



REPUBLIC OF KENYA



**Ndaburu v Ngondi (Sued as the legal representative of the Estate of  
Jermiam Ngondi Kiundu (Deceased)) (Environment & Land Case  
27 of 2021) [2023] KEELC 21580 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21580 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 27 OF 2021  
JM MUTUNGI, J  
NOVEMBER 16, 2023**

**BETWEEN**

**JOSPHAT NDEGE NDABURU ..... PLAINTIFF**

**AND**

**VIRGINIA MUTHONI NGONDI ..... DEFENDANT**

**SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JERMIAM  
NGONDI KIUNDU (DECEASED)**

**JUDGMENT**

1. The Plaintiff instituted the present suit vide a Plaint dated 23<sup>rd</sup> June, 2021 filed in Court on 21/7/2021. The Plaintiff and Jeremiah Ngondi Kiundu (deceased) were brothers and the Plaintiff's claim is that their father Kiundu Ndamburu (deceased) was the owner of land parcel Number Inoi/Kamondo/219 measuring 10 Acres. The Plaintiff's claim is that his elder brother Jeremiah Ngondi Kiundu (now deceased) was registered to hold the land in trust for the family. The Plaintiff further averred that his late brother, Jeremiah Ngondi sold a portion of six(6) acres of the land to third parties and that after subdivision the remaining Four(4) acres being land parcel No. Inoi/Kamondo/908 was registered under his name. The Plaintiff contends the deceased was registered to hold the land in trust and vide the plaint prays for the following orders:-
  - a. A declaration that land parcel No. Inoi/Kamondo/908 is held and registered in the name of Jeremiah Ngondi Kiundu (deceased) in trust for the Plaintiff.
  - b. An order for registration of the four acres on land parcel No. Inoi/Kamondo/908 in favour of the Plaintiff herein.
  - c. Costs of the suit.



- d. Any other relief which the Court may deem fit and just to grant.
2. The Defendant in a statement of defence dated 24<sup>th</sup> November, 2021 denied the averments and allegations by the Plaintiff and in particular denied that their father Kiundu Ndamburu was at any time registered as owner of land parcel LR Inoi/Kamondo/219. The Defendant stated that her late husband Jeremiah Ngondi Kiundu was the absolute owner of the land which he subdivided in 1977 without any objection from the Plaintiff. The Defendant further stated that her husband sold and transferred a portion of the land to a purchaser which left her deceased husband with land parcel Inoi/Kamondo/908 measuring 4 acres where her family and that of the Plaintiff now reside. She stated the Plaintiff occupies a portion of ½ acre which he utilizes with his family. She denied her husband held the land in trust for the Plaintiff.
  3. The suit was partly heard before by brother Cherono, J who heard and concluded the Plaintiff's case on 22/6/2022 when 2 witnesses testified. The parties agreed that the hearing of the suit proceeds from where Cherono, J had left. I accordingly heard the Defendant's case on 20/3/2023 when 2 witnesses testified in support of the defence case.
  4. The Plaintiff testified as PW1 and it was his evidence that he and Jeremiah Ngondi Kiundu were brothers and that Jeremiah Ngondi having been the eldest son of their father was registered to hold land parcel Inoi/Kamondo/219 which was clan land in trust for the family as their father was not there during land demarcation. He stated the land measured 10 acres and since they were only two brothers, each was entitled to 5 Acres of the said land. The Plaintiff testified that his deceased brother sold six (6) acres of the land to third parties leaving only Four (4) acres now comprised in land parcel number Inoi/Kamondo/908 registered in his deceased brother's name.
  5. The Plaintiff in his evidence explained that his late brother was registered as proprietor of the original parcel of land in 1960 during the adjudication process. He testified that the land was given by the clan to his father but was registered in the name of his brother to hold in trust. He stated he and his deceased brother were the only two siblings, their sister Wanjiru who was the third born having passed away. He explained at the time of adjudication he was very young and that even in 1980 when his brother sold part of the land he was still young. The Plaintiff testified that he had occupied and lived on the suit land all his entire life.
  6. The Plaintiff further testified that he had in 2006 filed a dispute before the Land Disputes Tribunal who after hearing the matter awarded him 2 acres out of the remaining 4 acres but the Tribunal's decision was on the application of his deceased brother quashed by the High Court on the basis that the Tribunal lacked the jurisdiction to deal with the matter as it involved title to land. The Plaintiff relied on all the documents that he had exhibited to support his case.
  7. PW2 Richard Kangi Gachoki in his evidence relied in his witness statement. He testified the Plaintiff and Jeremiah were brothers and their father was Kiundu and were the only two children. He stated he knew the family of Kiundu well as they were from the same "ugaciku" clan. It was his evidence that Jeremiah being the first born was registered to hold the 10 Acres parcels of land in trust for the family but he sold 6 acres leaving only a portion of 4 acres. He verified that both the family of Jeremiah and of the Plaintiff resided on the portion of 4 acres that remained.
  8. DW1 Virginia Muthoni Ngondi was sued on behalf of Jeremiah Ngondi Kiundu (deceased) who was her husband. Though she acknowledged her husband and the Plaintiff were brothers she denied he was registered to hold the suit land in trust. She admitted her husband sold a portion of 6 acres of the land and only 4 acres remained. She testified the Plaintiff had sued her husband at the Land Disputes Tribunal and the Tribunal had ordered the land to be shared equally with each getting 2 acres but



her husband challenged the Tribunal decision in the High Court where the Tribunal's decision was quashed. In Cross examination DW1 asserted that the Plaintiff and her late husband were born of the same mother but the father's were different.

9. DW2 Mwikamba Kibute testified that at the time Jeremiah was registered as owner he was only about 16 years. He stated the real father of the Plaintiff was one Ndamburu Muchiri but that the Plaintiff never got any land from him. He stated the land that was given to Jeremiah was clan land and that after he sold a portion he was left with a portion of 4 acres which is still registered under his name. The witness affirmed that the late Jeremiah gave the Plaintiff a small portion of land where he resides since the Plaintiff never got any land from his father, Ndambiri Muchiri. The witness further affirmed the Plaintiff had not been born at the time demarcation took place.
10. The parties following the closure of the trial filed the closing submissions. The Plaintiffs submissions were filed on 15/5/2023 while the Defendant filed her submissions on 6/7/2023. I have reviewed and considered the pleadings, the evidence and the submissions of the parties and the issues that arise for determination are as follows:-
  - i. Whether the late Jeremiah Ngondi Kiundu (deceased) was initially registered land No. Inoi/Kamondo/219 in trust for the family of Kiundu Ndamburu (deceased).
  - ii. Whether after the sale of six acres, Jeremiah Ngondi Kiundu (deceased) held the resultant land parcel No. Inoi/Kamondo/908 registered in his name in trust for the Plaintiff?
  - iii. Whether the Plaintiff is entitled to have land parcel Inoi/Kamondo/908 and/or a share thereof registered in his name upon discharge of the trust?
  - iv. What reliefs, if any, should the Court grant?
11. The Plaintiff's case before this Court is anchored under custom and it is his contention that his brother, Jeremiah Ngondi Kiundu (deceased) who was the first born in the family was given land by the clan to hold in trust on behalf of the family of Kiundu Ndamburu their father, who would have been registered but was not for reasons that were not made clear by the parties. It is however not disputed that Kiundu Ndambiri, was the father of Jeremiah Ngondi (deceased) and the Plaintiff though it was claimed that the Plaintiff was from a different father and that it was only their mother who was the same. The Defendant (DW1) admitted that her husband and the Plaintiff were brothers and that the suit land was clan land. DW2 in his evidence stated that at the time Jeremiah Ngondi Kiundu was registered as owner of the land, he was only about 16 years. He definitely must have been registered as owner because the father who would otherwise have been registered was not there. During land demarcation it was customary for the first born sons to be registered as owners on the understanding that they were to hold such land in trust for members of the family. At the time of land demarcation within the former Central Province (Kikuyu Land) women were not being registered as land owners and hence the registration of first born sons to hold land in trust; where the fathers were absent. In the premises and having regard to the facts of this case it is my determination that indeed Jeremiah Ngondi Kiundu (deceased) was registered as owner of land parcel Inoi/Kamondo/219 to hold in trust for the family of Kiundu Ndamburu and not as an absolute owner of the same.
12. The Defendant has submitted that the late Jeremiah Ngondi Kiundu was not registered to hold the land as a trustee stating that his registration was a first registration and that he was registered to hold the land as an absolute proprietor. The Defendant asserted that the Plaintiff led no evidence to prove that Jeremiah Ngondi was registered to hold the land as a trustee and contended that there was no evidence that the deceased held the land subject to Kikuyu Customary trust. In support of her submissions the Defendant relied on the Supreme Court Case of Isack M'inanga Kiebia –vs- Isaya Theuri M'lintari &



Another (2018) eKLR where the supreme Court extensively considered the application of customary law. In the case the Supreme Court set out the elements that a claimant claiming under customary trust ought to establish as follows:-

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 registered against the registered proprietor who is a member of the family, clan or group.
13. In the present case there is no dispute that the land registered in favour of Jeremiah Ngondi constituted clan land. The primary issue is whether the deceased was registered as proprietor of the land to hold as a trustee for himself and his siblings. Indeed, I find that the Supreme Court decision referred to above (supra) supports the case of the Plaintiff. The Plaintiff and the deceased (Jeremiah Ngondi) were brothers even though it is alleged they did not share the same father. Their mother was the same and from the evidence, they have lived together on the same land from their birth. There is no evidence that the Plaintiff at any time went to live with the person who is alleged to have been his father. No evidence of his whereabouts was given. The parties were in agreement the Plaintiff never got any land from his “other” alleged father.
14. Infact the Defendant affirmed in evidence that the Plaintiff has all the time resided on the suit land and that the deceased had given him a portion of the land where he resided. If the Plaintiff was not a member of the family of the deceased, the deceased would not have given him any land. The deceased did so only because he acknowledged the Plaintiff as a member of the family and clan. The deceased as observed earlier in this Judgment was registered only because the father who would have been registered was not there. The registration did not confer upon the deceased absolute ownership rights but constituted him a trustee on behalf of the family.
15. Though the deceased sold a portion of the original land, that could not relieve him of his obligation as a trustee. All it meant is that he continued holding the balance of the land as a trustee. The Plaintiff and the deceased having been the only surviving children of Kiundu Ndamburu (deceased) would have been entitled to share the land equally.
16. Though the Plaintiff claims entitlement of the whole remaining Four acres held by the deceased under land parcel Number Inoi/Kamondo/908 I do not consider he would be entitled to a claim of the whole parcel. The initial land parcel Inoi/Kamondo/219 was as per the abstract of title exhibited subdivided in 1977 when presumably the sale to third parties took place. There is no evidence that the plaintiff protested the subdivision and sale and he may therefore have approved the subdivision and sale. The Plaintiff as per the proceedings before the Land Disputes Tribunal (also exhibited) only complained that his late brother used the proceeds of the sale all alone but his plea before the Tribunal was that the remaining four acres comprised in land parcel Inoi/Kamondo/908 be shared equally between them with each getting two acres. He was then willing to accept an award of two acres and was not raising a claim for all the four acres. I do not consider that he would be entitled to claim the entire land parcel Inoi/Kamondo/908. After the sale of 6 acres by the deceased, apparently with the tacit approval of the Plaintiff, the deceased was only left holding four acres in trust.



17. After careful review and analysis of the evidence and applicable law, I am satisfied the Plaintiff has proved on a balance of probabilities that the deceased Jeremiah Ngondi Kiundu held land parcel Inoi/Kamondo/908 in trust for himself and the Plaintiff. I accordingly enter Judgment in favour of the Plaintiff and make the following final orders:-

1. A declaration be and is hereby issued that Jeremiah Ngondi Kiundu (deceased) held land parcel number Inoi/Kamondo/908 in trust for himself and the Plaintiff.
2. An order is hereby issued that the trust is hereby discharged and that land parcel Number Inoi/Kamondo/908 be shared equally between the Plaintiff and the estate of Jeremiah Ngondi Kiundu (deceased).
3. That the subdivision of land parcel Inoi/Kamondo/908 shall be undertaken having regard to the portions that the family of the Plaintiff and the deceased have each settled on and developed.
4. Each party will bear their own costs of the suit.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 16<sup>TH</sup> DAY OF NOVEMBER 2023.**

**J. M. MUTUNGI**

**JUDGE**

