



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**ELC NO.67 OF 2015 (O.S)**  
**(Consolidated with Nyeri HCCC No.23 Of 2012**  
**IN THE MATTER OF L.R NOS. AGUTHI/GATITU/2438, 2442, 2443 AND 2444**

**AND**

**IN THE MATTER OF DECLARATION OF TRUST**

**BETWEEN**

**MUMIN MAHMOUD MWANZI**

**HASHIM MAHMOUD MWANZI.....APPLICANTS**

**VERSUS**

**BURHAN ALI MANSUR.....RESPONDENT**

**JUDGMENT**

1. **Mumin Mahmoud Mwanzi** and **Hashim Mahmoud Mwanzi** (hereinafter referred to as the applicants) took up the summons dated **31st January, 2012** for determination of the following questions:-

i) **Whether a declaration should issue to the effect that the respondent holds L.R Nos. Aguthi/Gatitu/2438 in trust and for the benefit of the family of Mahmouled Sheikh Mwanzi (deceased) and L.R Nos. Aguthi/Gatitu/2442, 2443 and 2444 in trust and for the benefit of family of Asha Binti Mwanzi (deceased).**

ii) **Whether the trust referred to in (1) above, if found to exist, should be determined by cancellation of the respondent as the proprietor of the suit properties and in place thereof the same be registered in the names of the beneficiaries identified in respect thereof in paragraph 19 of the affidavit sworn in support of the application?**

iii) **Who should bear the costs of the application?**

2. The application is supported by the affidavit of the applicants where the applicants have deposed that the properties mentioned in prayer (1) above (hereinafter referred to as the suit properties) are registered in the name of the Burhan Ali Mansur (the respondent); that the suit properties were bought by their grandfather **Sheikh Mwanzi** in 1959 and registered in the name of the respondent's mother, **Fatuma Binti Mwanzi**, to hold in trust for the other children of their grandfather, namely Mahmoud Sheikh Mwanzi and Asha Binti Mwanzi. The applicants contend that the three beneficiaries of the suit property

namely, Mahmoud Sheikh Mwanzi, Asha Binti Mwanzi and Fatuma Binti Mwanzi, were put in possession of their respective shares by their grandfather, in accordance to Islamic rules. In this regard they argue that the two female beneficiaries got a third share of the suit properties and their father two thirds.

3. It is the applicants' case that the original parcel of land (L.R Aguthi/Gatitu/38) was subdivided sometime in 1990. They contend that their father (deceased) was allocated L.R No.Aguthi/Gatitu/2438 comprising the two thirds share. The remaining share is said to have been divided into six equal portions LR. NO. Aguthi/Gatitu/2439-2444; that out of the Six portions the respondent's mother (Fatuma Binti Mwanzi) was to get Aguthi/Gatitu 2439-2441 and that the other three parcels were meant for Asha Binti Mwanza (and/or her beneficiaries).

4. The respondent's mother is said to have sold her share of the suit properties but remained registered as trustee for the other two beneficiaries; that the applicants' father died in 2001 and was buried on his share of the original parcel of land. The respondent's mother is said to have died in 1959 and buried in Mombasa.

5. It is the applicants case that they have been in exclusive possession and use of the suit properties. They contend that the respondent, who has never resided on the suit properties since 1959, through deceit, misrepresentation, fraud and with intention to defraud the other beneficiaries of their share, got himself registered as the proprietor of the suit properties in 2010.

6. They point out that the suit properties were subject of proceedings in the defunct Land Disputes Tribunal where a decision was made in favour of their predecessors in interest. The respondent is said to have challenged the order of the Tribunal in vain. It is also stated that the respondent has resisted any attempts to determine the trust concerning the suit properties.

7. Reiterating that the respondent holds the suit properties in trust for them and other beneficiaries thereof, the applicants urge the court to determine the trust by cancelling the respondent's registration and in place thereof registering the same as follows:-

i) In respect of L.R No. Aguthi/Gatitu/2438 the same be registered in the names of the following children of Mahmoud Sheikh Mwanzi-Hashim Mohamoud; Asha Mohamoud; Amina Mohamoud; Hussein Mohamoud; Mumin Mohamoud; Asiya Mohamoud; Fatuma mohamoud; Fatuma Mohamoud; Musa Mohamoud and Adnan Mohamoud;

ii) In respect of L.R Nos. Aguthi/Gatitu/2442, 2443 and 2444 the land parcels be registered for the benefit of the children of Asha Binti Mwanzi (deceased)-Saida Waithera Salim; Fatuma Asha and Miski Asha.

8. In support of the application the applicants have annexed the following documents:

1. Certificates of official search-Pexbt 1(a -d);
2. Additional certificates of official search- Pexbt 2 (a-b);
3. Gazette notices-Pexbt 3(a-b);
4. Proceedings in the Land Disputes Tribunal-Pexbt 4 (a-b);
5. Proceedings in Misc. Application No. 6 of 2007-Pexbt 5 (a-b);
6. Death Certificate in respect of Zainabu Mwihaki Mahamoud;
7. Letter to the Land Registrar dated 31st March, 1995-Pexbt 7;
8. Letter to the Deputy Registrar from the Chief Mukaro Location dated 21st December, 2011.

9. In reply and opposition to the application, the respondent swore and filed the replying affidavit sworn on **27th February, 2012** where he has denied the contention that he holds the suit properties in trust for the applicants. He denies the allegation that the original suit property was bought by his grandfather and instead avers that it was bought by his mother. He argues that the registration of the suit properties in favour of his mother was first registration and as such indefeasible. He denies the allegations that the

applicants have been living on the suit properties from 1953 and instead explains that the applicants moved into the suit properties in 1993 following the death of his mother.

10. Concerning the allegation that he obtained the suit properties by deceit, misrepresentation or fraud, he explains that he obtained letters of administration in respect of the suit properties vide Nairobi High Court succession Cause No.21 of 1994, which proceedings the applicants' father challenged but failed to succeed to impugn.

11. Concerning the award by the Tribunal, he contends that it is incapable of vitiating the validity of his title to the suit properties. Terming the application lacking in merits, the respondent urges this court to dismiss the application with costs to him.

12. After the applicants filed the application herein, the respondent and another, **Anthony Maina Ng'ang'a**, filed a suit to wit, Nyeri HCCC NO.23 of 2012 seeking an order of eviction against the applicants, their agents and/or servants from the suit properties herein.

13. In the suit filed by the respondent, the respondent explains that he succeeded his deceased mother, who was the registered owner of the suit properties vide Nairobi High Court Succession cause No. 21 of 1994; that the applicants, who are his relatives, trespassed into the suit properties following the death of his mother in 1993 and that all attempts to remove the applicants from the suit properties have being in vain. As a result of the applicants' alleged unlawful conduct, the respondent claims to have suffered and continues to suffer prejudice because he cannot freely deal with the suit properties, in particular he cannot transfer the suit properties or any of them to the 2nd plaintiff (Anthony Maina Ng'ang'a).

14. In the statement of defence filed by the applicants, the applicants denied being trespassers and instead averred that the respondent's mother (original proprietor of the suit properties) held the suit properties in trust for them; that the respondent's mother is the one who put them in possession of the suit properties. The applicants have also reiterated their contention that the respondent got registered as the proprietor of the suit properties fraudulently by registering the suit properties in his name using improper transfer documents; transmitting the suit properties to himself when they were not subject of transmission and unlawfully registering the properties in his name.

15. The applicants also raised a counter-claim against the respondent's claim. In that counter-claim, the applicants have reiterated that they have rights over the suit properties as persons in possession and actual occupation of the suit properties and/or as beneficiaries of the customary trust in respect thereof. They reiterate that the registration of the respondent was fraudulent. For those reasons they seek the following reliefs:-

**i) A declaration that they have joint rights over the suit properties as persons in actual occupation thereof;**

**ii) In alternative to (a) above a declaration that the respondent is registered as the proprietor of the suit properties in trust for them and determination of the said trust;**

**iii) An order for rectification of the register in respect of the suit properties by cancellation of the respondents name therefrom;**

**iv. Costs of the suit and the counter-claim.**

16. The two suits herein were consolidated on **18th September, 2013.**

17. When the matter came up for hearing, the applicants reiterated the averments contained in their supporting affidavit herein. Besides reiterating the averments herein, the applicants produced letters allegedly exchanged between the respondent's mother and their father concerning the respondent's mother's share of the suit properties and denied having entered the suit properties after the demise of the respondent's mother as contended by the respondent.

18. The applicants also called **Ibrahim Murira Ndirangu (P.W.3)**, who informed the court that the suit properties were bought by the applicants' grandfather from his father; and that the developments on the suit property were erected by the applicants' father.

19. On his part, the respondent maintained that the suit properties were bought by his mother. Although he had no document or witness to attest to his contention, he argued that had the property been bought by his grandfather, it would have been registered in the name of the applicant's father as opposed to his mother, as under Islamic Customary Law, male children are given preference when it comes to registration of property of a muslim.

20. Concerning the letters allegedly written by his mother concerning the suit properties, he wondered how his mother could have written and executed those letters yet she was illiterate.

21. Concerning the applicants' contention that the subdivision conducted in 1990 was supposed to help the beneficiaries get their respective shares of the original parcel, he explained that the subdivision was effected because his mother wanted to sell certain portions therefrom to bail out the applicants' father from civil jail.

22. The foregoing notwithstanding, he admitted that he has never lived on the suit properties and that the developments (buildings) thereon were erected by the applicants' father. He also admitted that some of the applicants and their siblings live on the suit property.

23. With regard to the award of the Land Disputes Tribunal that ordered him to return the titles of the suit properties to the applicants' predecessors in interest, he stated that he did not comply with those orders because by the time the dispute was taken to the Land Disputes Tribunal, he had already been issued with letters of administration in respect of the estate of his deceased mother. He, nevertheless admitted that the grant issued to him was in respect of the original parcel of land and one portion of the subdivisions thereof, that 2444. He contended that the grant issued to him has never been challenged.

### **Submissions**

24. After the parties closed their respective cases, advocates for the respective parties filed submissions which I have read and considered.

### **Applicants' submissions**

25. On behalf of the applicants, it is submitted that the evidence adduced by the applicants and P.W.3 suffices to establish the pleaded trust and that the pleaded trust can also be inferred from the conduct of the predecessors in title or entitlement to the suit properties. In this regard it is submitted that the respondent's mother sub-divided the original parcel of land in accordance with Islamic Customary Law. It is further submitted that under that law, the property was to be shared in such a way that the applicants' father being a male child, would be entitled to two thirds of the property and the daughters a third share.

26. In sub-dividing the original property, the respondent's mother is said to have observed that rule. The conduct of the respondent's mother is also said to be indicative of existence of the said trust. It is pointed out that the respondent's mother only sold what she was entitled to under the said system of sharing the property and that after she obtained and sold her share, she never interfered with the activities of the applicants' or their predecessors in entitlement.

27. The pleaded trust is also said to have been recognised in other proceedings concerning the suit properties, for instance, the proceedings lodged at the defunct Land Disputes Tribunal where the respondent was ordered to hand over the titles of the suit properties to the applicants' predecessors in entitlement.

28. The respondent is accused of having obtained new titles to the suit properties by fraud or misrepresenting to the authorities that the old titles were lost yet he knew that they were in the possession

of the applicants' father. In obtaining the new titles, the respondent is said to have failed to give regard to the trust that existed in respect of the suit properties.

29. It is also pointed out that the applicants' and their families have been in possession of the suit properties for a long time and argued that under **Section 28** of the Registered Land Act, Cap 300 Laws of Kenya, the title of the respondent is subject to the applicants' unregistered interest therein. It is further submitted that under **Section 30** of Cap 300, the applicants' occupation of the suit properties constitutes an overriding interest to the respondent's title to the suit property.

30. The applicants' pleaded trust is also said to be legally recognised under **Sections 25(2)** and **28** of the Land Registration Act, 2012.

31. Concerning the respondent's contention that his entitlement is incapable of being challenged because he became entitled to the suit properties pursuant to orders made in Succession proceedings, it is submitted that the administration of the estate of the respondent's mother did not invalidate or nullify the trust attached to the estate; that the succession court was not seized of the issue of trust and that the applicants were not parties to the succession proceedings.

32. With regard to the respondent's prayer for eviction of the applicants, it is submitted that the applicants' occupation of the suit properties is protected by the provisions of the law cited herein above.

33. The respondent's claim is also said to be statute barred and in breach of his fiduciary duty as a trustee of the suit properties.

#### **Submissions for the respondent**

34. In the submissions filed for the respondent, two issues are framed for the court's determination. These are:-

- a. Whether the applicants have proved that they are beneficiaries of a trust created in their favour over the suit properties;
- b. Whether the applicants are trespassers on the suit properties who ought to be evicted;

35. With regard to the first issue, it is submitted that the applicants failed to prove the pleaded trust. In this regard, it is submitted that the applicants failed to explain why the suit properties were not registered in the name of their father who being a male child of a muslim father, would ordinarily have been registered instead of the respondent's mother and that no credible evidence was availed to prove that the property was bought by the applicants' grandfather. It is reiterated that the registration of the respondent's mother was indefeasible. The authorities cited in support of the applicants' case are said to be irrelevant.

36. On whether the applicants have become entitled to the suit properties by adverse possession, reference is made to the case of **Wasui v. Musumba (2002) KLR** and submitted that the claim for adverse possession cannot be established against the title held by the respondent because it was only obtained in 2010 and the cases herein brought barely two years thereafter. In the case **Wasui v. Musumba (supra)** it was held:-

**“...An order for the relief by way of adverse possession can only be made against a respondent if the said respondent is the currently registered proprietor of the land which the applicant seeks to have registered in his name.”**

37. It is maintained that the applicants' have failed to prove entitlement to the suit properties, either under the pleaded trust or claim for adverse possession. For that reason, the applicants are said to be trespassers who ought to be evicted from the suit properties. The court is urged to so find and dismiss the applicants' application with costs to the respondent.

#### **Analysis and determination:**

38. It is not in dispute and/or controverted that the applicants have been in possession and occupation of the suit properties for a long period of time. Although the respondent claims that the applicants' or their parents moved into the suit properties following the death of his mother in 1993, the evidence on record show that the applicants' and/or their parents took possession and/or occupation of the suit properties long before the demise of the respondent's mother. In this regard see the testimony adduced before the the Land Disputes Tribunal, in particular the testimony of the 1st and the 2nd witness, who testified that the applicants' father began developing the suit properties immediately after the original parcel of land was bought by the applicants' grandfather from Ndirangu Wang'ombe.

39. It is noteworthy, that in those proceedings, the respondent claimed that it is his mother who had bought the original parcel of land from the said Ndirangu Wangomb'e in 1959. He also claimed that it was his mother who developed the land by building semi permanent houses and planting coffee. In the proceedings conducted before this court, the respondent abandoned that assertion and admitted that the developments erected on the suit properties were erected by the applicants' father. Although he maintained that the suit properties were bought by his mother he was unable to state from whom.

40. Upon reading and reviewing the totality of the evidence adduced in this suit and the conduct of the parties and/or their predecessors in title or entitlement, I am persuaded that the suit properties, though originally registered in the name of the respondent's mother and now in the name of the respondent are subject to a customary trust in favour of the applicants and the other persons named in paragraph 19 of the applicants' supporting affidavit.

41. That fact can be deciphered from the letters exchanged between the respondent's mother and the applicants' mother dated **13th April, 1990**. In that letter the respondent's mother had addressed the applicants' mother as follows:-

**“...Vile Ninavotaka mimi utafute mtu hapo mahali pakatwe pazwe 200,000/=. Hizo za tosha za mimi za kutafuta nyumba huku. Nikipata sehemu yambu mimi itakuwa Ishaondoka. Title deed twende nayo Tukawaandikishe watoto wote kule inakohusika. Sasa Ikiwa na baba yao atataka jina lake liandikwe haya. Ikiwa ni majina ya watoto tu haya. Maanane bado Mwenyewe yuko hai.**

**Lakini Kusema Kufanya mpango wa kwenda kukopa bank halafu mtu aje ashindwe kulipa mutakwenda wapi? Kwa hivyo mpango huo sikuupendelea. Maanake musije mukakosa pahali pa kwenda.”**

42. Although the contents of this letter are challenged by the respondent on the ground that his mother was illiterate, having read the contents of the letter alongside the other testimonies adduced in this suit, I find the contents of that letter very relevant to what was happening at the time. For instance, the letter dated **13 April, 1990** (Pexbt 9(a)), sheds light on an issue raised in the testimony of the respondent both before this court and in the Land Disputes Tribunal to wit, the reason for sub-division of the original suit property.

43. Whereas the respondent claims that the sale of the portion allegedly reserved for his mother was to bail the applicants' father from Civil jail, that letter indicates that the respondent's mother wanted to sell her share of the suit properties to go and buy alternative land in Mombasa. The contents of that letter also reveal that the respondent's mother was against a proposal of using the property as security for purpose of obtaining a loan to repay the debt that the applicant's father owed. She feared that such an action had the potential of exposing the applicants to landlessness. More importantly, in that letter, the respondent's mother expressed a willingness to hand over the title deed she had for the purpose of the property being registered in the names of the beneficiaries thereof or the applicants' father.

44. It noteworthy that in that letter, the respondent's mother expressly stated that once she got a buyer for her share, she would leave. There is evidence that her wish was fulfilled and she left for Mombasa without returning or coming back to lay any claim to what remained from the suit properties.

45. It is, therefore clear from the foregoing, that the respondent's mother held the suit properties for herself and her siblings. After she obtained her share of the suit properties, she left for Mombasa without coming back. Consequently, her registration as owner of the suit properties and that of the respondent after administration of the estate, is subject to the overriding interest contemplated in **Section 28** as read with **Section 30(g)** of the Registered Land Act. The said Sections provide as follows:-

**“28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –**

**(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register: Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.....**

**30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –**

**(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed”** (Emphasis supplied)

46. Despite the Registered Land Act having been repealed by the Land Registration Act, the title obtained by the respondent is, by dint of the provisions of **Section 107(1)** of the Land Registration Act, affected by the said **Section 28** and **30** of the Registered Land Act, the same having being acquired when the said Act was in force. The said **Section 107** provides as follows:-

**“107. (1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”**

47. Even if am wrong on the finding that the registration of the respondent and his predecessor in title was subject to a trust in favour of the applicants, in view of the decision of the Land Disputes Tribunal to the effect that the applicants' have legally recognisable rights in the suit properties and **Sections 28** and **30** cited above, which recognise the rights of persons in possession, I find and hold that the applicants' occupation is legally protected by the aforementioned provisions of the law. I am guided in my finding above by the decision in the case of **Mbui v. Mbui** (2005)1 E.A 264 where the Court of Appeal stated:-

**“...Gerald in this case, was in occupation of the land with the consent and knowledge of Mbui since his birth in 1956. He has constructed a five-roomed permanent house and has planted coffee in the suit land....We think the superior court was right in distinguishing the authorities cited in that score. But more significantly, we think a trust arose from the possession and occupation of the land by Gerald which has the protection of sections 28 and 30(g) of the Act unless there is an inquiry made which discloses no such rights...”**

48. In the circumstances of this case, there is evidence that the applicants are in possession and occupation of the suit properties. They have been in such possession and occupation for a long period of time. When the inquiry contemplated under **Section 30(g)** of the Registered Land Act was made, they were found to have rights in the suit properties. For those reasons, the possession and occupation of the applicants of the suit properties constitutes an overriding interest to the title held by the respondent for which registration is not required.

49. The argument by the respondent's counsel that the title of the respondent's mother was infeasible because it was 1<sup>st</sup> registration has no basis in law. In this regard see the case of **Kanyi v. Muthiora (1984) KLR 713** where the Court of Appeal held:-

**“A proprietor by first registration or any subsequent registration is not relieved by anything in section 28 from any duty or obligation to which he is subject as a trustee. The appellant had rights against the appellant stemming from possession and occupation of part of the land, which amounted to overriding interest not required to be noted on the register and the appellant's proprietorship was subject to it, Section 30(g).”**

50. The grant that the respondent obtained in respect of the suit properties merely made him an administrator of the estate of his deceased mother. It did not make him an automatic beneficiary of the estate. That fact was laid bare by the court that granted him the letters of administration. Commenting on the objection by the applicants' father against issuance of grant to the respondent the trial court stated:-

**“This is a misconception of the law that because one is appointed an administrator he automatically becomes a beneficiary.”**

51. From the evidence adduced in the suits herein, it is clear that the respondent's claim is based on the aforementioned misconception of the law. Being made an administrator of the estate of his mother did not confer on him right of ownership of properties that his mother held in trust for others.

52. The evidence adduced in this case leaves no doubt that the respondent's mother held it in trust for the applicants'. If this was not the case, she would have objected to the massive development effected thereon by the applicants. Her conduct and that of the respondent, during the lifetime of his mother, clearly points to the behavior of a person without any right whatsoever to the suit properties.

53. The respondent only began laying claim to the suit properties after his mother passed on. His evidence concerning how his mother gained rights to the suit properties is also incapable of displacing that of the applicants to the effect that the original parcel of land was bought by their grandfather. If indeed the original property was bought by the respondent's mother, he would at least have had a witness to proof that fact.

54. The upshot of the foregoing is that the applicants' application has merit and is allowed in terms of prayer (1) and (2). The respondent's suit is, on the other hand, found to have no merit and dismissed.

55. On the question of costs, this being a family dispute, parties shall bear their own cost of the suits.

**Dated, signed and delivered in open court at Nyeri this 20<sup>th</sup> day of April, 2015.**

**L N WAITHAKA**

**JUDGE**

**In the presence of:**

Mr. Aunda holding brief for Mr. King'ori for the applicants

Mr. Wahome holding brief for Ms Mwai for the respondents

Lydia – Court Assistant