



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC CASE NO. 29 OF 2012'A'**

**ELIZABETH NJOKI ..... 1<sup>ST</sup> PLAINTIFF**

**MARY NYAWIRA MURIUKI ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MUTHONI MURIUKI ..... 1<sup>ST</sup> DEFENDANT**

**REUBEN KAMAU MBUI ..... 2<sup>ND</sup> DEFENDANT**

**JAMES KAMAU MUNYUI ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

By their plaint filed herein on 23<sup>rd</sup> July 2012, the plaintiffs herein sought judgment against the defendants herein jointly and severally in the following terms:-

- a. *A declaration that the 1<sup>st</sup> defendant held L.R No. KABARE/GACHIGI/1013 in trust for the plaintiffs and that the registration of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as joint proprietors was fraudulent and the Land Registrar Kirinyaga be ordered to cancel the entry in the register and insert the names of the plaintiffs therein*
- b. *A permanent injunction restraining the 2<sup>nd</sup> and 3<sup>rd</sup> defendants by themselves, their agents and/or in any way interfering with L.R No. KABARE/GACHIGI/1013*
- c. *Costs be borne by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.*

The 1<sup>st</sup> defendant is mother to the plaintiffs while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are nephew to the plaintiff and it is the plaintiffs case that parcel of land No. KABARE/GACHIGI/35 was registered in their late father's names (one MURIUKI MUNYUI) and upon his demise, the plaintiffs and 1<sup>st</sup> defendant took out Succession Cause No. 41 of 1991 at the Kerugoya Senior Principal Magistrate's Court with regard to his Estate and it was agreed that land parcel No. KABARE/GACHIGI/35 would be registered in the names of the 1<sup>st</sup> defendant. However, the 1<sup>st</sup> defendant sub-divided the said land among her children as follows:-

- a. **DAVID MUNYUI MUCHAI - 2 ½ Acres**
- b. **JOHNSON MBUI MUCHAI - 2 ½ Acres**

The 1<sup>st</sup> defendant then retained 2 ½ acres being land parcel No. KABARE/GACHIGI/1013 (hereinafter the suit land) which was held by her in trust for the plaintiffs but they recently discovered that through

coercion and/or mis-representation, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had also been registered as joint proprietors of the suit land. It is the plaintiff's case that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants took advantage of the 1<sup>st</sup> defendant's old age and had themselves registered as joint proprietors through fraudulent means.

The 1<sup>st</sup> defendant passed away on 27<sup>th</sup> July 2012 a few days after this suit was filed according to the death certificate produced in the course of this trial (see defence Exhibit 10). The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a defence in which they stated that the 1<sup>st</sup> defendant gave them the suit land as a gift and even before then, they had been working on it since 2006 and that all statutory formalities were adhered to before the said transfer.

MARY NYAWIRA MURIUKI (PW1) the 2<sup>nd</sup> plaintiff herein testified on behalf of the plaintiffs and her testimony was supported by the 1<sup>st</sup> plaintiff ELIZABETH NJOKI (PW2) and their brother JOHNSON MBUI MURIUKI (PW3). The totality of their evidence was that the parcel of land No. KABARE/GACHIGI/35 belonged to their late father MURIUKI MUNYUI and following his death, Succession proceedings were commenced in KERUGOYA SUCCESSION CAUSE NO. 41 of 1991 and the land was transmitted to the 1<sup>st</sup> defendant their mother who then gave 2 ½ acres each to the plaintiffs brothers DAVID MUCHAI (DW2) and JOHNSON MURIUKI (PW3). Their mother (1<sup>st</sup> defendant) retained the other 2 ½ acres which was registered as KABARE/GACHIGI/1013 (the suit land) and which all of them worked on and was therefore held in trust for the plaintiffs by the 1<sup>st</sup> defendant. However, the plaintiffs discovered that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who are sons to their brothers DAVID MUCHAI and JOHNSON MURIUKI had taken advantage of the 1<sup>st</sup> defendant's old age (she was then 94 years old) and registered themselves fraudulently as joint proprietors of the suit land.

The defendants case as can be gleaned from the testimony of JAMES KAMAU MUNYUI (3<sup>rd</sup> defendant) and DAVID MUNYUI MUCHAI (DW2) is that after parcel of land No. KABARE/GACHIGI/35 had been divided into KABARE/GACHIGI/934, KABARE/GACHIGI/935 and KABARE/GACHIGI/936, parcel No. 935 and 936 were given to the plaintiff's brother's DAVID MUNYUI MUCHAI (DW2) and JOHNSON MURIUKI (PW3) while the 1<sup>st</sup> defendant retained No. 934 which she sub-divided into KABARE/GACHIGI/1013 and KABARE/GACHIGI/1014. 1<sup>st</sup> defendant retained parcel No. 1013 and sold 1014 to GITHUMARA TEA BUYING CENTER and all this time, the plaintiffs did not raise any objection. The suit land was then registered in the names of all the three defendants and after the death of the 1<sup>st</sup> defendant, a new title was issued in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. It is the defendants' case that the plaintiffs live in their matrimonial home and that the suit land was legally transferred into the 2<sup>nd</sup> and 3<sup>rd</sup> defendants names and at no time was the 1<sup>st</sup> defendant holding it in trust for the plaintiffs.

The plaintiffs were originally represented by Mr. Ngangah advocate but later filed a Notice to act in person and after the end of the trial, both Mr. Ngigi for the defendants and the plaintiffs made submissions.

I have considered the parties respective cases and the oral submissions by Mr. Ngigi Advocate for the defendants and those written by the plaintiffs.

This is one of those unfortunate cases pitting family against each other. On one side are the two plaintiffs (sisters) supported by their brother JOHNSON MURIUKI (PW3), while on the other side are their nephews (2<sup>nd</sup> and 3<sup>rd</sup> defendants) supported by the plaintiffs' other brother DAVID MUNYU MUCHAI (DW2). The following facts are not in dispute:-

- 1. The plaintiffs and their two brothers are the children of MURIUKI MUNYUI and MUTHONI MURIUKI both deceased. MUTHONI MURIUKI had originally be sued as 1<sup>st</sup> defendant herein before her demise.**
- 2. During his life time, MURIUKI MUNYUI was owner of land parcel No. KABARE/GACHIGI/35 which passed onto his wife MUTHONI MURIUKI**

3. **MUTHONI MURIUKI then had that parcel of land sub-divided and distributed as follows:-**

- a. **KABARE/GACHIGI/934 - to herself**
- b. **KABARE/GACHIGI/935 - to her son JONHSON**

**MURIUKI (PW3)**

- c. **KABARE/GACHIGI/936 - to her other son DAVID**

**MUNYUI MUCHAI (DW2)**

4. **MUTHONI MURIUKI later sub-divided parcel No. KABARE/GACHIGI/934 into two portions:-**

1. **KABARE/GACHIGI/1013 (the suit land) which she retained and**
2. **KABARE/GACHIGI/1014 which she sold to a tea buying Company.**

It is the plaintiffs case that the 1<sup>st</sup> defendant held the suit land which she later transferred into the name of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in trust for them. Mr. Ngigi for the defendants has rightly submitted that the law never presumes a trust and that evidence has to be led to that effect. Counsel then goes on to add that there was no evidence upon which a trust can be found in favour of the plaintiffs in relation to the suit land. This Court finds that infact there is evidence upon which this Court can make a finding that the suit land was held in trust for the plaintiffs. Indeed this Court is satisfied that the original KABARE/GACHIGI/35 from which the suit land was curved was held in trust by the 1<sup>st</sup> defendant for her children. That explains why she sub-divided it and gave an equal share to her sons DAVID and JOHNSON and retained another 2 ½ acres for herself. It must be remembered that the original land parcel KABARE/GACHIGI/35 belonged to the plaintiffs father and upon his demise, the family agreed that it be transmitted to the 1<sup>st</sup> defendant. When the 1<sup>st</sup> defendant sub-divided the land and retained KABARE/GACHIGI/934 and gave the other two parcels to her sons DAVID and JOHNSON, she could only have been holding that parcel in trust for the plaintiffs who were the only remaining children to whom no land was given. That evidence is found in the testimony of the 2<sup>nd</sup> plaintiff MARY NYAWIRA (PW1) who stated as follows:-

***“I, the 1<sup>st</sup> plaintiff and my mother were utilizing that portion and it was my mother’s wish that the three of us would develop that land. Later, we discovered that my brothers’ sons who are the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein had jointly registered themselves as joint proprietors of that land. My mother was then 94 years old and at no time did she tell me and the 1<sup>st</sup> plaintiff that she had registered the land in the joint names of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. She was then too old and not in control of her faculties”***

This was supported by the testimony of her brother JOHNSON MURIUKI (PW3) when he said:-

***“My mother’s portion No. 934 was to be owned jointly by my mother and the two plaintiffs. They all jointly used the land”***

In cross-examination by Mr. Ngigi counsel for the defendants, this same witness said:-

***“The registration of plot No. 1013 in the joint names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants was done behind our backs. It is not true that the plot No. 1013 was the sole property of the 1<sup>st</sup> defendant”.***

In opposition to that testimony, DAVID MUNYUI MUCHAI stated as follows in his evidence in chief:-

***“The plaintiffs cannot claim ownership of the land in dispute as there was no agreement. If the 1<sup>st</sup> defendant was holding the land in trust, the plaintiffs would have said so at the time that the same was being transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants”***

This witness was perhaps alluding to the fact that since the suit land was in the sole names of the 1<sup>st</sup> defendant before later being registered in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and since there was nothing in the certificate of ownership to indicate that it was held in trust, the plaintiffs cannot therefore claim that the suit land was held in trust for them. The same sentiments were raised by Mr. Ngigi the defendants counsel when he stated that since the three defendants were jointly registered as owners of the suit land it could only pass to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants upon the demise of the 1<sup>st</sup> defendant. However, it is the plaintiffs’ evidence that they were kept in the dark when this transfer was being done. And with regard to the submission and testimony that there was nothing to suggest that the suit land was held by the 1<sup>st</sup> defendant in trust for the plaintiffs since the certificate of title does not say so, the Court of Appeal in MUTHUITA VS WANOE COURT OF APPEAL CIVIL APPEAL NO. 12 OF 1982 held that a registered proprietor is not relieved from his obligation to which he is subject as a trustee and the absence of any reference to a trust in an instrument of acquisition of land does not affect the enforceability of a trust existing upon the land. The Court went on to state that the provision in Section 126 of the Registered Land Act (now repealed and under which the suit land was registered) which refers to the reference “----- shall be registered with the addition of the words “as trustee ----- “ are only permissive and not mandatory. See also the case of G. KINGURU VS M. GATHANGI 1976 K.L.R 253 among others. Therefore, the fact that the document of title deed not reflect that the 1<sup>st</sup> defendant was registered as an owner of the suit land as trustee cannot defeat the plaintiffs claim in trust. It is also clear that the plaintiffs are the daughters of the 1<sup>st</sup> defendant and therefore a fiduciary relationship exists between them which further supports their claim in trust.

It is also the defendants’ case that the plaintiffs did not raise any objection when the 1<sup>st</sup> defendant sold the other portion of land KABARE/GICHIGI/1014 to the Githumara Tea Buying Center and therefore they should now not complain about the transfer of the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiffs’ answer to that is found in the testimony of MARY NYAWIRA MURIUKI (PW1) when she said as follows in cross-examination by Mr. Ngigi:-

***“Our mother did not inform us that she was sub-dividing the land No. 934. That land was hers together with me and my sister the 1<sup>st</sup> plaintiff. We allowed her to sell 1014 to the Tea Center because she was old and she was selling her portion 1014 and leaving 1013 for us. When she registered 1013 in her names and the defendants’ she did not inform us”***

As stated earlier, the fact that the 1<sup>st</sup> defendant had no objection in transferring two portions of the original parcel of land No. KABARE/GACHIGI/35 to her two sons DAVID and JASON is clear evidence to support the plaintiffs’ case that she held that land and the subsequent portions resulting therefrom in trust for herself and her children including the plaintiffs. However, she appears to have procrastinated or un-willing to give a portion to the plaintiffs perhaps because they are women. That was discriminatory. Kenya subscribed to and has ratified various International conventions and treaties which clearly states that women shall not be discriminated upon. These conventions and treaties are part of our laws. Article 2(6) of our Constitution says so and similarly, Article 27 of the Constitution provides that everyone is equal before the law. Article 1 of the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) has defined discrimination against women as follows:-

***“Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status on a basis of equality of man and woman, of human rights and fundamental freedoms in the political, economic, social cultural, civil or any other field”***

Kenya has also ratified without reservations the *African Charter of Human and People Rights* which enjoins member states to, inter alia, ensure the elimination of every discrimination against women and ensure the protection of the rights of the woman and child as stipulated in *International Conventions and Declarations*. Therefore, to deny the plaintiffs a share of the suit land on the basis that they are married women would be discriminatory and not permitted under the law. Indeed this is what the 3<sup>rd</sup> defendant seems to suggest in his evidence when he said that the plaintiffs live in their matrimonial homes. The fact that the 1<sup>st</sup> defendant would even go further and give the suit land to his grandsons (2<sup>nd</sup> and 3<sup>rd</sup> defendants herein) and leave out her daughters (plaintiffs) smacks of outright discrimination against the plaintiffs simply because they are married women. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants ought to get their share of the land from their fathers. I did not hear any of the parties testify that their customary law does not allow married women or any woman for that matter to be treated in the same manner as their brothers when it comes to division of family property including land. If there is any such law, then it is inconsistent with the Constitution and therefore void to that extent. The plaintiffs were plainly entitled to their rightful portions of the parcel of land No. KABARE/GACHIGI/35 and ultimately to the suit land. What the 2<sup>nd</sup> and 3<sup>rd</sup> defendants did amounts to un-justly enriching themselves at the expense of the plaintiffs. Equity abhors unjust enrichment.

Upon considering all the evidence herein, I am satisfied that the plaintiffs have proved that the suit land was held by the 1<sup>st</sup> defendant in trust for them. I accordingly enter judgment for the plaintiffs as prayed in their plaint herein and direct that the registration of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as joint proprietors of land parcel No. KABARE/GACHIGI/1013 was fraudulent and the Land Registrar Kirinyaga is ordered to cancel the entry in the register and insert the names of the plaintiffs herein. A permanent injunction is also issued restraining the 2<sup>nd</sup> and 3<sup>rd</sup> defendants by themselves, their agents and/or servants against interfering, entering and/or in any way interfering with L.R No. KABARE/GACHIGI/1013.

As the parties are relatives, each shall meet their own costs.

It is so ordered.

**B.N. OLAO**

**JUDGE**

**24<sup>TH</sup> APRIL, 2015**

24/4/2015

Before

B.N. Olao – Judge

Gichia – CC

Plaintiffs – absent

Mr. Ngigi for Defendants – present

COURT: Judgment delivered this 24<sup>th</sup> day of April 2015

Plaintiffs in person absent

Mr. Ngigi for Defendants present

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**24<sup>TH</sup> APRIL, 2015**