



**Njogu v Baaru & another (Environment & Land Case 346 of 2014)
[2023] KEELC 22460 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22460 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 346 OF 2014
JO OLOLA, J
DECEMBER 20, 2023**

BETWEEN

GEOFFREY MWANGI NJOGU PLAINTIFF

AND

CHARITY KIRIGO BAARU & ANOTHER DEFENDANT

JUDGMENT

1. This suit was initially filed as Nyeri HCCC No. 152 of 2010 before being transferred to this court in the year 2014.
2. By an Originating Summons dated 4th November 2010, Geoffrey Mwangi Njogu (the Plaintiff) prays for orders:
 - 1). That it be declared that the Defendants (Charity Kirigo Baaru and Ann Wamuyu Baaru hold parcel of land LR No. Konyu/Baricho/3069 in trust for the benefit of the Plaintiff George Mwangi Njogu and other beneficiaries thereof;
 - 2). That the trust so declared be determined and the shares of each identified beneficiary be settled; and
 - 3). That the costs of this suit be provided for.
3. The Originating Summons is supported by an affidavit sworn by the Plaintiff wherein he avers that the said LR. No. Konyu/Baricho/3069 (the suit property) is registered in the joint names of the Defendants and a person he describes as a stranger. The Plaintiff asserts that the suit property is a resultant sub-division of LR No. Konyu/Baricho/180 which originally belonged to the Plaintiff's deceased grandfather Ngatia s/o Njogu.
4. It is the Plaintiff's case that the said LR. No. Konyu/Baricho/180 was initially registered in the names of Baaru Ngatia and Nelson Njogu Ngatia to hold in rust for the family of the original owner following



the decision in Karatina District Magistrates Succession Cause No. 46 of 1977. The parcel of land was thereafter sub-divided into the suit property and another parcel known as Konyu/Baricho/3070. The suit property was then registered in the name of Baaru s/o Ngatia (deceased) to hold in trust for the Plaintiff's family.

5. The Plaintiff avers that following the death of the said Baaru s/o Ngatia, the Defendants who are his widows proceeded to distribute the suit property to themselves and a stranger without taking into account the existing trust on the land.
6. The Defendants- Charity Kirigo Baaru and Ann Wamuyu Baaru are opposed to the grant of the orders sought in the Originating Summons. In a joint Replying Affidavit sworn and filled herein on 30th November 2010, they aver that the suit herein is misconceived and a gross abuse of the court process.
7. The Defendants aver that the Karatina Succession Cause No. 45 of 1977 never declared any trust and that no trust exists in regard to the suit property. It is the Defendants' case that they inherited the estate of their husband and that the same was not subject to any trust in favour of the Plaintiff.
8. The Defendants accuse the Plaintiff of failing to disclose that his father Njogu Ngatia who was the elder gave evidence in Karatina Succession Cause and that he never claimed the estate then in issue as he had already been given the parcel of land known as Magutu/Murigu/36 where he was buried upon his death.
9. The Defendants further assert that the Plaintiff's suit herein is belated and defeated by the Limitation of Actions Act as he has all along been aware of the Succession Cause that led to the registration of the proprietors of the suit property yet he took no action.

The Plaintiff's Case.

10. The Plaintiff called two (2) witnesses in support of his case at the trial which commenced before Justice A. Ambwayo in September 2013.
11. PW 1 – Geoffrey Mwangi Njogu is the Plaintiff. He told the court that the suit property is a sub-division of LR. No. Konyu/Baricho/180 which was originally registered in the name of his grandfather Ngatia Njogu. When his grandfather died in 1974, PW 1's father filed the Karatina Succession Cause No. 46 of 1977 after which the land was registered in the name of Baaru Ngatia and Nelson Njogu Ngatia representing the two houses which had sons.
12. PW 1 further told the court that in 2006 the original land was sub-divided into two equal portions being parcel Nos. 3069 and 3070. Baaru Ngatia was registered to hold the suit property for the benefit of the beneficiaries of the house where PW1's father was born. He later died. PW 1 testified that recently, they came to discover that the two widows of Baaru Ngatia filed succession proceedings for his estate and transferred the land without their knowledge. They have thereafter tried to evict the beneficiaries from the land.
13. PW 2 – Purity Wangui Njogu is the widow of Njogu Ngatia and the mother of the Plaintiff. she told the court her husband's father Ngatia s/o Njogu was the proprietor of the original parcel of land known as Konyu/Baricho/180. Upon the death of her father-in-law his estate was distributed vide Karatina District Magistrates Succession Cause No. 46 of 1977. The land was thereafter registered in the joint names of Baaru Ngatia (representing her husband's house) and Nelson Njogu who was to hold in trust for the other house.



14. PW 2 further told the court that after Baaru Ngatia's death, they discovered that his two widows had filed succession proceedings and transferred the suit property without their knowledge. The widows have since tried to evict PW 2 and her family from the land.

The Defence Case.

15. On their part the Defendants called a total of three (3) witnesses in support of their case.
16. DW 1 – Ann Wamuyu Baaru is the 2nd Defendant and one of the wives of Baaru Ngatia who was the registered proprietor of the suit property. DW 1 told the court that the 1st Defendant who passed away before testifying herein was her co-wife. She testified that when their husband died, they filed succession proceedings and took over the land.
17. DW 1 told the court that the suit property is not the subject of any trust and that the Plaintiff and his family have their parcel of land in Ruguru being LR. No. Magutu/Murigu/36. That was as per the declaration of their father in-law before he died.
18. DW 2 – Nancy Nyawira Karua is a daughter of the 1st Defendant and the one substituted as the 1st Defendant following the death of the original 1st Defendant. She told the court that the Plaintiff is a son to one of her uncles Njogu Ngatia and that their land as given by her grandfather is Magutu/Murigu/36 and not the suit property. She further told the court that Njogu Ngatia's first wife resides on the land that was given to the Plaintiff's father wherein the Plaintiff's father and mother are buried.
19. DW3 – Dickson Kamau Ngatia is the son of Ngatia Njogu and a step-brother of the Plaintiff's father. He told the court his father gave the Plaintiff's father the parcel of land known as Magutu/Murigu/36 but they got housed on the suit property at some point when the Plaintiff's father came back from Kieni. DW 3 told the court that when the Plaintiff's father died, he was buried on the said parcel No. Magutu/Murigu/36.

Analysis and Determination.

20. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties.
21. By the Originating Summons dated 4th November 2010, the Plaintiff urges the court to declare that the two Original Defendants herein – Charity Kirigo Baary and Ann Wamuyu Baaru hold the parcel of land known as Konyu/Baricho/3069 in trust for the benefit of himself and other beneficiaries. In addition, he urges the court to determine the trust so declared and to have the shares of each identified beneficiary settled.
22. Those prayers arise from the Plaintiff's contention that the suit property is their ancestral land the same being a sub-division of a parcel of land previously known as LR. No. Konyu/Baricho/180 which land was registered in the name of the Plaintiff's grandfather one Ngatia s/o Njogu. It is the Plaintiff's case that following the death of his said grandfather some time in 1974, the family instituted Karatina District Magistrates Court Succession Cause No. 46 of 1977 following which the said original parcel of land was registered in the names of Baaru Ngatia and Nelson Njogu Ngatia to hold in trust for the rest of the family.
23. The Plaintiff asserts that the said LR No. Konyu/Baricho/180 was subsequently sub-divided into two equal pieces with the resulting LR. No. Konyu/Baricho/3069 (the suit property) being registered in



- the name of Baaru Ngatia while the other being LR. No. Konyu/Baricho/3070 was registered in the name of Nelson Njogu Ngatia.
24. It is the Plaintiff's case that the registration of Baaru Ngatia as the proprietor of the suit property was in trust for himself as well as the Plaintiff's family. He accuses the original two Defendants herein being the widows of the said Baaru Ngatia of proceeding upon Baaru Ngatia's death to cause the suit property to be registered in their names and that of an unnamed stranger and thereafter seeking to evict the Plaintiff from the suit land in spite of the existing trust on the land.
 25. As fate would have it Baaru Ngatia's first wife – Charity Kirigo Baaru who was sued as the 1st Defendant herein passed away on 25th May 2019. She was substituted in these proceedings by her daughter Nancy Nyawira Karua (PW 2).
 26. The Defendants on their part reject the Plaintiff's claim of the existence of a trust over the suit property. It is their case that they did as widows of the late Baaru Ngatia inherit his estate and that the same was not the subject of any trust in favour of the Plaintiff. They accuse the Plaintiff of failing to disclose that his father Njogu Ngatia testified in the said Karatina District Magistrates Court Succession Cause No. 46 of 1977 and that he never made any claim over the suit property as the Plaintiff's grandfather had already given him a different parcel of land known as Magutu/Murigu/36.
 27. As it were, the legal burden of proving the existence of a customary trust rests with the one who is asserting a right under customary trust. As the Court of Appeal stated in *Muthuita – vs- Muthuita* [1982 – 88] IKLR 42, customary trust is proved by leading evidence. The existence of a 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 an intention to create one in the first place.
 28. Again as was stated in *Peter Ndungu Njenga -vs- Sophia Watiri Ndungu* [2000] eKLR:

“The concept of trust is not new. 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.”
 29. It follows that in dealing with a matter such as this, the court will be interested in evidence that points to the root of the title to the land. Pertinent questions that the court must contend with include how the land was first registered; whether it was clan or communal land before registration and whether the same was inherited or passed down from the family lineage.
 30. In the matter before me, it was not in dispute that the suit property comprised of what was initially registered in the name of the Plaintiff's grandfather one Ngatia S/o Njogu in 1959 during land consolidation and demarcation as LR. No. Konyu/Baricho/180. It was also not in dispute that the said Ngatia S/o Njogu's first born son was Njogu Ngatia who is the father to the Plaintiff herein.
 31. It was also apparent that the Plaintiff's said grandfather Ngatia S/o Njogu passed on sometimes in the year 1974. In support of his case, the Plaintiff has produced proceedings conducted following his death in Karatina District Magistrates Court Succession Cause No. 46 of 1977. In a ruling delivered in the said Cause on 3rd November 1977, the Honourable J.W. Wairoto, DM III ordered as follows:

“I have upheld Muirigi's recommendation and also recommendation by the Interested Parties and order that this land be registered in the names of Baru Ngatia and Nelson Njogu Ngatia jointly.



Then I have upheld that each of the family to retain the portion he or she is possessing at present. Lastly, words said by the deceased in connection with his property to be respected.

In this land Konyu/Baricho/180 certificate of succession to be issued to Baru S/o Ngatia and Nelson Njogu Ngatia joint(ly).”

33. From the material placed before me, the late Ngatia S/o of Njogu had three wives and it was apparent that the two sons in whose names the property was to be registered were chosen to represent the two houses that had sons being the 1st wife and the 3rd wife. The 2nd wife was said to have given birth to daughters who were by then married.
34. While it was true that the Plaintiff’s father hailed from the same house as that of Baaru Ngatia who was the husband to the original Defendant’s herein, it was apparent that despite being the first born in the house, he was by- passed and the land was instead registered in the name of his younger brother together with his step-brother Nelson Njogu.
35. In my considered view, the only reason the Plaintiff’s father was not considered for the joint registration was the reason given by the Defendants herein and their witnesses, that he had no claim over the land as he had already been given another parcel of land as his inheritance. That the Plaintiff’s father had no claim over the land is apparent from the proceedings in the Succession Cause No. 46 of 1977 aforesaid. He was the first witness in the proceedings which record him as stating as follows in Kikuyu language:

“ 1. Njogu S/o Ngatia Sworn States in Kikuyu.

I am the first born of the deceased Ngatia Njogu. He died in November 1974. He had 3 wives, (i). Nyachomba who had 3 sons. The names of the sons are myself, Njogu Ngatia, Baru Ngatia and Festus Githinji Ngatia. The second wife was known as Nyakiaguthu Ngatia who had no sons but still alive. Third wife was Wanjira w/o Ngatia who has six sons, Nelson Njogu, Wilson Maina Ngatia, Stephen Muhoro, Kamau Ngatia, James Baru and Patrick Wachira. The land is 9.2 acres. The land to be registered in the names Baru S/o Ngatia and Nelson Njogu. They should have one title.”

36. If the Plaintiff’s father had any claim over the suit property, there was no reason why he would not propose for his name to hold the land for his mother Nyachomba’s house. From the documents produced by the Defendants, it was evident that the Plaintiff’s father was on 11th February 1959 registered as the proprietor of the parcel of land known as Magutu/Murigu/36 and that he was issued with a title thereafter on 26th June 1972.
37. That then in my view is the parcel of land to which the Plaintiff has any entitlement. The Plaintiff has not denied that that is the same parcel of land in which his father and mother are buried.
38. It follows that I did not find any merit in the Originating Summons as filed by the Plaintiff. The same is dismissed with costs to the Defendant.

DATED, SIGNED AND DELIVERED AT NYERI THIS 20TH DAY OF DECEMBER, 2023.

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J. O. OLOLA
JUDGE

