



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

E.L.C SUIT NO. 107 OF 2016

PURITY KABARI KARURI .....1<sup>ST</sup> PLAINTIFF

JUSTIN MUGO NDWIGA ..... 2<sup>ND</sup> PLAINTIFF

JACKSON GACHOKI NDWIGA..... 3<sup>RD</sup> PLAINTIFF

BEATRICE WANJIRU NDWIGA.....4<sup>TH</sup> PLAINTIFF

JANET WANJIRA KATHURI .....5<sup>TH</sup> PLAINTIFF

SELINA WATHITHA NDWIGA .....6<sup>TH</sup> PLAINTIFF

MARY WANJIKU KARIITHI .....7<sup>TH</sup> PLAINTIFF

VERSUS

NANCY KARIUKO NDWIGA .....DEFENDANT

JUDGMENT

1. The plaintiffs vide a Plaint dated and filed on 14<sup>th</sup> July, 2016 seek for judgment against the defendant for the following orders: -

**a. A declaration that the late Ndwiga Njeru was registered to hold land parcel Number Baragwe/Thumaita/944 in trust for his family which includes the plaintiffs and the defendant herein and that the insertion of the defendant's name into the register of the said land to the exclusion of the plaintiff was fraudulent hence null and void.**

**b. An order directing the registration of land parcel number Baragwe/Thumaita/944 in the names of the plaintiffs and the defendant herein to hold the same in equal shares since their father, Ndwiga Njeru, is already deceased.**

**c. Costs of the suit with interest.**

2. The defendant denied the plaintiffs' claim by way of a Statement of Defence and Counterclaim dated 24<sup>th</sup> August, 2016 and filed on 25<sup>th</sup> August, 2016 respectively.

3. In her counterclaim, the defendant prays that the plaintiffs' suit be dismissed with costs and a permanent injunction be issued restraining the plaintiffs from interfering with the suit land or picking tea thereon. The defendant also prays for costs of the suit and counterclaim be awarded to her.

4. The matter was heard by way of viva voce and on 21<sup>st</sup> October, 2021 the parties through their advocates on record agreed to file written submissions. The Defendant filed hers on 8<sup>th</sup> November, 2021. The plaintiff did not file their submissions as directed by the court.

**PLAINTIFFS' CASE**

5. The 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs testified on their behalf and on behalf of the other plaintiffs. Both plaintiffs as witnesses adopted their witness

statements dated 26<sup>th</sup> October, 2020. They also produced the documents contained in their list of documents dated 26/10/2020 as exhibits in this case.

6. The plaintiff's case is that land parcel number Baragwe/Thumaita/65 was initially registered in the names of Murathi Kathungu to hold in trust for his family members.

7. When the said Murathi Kathungu passed on, the said land was inherited by his three brothers namely Thambiri Njeru, Njagi Njeru and Ndwiga Njeru who thereafter subdivided and distributed as follows: -

- Baragwe/Thumaita/943 – Njagi Njeru
- Baragwe/Thumaita/944 – Ndwiga Njeru
- Baragwe/Thumaita/945 – Thambiri Njeru.

8. They stated that all the brothers inherited the respective parcels of land for them to hold in trust for themselves and their respective families.

9. Land parcel Baragwe/Thumaita/944 was thus registered in the name of Ndwiga Njeru to hold the same in trust for himself and the plaintiffs.

10. They stated that the defendant had caused her name to be entered on the register of the suit land jointly with their father fraudulently because, when they went to the District Officer's office to find out how the land was registered in the name of the defendant but they did not get the documents of transfer including the consent.

11. They therefore prayed that judgment be entered in their favour as prayed in the plaint.

#### **DEFENDANT'S CASE AND SUBMISSIONS**

12. The defendant testified on oath and stated that on 1<sup>st</sup> January, 2012 her deceased father Ndwiga Njeru called a family meeting where he decided that the suit land be jointly registered in his and her name.

13. She stated that other than the suit land, the deceased had another land being Gichugu Settlement Scheme/385 measuring 15 acres which he shared amongst all his children including the plaintiffs.

14. She stated that the area chief wrote a letter dated 27<sup>th</sup> March, 2012 to confirm the distribution of that land. She produced the said letter as Defendant's Exhibit no. 1.

15. She stated that the said land was then subdivided into parcel numbers Gichugu Settlement Scheme/4138, 4139 and 4140. She produced the green cards and titles as exhibit nos. 2 and 3.

16. She further stated that all her siblings were given land and the land control board gave consent. She produced the application for consent, letter of consent and certificates of search as Exhibit Nos. 4 – 7.

17. She also stated that the deceased gave her the suit land and took her to the Land Control Board whereupon the same was registered in their joint names. She produced the green card as Exhibit No. 8.

18. She stated that the suit land was a resultant subdivision of land parcel no. Baragwe/Thumaita/65 which belonged to her uncle Murathi Kathungu who died without a wife or children.

19. She stated that she used to live with her father and that she used to take care of him upon the demise of their mother. That her brothers live in Mwea and her sisters Selina and Purity moved into the suit land after their father died.

20. She stated that her sister Beatrice lives with her husband and Purity left after getting married and has no house on the suit land.

21. She stated that there is one house and a kitchen on the suit land where she was living with her father. She stated that after her father died, he was buried in Mwea Settlement scheme.

22. She stated that there are trees, coffee, bananas and trees on the suit land all which were planted by their father.

23. She stated that she did not cheat or defraud her father in his old age and that her father voluntarily caused the suit land to be registered in their joint names. She prayed that the suit be dismissed and judgment be entered as prayed in her counter claim.

#### **DEFENDANT'S SUBMISSIONS**

24. The Defendant submitted that the Plaintiffs' claim for declaration of a trust ought to fail. This is because the plaintiffs were bringing the same against their father for a declaration that he was registered in the land in trust for them. Thus, the said claim ought to be made against their father's legal representative and the joint owner.

25. She submitted that the Plaintiffs had miserably failed to prove the claim on fraud according the required standard of proof as provided under *Section 109 and 112 of the Evidence Act*. She relied on the cases of *Vijay Morjaria versus Nasighn Madhusingh Darbar & another (2000) e KLR* and *Kinyanjui Kamau versus George Kamau (2015) e KLR*.

26. She submitted that the plaintiffs have not proved that the defendant indeed took advantage of their elderly father's age to have her name jointly registered as proprietors of the suit land.

27. She further submitted that the Plaintiffs did not tender any evidence to the effect that the Assistant County Commissioner told them that there were no documents for booking land control board in respect of the suit land. Further, they did not call any witness or bring any letter from the land control board that the suit land never underwent land control board consent.

28. She submitted that the issue of customary trust was also not proved. This is because she had managed to prove that the plaintiff had his own clan land parcel No. Gichugu/Settlement Scheme/385.

29. She submitted that the suit land was given to their father via succession and not by the clan as claimed because the late Murathe Kathungu did not have a wife or children to inherit his land.

30. She submitted that though the plaintiffs had claimed that they live on the suit land, it had emerged during hearing that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiff live in land parcel Gichugu/Settlement Scheme/385 while the rest were married living with their husbands.

31. She submitted that no evidence of development of the suit land by the plaintiffs was produced. That the plaintiffs did not produce any photographs or any empirical evidence of development on the suit land but it emerged that it is only their father's house which was on the land.

32. She prayed that the plaintiff's suit be dismissed with costs and the counterclaim be allowed with costs.

### **ANALYSIS**

33. I have considered the pleadings, evidence, exhibits and the relevant law and in my view, the issues that comment for determination are as follows: -

**a. Whether land parcel Baragwe/Thumaita/994 is a clan land held by the defendant in trust for the plaintiffs?**

**b. Whether the suit land parcel number BARAGWE/THUMAITA/994 was registered in the joint names of the late Ndwiga Njeru and the defendant herein fraudulently?**

**c. Whether the Defendant is entitled to the prayers sought in the counterclaim.**

**d. Who should bear the costs of the suit?**

### **WHETHER LAND PARCEL NUMBER BARAGWE/THUMAITA/994 IS HELD BY THE DEFENDANT IN TRUST FOR THE PLAINTIFFS?**

34. The plaintiffs' claim is that of customary trust. Trusts, including customary trust are recognized as overriding interests on land that need not be noted in the register under *Section 28 of the land registration Act No. 3 of 2012* which provides as follows:-

“Unless the contrary is expressed in the register, all registered land shall be subject to the following interests as may for the time being subsist and affect the same, without their being noted on the register-;

(a) Deleted by Act No. 28 of 2016, S.11(a);

(b) Trusts including customary trusts;.....”.

35. The prerequisites of proving existence of a trust have been set out by the Supreme Court of Kenya in the case of **ISACK M'INANGA KIEBIA VS THEURI M'LINTARI & ANOTHER (2018) e KLR** where it was held-;

“Some of the elements that would qualify a claimant as a trustee are-;

1. The land in question was before registration, family, clan, or group

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 directed against the registered proprietor who is a member of the family, clan or group”.

36. Where a claim for trust is denied by the registered proprietor, it behooves the claimant to proof the same to the required standard as was held in the case of **KARANJA WANJIHIA VS DUNCAN WANJIHIA AND 4 OTHERS (2004) e KLR** where the Court held-;

“Trust is an issue both of facts and law. It is a serious issue, and needs to be demonstrated through proper evidence and verification on evidence”.

According to the plaintiffs, Land parcel number **BARAGWE/THUMAITA/65** was allocated to their uncle one MURATHI KATHUNGU (deceased) by the clan during land demarcation and Adjudication period in 1958 to hold in trust for himself and in trust for the future generations. It is the plaintiffs’ contention that when the said Murathi Kathungu died without a family of his own, his brothers who include their father, Ndwiga Njeru took out succession proceedings and the said parcel of land was closed upon partition on 23/12/1985 with the resultant portions-; **BARAGWE/THUMAITA/943, 944 &945**. It is the plaintiffs’ further contention that after the aforesaid land was partitioned, land parcel number BARAGWE/THUMAITA/944 was registered in the name of their father, NDWIGA NJERU while the other two portions were registered favour of their uncles Thambiri Njeru and Njagi Njeru. The plaintiffs’ averment is that it is the suit land whereupon they have lived and developed. The plaintiffs did not call clan member(s) who were present during land demarcation and Adjudication or any other witness(s) or verifiable documents that the original land parcel Number BARAGWE/THUMAITA/65 was indeed given to the original allottee, MURATHI KATHUNGU to hold the same in trust and that their father, Ndwiga Njeru was not given any clan land. It even transpired during the trial that the plaintiffs’ father who was also father to the defendant herein had his own land of land being parcel Number GICHUGU/SETTLEMENT/SCHEME/385 which had been given by the clan. That was even admitted by the plaintiffs’ witness during cross-examination. From the evidence adduced by the defendant and her witness, it is not in dispute that the registered proprietor of the suit land parcel No. BARAGWE/THUMAITA/944, Nwiga Njeru acquired the same as a beneficiary through the process of transmission. It is therefore my view from the evidence that the suit land which the said Ndwiga Njeru (deceased) acquired through transmission from the estate of his deceased brother as an inheritance does not give rise to the overriding interest of customary trust to be passed on to the next generation as of right but an inheritance to be held absolutely. It is my view, therefore, that parties who hold land as beneficiaries through a succession hold the same absolutely unless proved otherwise. In the same vein, it can correctly be said that Ndwiga Njeru (deceased), the beneficial registered owner of parcel Number BARAGWE/THUMAITA/944, held the same absolutely and was at liberty to alienate/dispose and/or gift the land to any person as he wished, including the defendant herein.

**WHETHER THE SUIT LAND PARCEL NUMBER BARAGWE/THUMAITA/994 WAS REGISTERED IN THE JOINT NAMES OF NDWIGA NJERU(deceased)AND THE DEFENDANT HEREIN FRAUDULENTLY?**

37. To succeed in a claim of fraud, the particulars of fraud have to be specifically pleaded and proved. This position was held in the case of **DEMUTIL ANANYAMA PURURMU VS SALIM MOHAMED SALIM [2021] e KLR** where the Court of Appeal held as follows:

“20. As regards the standard of proof, this Court in the case of *Kinyanjui Kamau Vs George Kamau [2015] e KLR* expressed itself as follows:-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo Vs Ndolo (2008) 1 KLR (G & F) 742* wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”(Emphasis ours)”

38. The burden was thus on the Plaintiffs to prove on a standard higher than a balance of probability but lower than beyond reasonable doubt that indeed the Defendant engaged in acts of fraud.

39. The Plaintiffs have averred that in April, 2016 they discovered that the name of the defendant has been fraudulently, secretly, irregularly and/or illegally inserted into the register of the suit land to hold the same jointly with their late father. They set out the following particulars of fraud at paragraph 7 of their plaint: -

- a. Taking advantage of their elderly father’s age to have her name inserted into the register of the said land parcel number Baragwe/Thumaita/944.
- b. Failure to obtain the relevant land control board’s consent.
- c. Dealing in and/or transacting in land without having a written agreement.
- d. Causing her name to be inserted into the register of the said land without the relevant control board’s consent.
- e. Causing her name to be entered fraudulently into the register of a land held in trust to the exclusion of the beneficiaries.
- f. Concealing the existence of the defendants herein being the other beneficiaries of the said land.

40. From the evidence tendered, it was not disputed that the suit land was registered in the name of the deceased, Ndwiga Njeru, prior to the

alleged fraud. Further, the acts of fraud are alleged to have been committed by the Defendant herein.

41. The person charged with the process of receiving, approving and registration of documents in the land registries is the land Registrars. They are the ones also given the mandate to issue instruments of ownership of land such as title deeds and certificate of leases. The land Registrar who caused the registration of the said Ndwiga Njeru (deceased) and the Defendant herein as joint owners of the suit land parcel Number BARAGWE/THUMAITA/994 must have been presented with documents for approval before registration was done. The land registrar was not joined as a party or summoned as a witness to produce the documents used to approve registration of the two as joint owners such as application for consent to transfer and consent to transfer by the relevant land control board. It cannot be possible that the Defendant caused herself to be registered jointly with Ndwiga Njeru (deceased) without the approval of the land Registrar. For the above stated reasons, I find that the plaintiffs have not established the commission of any fraud by the defendant or any other person whatsoever and whosoever in the joint registration of the suit land parcel number BARAGWE/THUMAITA/944 with Ndwiga Njeru (deceased).

#### **WHETHER THE DEFENDANT IS ENTITLED TO THE PRAYERS SOUGHT IN THE COUNTERCLAIM.**

42. During the hearing, it came out that Ndwiga Njeru (deceased) though it claimed to be elderly to a point that his age could be taken advantage of, no medical Doctor or report was called and/or produced to show that he was mentally incapacitated and incapable of making independent personal decisions. To the contrary, it was clear that he was an organized man who bequeathed all his properties to his children before his death.

43. All his children including the plaintiffs were given a share and no one expressed dissatisfaction with the share they got otherwise they could have challenged the distribution before his demise.

43. Further during hearing, it came out that prior to the deceased's demise, he lived on the suit land with the defendant who took care of him. The Plaintiffs do not live in the suit land and only moved therein after his death and none has made any developments thereon as alleged.

44. It is my view that since the suit land was jointly registered in the names of the deceased and the defendant herein before his demise, the suit land automatically devolved to the defendant upon the death of the deceased.

45. Since Plaintiffs did not succeed in their claim of fraud and also that of trust, I find and hold that the Defendant is the absolute and indefeasible owner of the suit land whose interests ought to be protected under *Section 25 of the Registration of Land Act, 2012* which provides as follows: -

**(1) The rights of a proprietor, whether acquired on first registration or 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 —**

**(a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register. (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.**

46. In view of the forgoing, I find that the Defendant has proven her Counter-claim against the plaintiff on a balance of probabilities.

#### **WHO SHOULD BEAR THE COSTS OF THE SUIT?**

47. It is trite law that costs though discretionally, follow the event unless there is a good reason to order otherwise.

48. It is my view that since parties are close relatives, each party should bear their own costs. It is so ordered.

#### **CONCLUSION**

49. In view of the foregoing, I enter final judgment as follows:-

**a. The plaintiffs' suit lacks merit and is hereby dismissed in its entirety.**

**b. The Defendant, Nancy Kariuko Ndwiga is the sole and absolute owner of land parcel Number BARAGWE/THUMAITA/944.**

**c. A permanent injunction is hereby issued restraining the plaintiffs from interfering with the suit land or picking tea thereon.**

**d. Each party to bear her own costs of this suit and the counter-claim.**

**JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2022**

.....

**HON. E.C. CHERONO**

**ELC JUDGE**

In the presence of:-

1. Ms Muturi holding brief for C.S. Macharia for Plaintiffs
2. Ms Mwai holding brief for Otuke for Defendant
3. Kabuta – Court Assistant.