servants, or anyone claiming through her from utilizing it. I dare say it will be immoral to do so bearing in mind that she has the option, which she has not sought, to have the suit land registered in her sole name and to keep away the Defendant and his siblings from it.



35. Talking of morals, Mr Okutta counsel for the Defendant has made the following submissions in paragraph 4:

“My Lord, that these suits (*sic*) are between a biological mother and son cannot be gainsaid, sad affair and morally challenging as it may be, we submit that the law should take it’s cause leaving moral issues to be determined by those with jurisdiction on them.”

Counsel did not offer any suggestion as to who are those institutions “with jurisdiction.” Is it the leadership of the churches or mosques? Is it the political leadership? Is it the village elders or the local administration? At the commencement of this judgment, I believe that by citing the various scriptures, I was alluding to a moral issue and as I read the submissions by Mr Okutta, I am now more than convinced that I was on the right track. Morality is basically the belief that some behaviour is right and acceptable while some other behaviour is wrong. It guides an individual’s behavior. To short change your own mother, as happened in this case, cannot be morally correct and I do not think I should steer away from that route as suggested by Mr Okutta. When conduct is immoral, as is now clear from the Defendant’s fraudulent activities with respect to the suit land, the Court should not shy away from saying so. In his article “*Law And Morality*” reported in Marquette Law Review Vol 36, Scheller JR writes at page 322 that:

“Law is related to morality in the setting forth of those virtues that are related to the common good. This does not mean that positive human law should prohibit all rules nor command all virtues; rather it prohibits only the grosser failings of mankind which threaten the very survival of society and commends those virtues which can be ordained by human means to the common good.”

He then goes on to add that:

“Law is related to morality in as much as law is subject to and cannot contradict moral principles i.e. natural moral law.”

What the Defendant did was not only illegal but it was also grossly immoral by any standards. To answer Mr Okutta, this Court has the jurisdiction to inform the Defendant, which I hereby do, that his conduct was irreprehensible. Hopefully he has learnt from it especially considering that the Plaintiff, in a demonstration of motherly love, has not excluded him from her family even as she sought judgment against him.

36. The Defendant’s counter-claim is for dismissal.

37. On the issue of costs, the law tells me they “follow the event”. But again, this dispute involves a mother and her son. And notwithstanding the Defendant’s repulsive conduct, I will not punish him with an order to pay costs and will hope that he will use that as an opportunity to start a new chapter in his relationship with his mother.

38. Each party shall therefore meet their own costs.

39. Ultimately therefore and having considered the evidence by all the parties, there shall be judgment for the Plaintiff on the following terms:

1. The Defendant’s counter-claim is dismissed.
2. The Defendant holds the title to the land parcel No Bukhayo/Bugengi/2504 in trust for the Plaintiff and her family.



3. The trust is hereby determined.
4. The Defendant shall within 30 days from the date of this judgment surrender to the Land Registrar Busia the original title deed to the land parcel No Bukhayo/Bugengi/2504 for cancellation and issuance of a new title deed in the name of the Plaintiff in trust for her family.
5. In default of (4) above, the Land Registrar shall be at liberty to issue a new title to the Plaintiff notwithstanding the absence of the original title in the name of the Defendant which is hereby cancelled.
6. The Deputy Registrar shall, if need be, execute all necessary documents to facilitate that registration upon request.
7. The parties shall meet their own costs.

Right of Appeal.

**JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 23RD DAY OF NOVEMBER 2023
BY WAY OF ELECTRONIC MAIL.**

BOAZ N. OLAO

JUDGE

23RD NOVEMBER 2023

