



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**E.L.C NO. 29 OF 2012'B'**

**BEATRICE WAMBUI KABUI .....1<sup>ST</sup> PLAINTIFF**

**JANE MUTHONI NYAMU .....2<sup>ND</sup> PLAINTIFF**

**CATHERINE WANGUI KINYUA.....3<sup>RD</sup> PLAINTIFF**

**ELIZABETH GACAMBI WACHIRA.....4<sup>TH</sup> PLAINTIFF**

**MERCY WACHUKA KIBUI .....5<sup>TH</sup> PLAINTIFF**

**TABITHA NJOKI WACHIRA .....6<sup>TH</sup> PLAINTIFF**

**DAMARIS WAMUTIRA KABUI .....7<sup>TH</sup> PLAINTIFF**

**ANDREW KABUI .....8<sup>TH</sup> PLAINTIFF**

**VERSUS**

**STEPHEN KIMOTHO KABUI .....DEFENDANT**

**JUDGMENT**

The plaintiffs filed this suit against the defendant on 4<sup>th</sup> September 2012 seeking the following reliefs:-

- a. ***A declaration that land parcel No. MUTIRA/KAGUYU/3157 is registered in the name of the defendant as a trustee for himself and the plaintiffs***
- b. ***An order compelling the defendant to sub-divide it into equal portions and to register the sub-divisions and transfers in favour of the plaintiffs and the defendant respectively***
- c. ***Costs of the suit***
- d. ***Interest on (b) above at Court rates***
- e. ***Any other or further relief the Honourable Court may deem fit to grant.***

The 1<sup>st</sup> to 6<sup>th</sup> plaintiffs are sisters to the defendant and the 7<sup>th</sup> defendant/plaintiff is their mother. The 8<sup>th</sup> plaintiff is the son to the 1<sup>st</sup> plaintiff.

At all material time, the land parcel No. MUTIRA/KAGUYU/226 was registered in the name of the late KABUI KIMOTHO who was husband to the late BEATRICE WANJIRU KABUI and DAMARIS WAMUTIRA KABUI (7<sup>th</sup> plaintiff herein) and who was the father of the 2<sup>nd</sup> to 6<sup>th</sup> plaintiffs. It was the plaintiff's pleading that the land parcel No. MUTIRA/KAGUYU/226 was subsequently divided into

MUTIRA/KAGUYU/3158 which was registered in the names of BEATRICE WANJIRU KABUI to hold in trust for the 1<sup>st</sup> house and MUTIRA/KAGUYU/3157 (the suit land) which was registered in the names of the defendant to hold in trust for himself and the 2<sup>nd</sup> house. That some of the plaintiffs have been utilizing the suit land hence this suit.

The defendant filed a defence claiming that the suit land was a gift *intervivos* to him from his father LIVINGSTONE KABUI KIMOTHO during his life time and it was not subject to any trust or other obligations. Further, the defendant pleaded that the plaintiffs were adults and they should have asked or coerced their late father for land and the plaintiffs have no proprietary interest in the suit land neither do they work or reside on the same and the suit should therefore be dismissed with costs.

The parties being family, this Court as is the usual practice attempted to have the dispute settled out of Court but on 24<sup>th</sup> November 2014, I was informed that those attempts had collapsed and so the trial commenced with the 1<sup>st</sup> plaintiff BEATRICE WAMBU KABUI confirming that their late father KABUI KIMOTHO was the registered owner of parcel of land No. MUTIRA/KAGUYU/226 and had two wives the 1<sup>st</sup> being BEATRICE WANJIRU KABUI (1<sup>st</sup> plaintiff) and the 2<sup>nd</sup> being the 7<sup>th</sup> plaintiff herein i.e. DAMARIS WAMUTIRA KABUI. She said the 2<sup>nd</sup> to 6<sup>th</sup> plaintiffs are her sisters while the 8<sup>th</sup> plaintiff is her son. She testified that their late father sub-divided the said land into MUTIRA/KAGUYU/3158 which was given to BEATRICE WANJIRU KABUI while MUTIRA/KAGUYU/3157 (the suit land) was given to the defendant to hold in trust for the house of 7<sup>th</sup> plaintiff. She said she lives on the suit land where she has planted tea and other crops and so too does the 7<sup>th</sup> and 8<sup>th</sup> plaintiff. The 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> plaintiffs cultivate a portion of the suit land but they do not live there. 1<sup>st</sup> plaintiff told the Court that this dispute was previously heard by the elders under the then Land Dispute Tribunal in Case No. 9 of 2011 (Plaintiff Exhibit 4) whose decision was however set aside *vide* Embu Judicial Review Application No. 38 of 2011 (Plaintiff's Exhibit 5). She added that since the parcel of land MUTIRA/KAGUYU/3158 was divided between BEATRICE WANJIRU KABUI and her son, the suit land should be divided between the defendant and plaintiffs.

In support of the plaintiffs case, they called JOSEPH NGUYO KAROKI (PW2) a member of their Ugaciku Clan who testified that the late KABUI KIMOTHO had two wives the late BEATRICE and DAMARIS (7<sup>th</sup> plaintiff) and that during his life time, he sub-divided his land MUTIRA/KAGUYU/226 into two portions being MUTIRA/KAGUYU/3157 (the suit land) measuring about six (6) acres which he gave to the defendant to hold in trust for the house of DAMARIS. He added that the plaintiffs including PW1's son Andrew Kabui live on their portions on the suit land which the late KABUI KIMOTHO had told the defendant to share with his siblings and that is why they live on that land just the way the other house occupy the other land MUTIRA/KAGUYU/3158.

On his part, the defendant said that the suit land measuring about six (6) acres is his property given to him by his father before he died in 2007 and that at no time did he tell him (defendant) to hold the suit land in trust for any other person. He added that even his mother (7<sup>th</sup> plaintiff) accompanied them to the Land Board when the suit land was being transferred into his name. Defendant testified that the 1<sup>st</sup> plaintiff who is the mother to the 8<sup>th</sup> plaintiff is married to one Wahome but is living on the suit land following a separation from her husband and 8<sup>th</sup> plaintiff also lives on the suit land where he has built a house. The other plaintiffs are all married and live with their husbands. Defendant's case is that while he is prepared to give one acre to his mother, his late father never said he should give the plaintiffs land. He therefore urged me to find that the suit land is his sole property.

At the end of the trial, both Mr. Ngigi counsel for the plaintiff and Mr. Ngari counsel for the defendant made written submissions.

The thrust of Mr. Ngigi's submissions is that although the suit land is registered in the defendant's names, he holds it in trust for the plaintiff notwithstanding the fact that the title does not bear the word "*trustee*". He cited the Court of Appeal Case of **MBUI MUKANGU VS GERALD MBUI C.A CIVIL APPEAL NO. 231 of 2000 (NYERI)** and also my own decision in **DAVID MURIUKI AND ANOTHER VS**

**MWATHI KABA AND ANOTHER KERUGOYA E.L.C CASE NO. 204 of 2013.**

On behalf of the defendant, Gathara Mahinda and Company Advocates filed submissions urging me to find that the suit land was given to the defendant as a gift by his father as indicated on the title document and that the 1<sup>st</sup> to 6<sup>th</sup> plaintiffs who were adults should have asked to be given land too since they were adults. Reliance was placed on the Court of Appeal decision of **MURIUKI MARIGI VS RICHARD MARIGI MURIUKI AND ANOTHER C.A CIVIL APPEAL NO. 189 of 1996 (NYERI)** where it was held that a registered owner of land cannot be forced to share his land during his life time. It was submitted on behalf of the defendant that there was no evidence of trust and in any case, it is only the 7<sup>th</sup> plaintiff who lives on the suit land and the others have just trooped back “*after smelling a rich killing*”. Reference was also placed on the case of the **REGISTERED TRUSTEES ANGLICAN CHURCH OF KENYA MBEERE DIOCESE VRS REV. DAVID WAWERU NJOROGE C.A CIVIL APPEAL NO. 108 of 2002 (NYERI)**.

I have considered the evidence by both parties, the documentary exhibits, the submissions by counsels and the cases cited.

From the evidence on record, the following facts are not disputed:-

1. ***The 1<sup>st</sup> to 6<sup>th</sup> plaintiffs are sisters to the defendant and all are children of the 7<sup>th</sup> plaintiff and the late KABUI KIMOTHO***
2. ***During his life time, the late KABUI KIMOTHO was the registered proprietor of land parcel MUTIRA/KAGUYU/3157 and other than the 7<sup>th</sup> plaintiff, he also had another wife the late BEATRICE WANJIRU KABUI who had only one child JEREMIAH KABATA KABUI***
3. ***Before he died, the late KABUI KIMOTHO sub-divided his land into MUTIRA/KAGUYU/3157 (the suit land) which was registered in the names of the defendant and MUTIRA/KAGUYU/3158 which was registered in the names of BEATRICE WANJIRU KABUI.***

What this Court has to decide is whether the suit land was registered in the defendant’s names to hold in trust for the plaintiffs or whether infact it was a gift donated to him absolutely for his sole use.

Trust is a matter of evidence to be determined from the parties intentions and the law will not presume it except in case of absolute necessity – see **MBOTHU & OTHERS VS WAITITU & OTHERS 1986 K.L.R 171** and also **DORCAS NDOMBI WASIKE VS BENSON WAMALWA KHISA C.A CIVIL APPEAL NO. 87 of 2004.** It must be borne in mind that there are different types of trust including resulting trusts. The plaintiffs evidence as supported by that of their witness JOSEPH NGUYO KAROKI (PW2) is that the defendant was registered as owner of the suit land but in trust for his siblings. The defendant denies this. Part of the documentary evidence produced herein were the proceedings in Land Disputes Tribunal Case No. 6 of 2011 (Plaintiffs Exhibit 4) in which the 7<sup>th</sup> plaintiff who is the defendant’s mother had sued him over this same suit land. In that case, the other plaintiff’s were her witnesses and in her evidence in chief, the 7<sup>th</sup> plaintiff stated as follows:-

***“This land MUTIRA/KAGUYU/3157 belonged to my husband awarded to him by the clan during demarcation. My husband has since married another woman and so he sub-divided the land into two, on my part, we agreed that Stephen Kimotho to be registered as a trustee of the land and that is how he became the proprietor of the land. Before my husband died, he had given everybody in the family a portion to work on including those who were married. He also directed that everybody in the family is at liberty to acquire a portion in the lands and as you can see, I am alive as his wife and this land is rightly mine but we set my son just as a trustee which he now wants to violate. My plea is that the time has now come for this land to be sub-divided each person to his or her own portion as was the wish of my late husband. I want to leave my children in peace when I die”***

The Land Dispute Tribunal accepted this testimony which was supported by all the other witnesses and proceeded to order a sub-division of the suit land between the plaintiffs and defendant. Of course the Land Disputes Tribunal had no jurisdiction to make such orders and Ong'udi J. quashed that decision in Embu High Court Judicial Review Case No. 35 of 2011. Nonetheless, what the 7<sup>th</sup> plaintiff told the Land Disputes Tribunal remains evidence and forms part of this record irrespective of the fact that the decision was set aside for want of jurisdiction. This Court must consider and take that evidence into account notwithstanding the fact that the 7<sup>th</sup> plaintiff did not testify in this case. Her evidence clearly supports that of the 1<sup>st</sup> plaintiff in this case and shows the existence of a trust.

There is also evidence that although some of the plaintiffs do not live on the suit land, they in fact work on it. The 1<sup>st</sup> plaintiff said so in her evidence and in cross-examination, the defendant conceded as much when he said:-

***“It is true that the plaintiffs are also cultivating on 3157. I am also cultivating there”***

Therefore, both the plaintiffs and the defendant either occupy or work on the suit land and this can only be pursuant to the directive of their deceased father that they share the same on behalf of their mother's house the other portion having gone to the house of the second wife. Although the suit land is registered in the names of the defendant, it is clear following the Court of Appeal's decision in the case of **MBUI MUKANGU VS GERALD MBUI C.A CIVIL APPEAL NO. 231 of 2000 (NYERI)** which was cited by Mr. Ngigi, that the registration of land in one's names does not relieve the registered proprietor of his duties or obligations as a trustee. That case distinguished the case of **MURIUKI MARIGI VS RICHARD MURIUKI C.A CIVIL APPEAL NO. 189 of 1996 (NYERI)** and held that where land was ancestral land, as is the case herein, the registered owner cannot deal with it as his sole property. The suit land herein was originally clan land given to the parties' father before being registered in the defendant's names. The case of **MARIGI** (supra) which was cited by the defendant's counsel does not aid him in the circumstances of this case.

What about the insertion of the word “**gift**” in the document of title to the suit land? The defendant's counsel made a spirited submission that since the abstract of title to the suit land states that it was “**a gift**”, the interest that was passed to the defendant was absolute and devoid of any restrictions. This issue was considered by the Court of Appeal in **MUTISO VS MUTISO 1988 K.L.R 846** where a husband had transferred the land to his wife by way of a gift while he was in jail so that she could get a loan. When he left jail, the wife also left him after their marriage collapsed and she claimed the land as her sole property. The husband argued that she held the land in trust for him and he was entitled to have it back. The Court agreed with him and citing the Court of Appeal of England's decision in **HODUSON VS MARKS (1971) Ch 892** held that even if a gift is indicated on the title, it may still be that the beneficial ownership is intended to remain in the person making the gift. The **MUTISO** case (supra) was of course dealing with a case involving a man and his wife. However, in my view, it makes no difference where the case involves a man and his child as in this case. **Gachuhi J.A** addressed the issue as follows in the **MUTISO** case (supra).

***“My emphasis is on the doctrine of advancement or as it is known as gifts. Such advancement should be clear from the time of inception. It must be free from any consideration such as for defeating creditors. But where there is a rebuttal evidence that it was not the intention of the donor to make such a gift, any advancement must be held on a resulting trust, the donor retaining the legal ownership and the transferee must retransfer the property to the donor at the donor's request”.***

In this case, there is direct evidence from the donor's own wife that the registration of the suit land in defendant's names was for him to hold it in trust for his mother, himself and his siblings. Secondly, there is evidence that plaintiffs live and/or occupy portions of the suit land and have been doing so even before their father died until 21<sup>st</sup> February 2013 when the defendant sought an injunction to restrain them from using the land which application was dismissed. Therefore, there is clear rebuttal evidence of the defendant's assertion that their late father gifted him the land for his sole use. It could only have been

with the intention that he holds it in trust for his mother, his siblings and himself. The fact that his siblings are married is of no consequences because the **Constitution in Article 27** provides for equality before the law and that there shall be no discrimination on grounds, inter alia, of marital status - Kenya also signed and ratified in 1984 the **United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)**. It would therefore be against the principles of equality and elimination of discrimination against women on the basis of their marital status, for the defendant to say that while he is agreeable to giving one acre to his mother, his siblings are not entitled to a share on the suit land simply because they are married. It would be a travesty of justice if this Court were to up-hold that argument.

After considering the evidence on both sides, this Court is satisfied that the plaintiffs have proved their case against the defendant and that he holds the suit land in trust for them. In a case such as this, the plaintiff ought to seek the determination of the trust in the pleadings and this Court will do just that because it is the natural consequence where a trust is found to exist. Secondly, the 8<sup>th</sup> plaintiff is only a son of the 1<sup>st</sup> plaintiff and so he can only claim his mother's share of the suit land. His claim against the defendant is therefore dismissed.

Ultimately therefore, there shall be judgment for the 1<sup>st</sup> to 7<sup>th</sup> plaintiffs against the defendant in the following terms:-

- 1. A declaration that land parcel No. MUTIRA/KAGUYU/3157 is registered in the defendant's names as trustee for himself and the 1<sup>st</sup> to 7<sup>th</sup> plaintiffs and the said trust is hereby determined.***
- 2. A order compelling the defendant to sub-divide it into equal portions and to register the sub-divisions and transfer in favour of the 1<sup>st</sup> to 7<sup>th</sup> plaintiffs and defendant respectively.***
- 3. As much as possible, the sub-divisions should be in accordance with the portions currently occupied by the 1<sup>st</sup> to 7<sup>th</sup> plaintiffs.***
- 4. The Deputy Registrar of this Court should be at liberty to sign the transfer on behalf of the defendant should he fail to do so, upon application by the 1<sup>st</sup> to 7<sup>th</sup> plaintiffs.***
- 5. As the parties are family, each shall bear their own costs.***

**B.N. OLAO**

**JUDGE**

**18<sup>TH</sup> SEPTEMBER, 2015**

18/9/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Ngigi for Plaintiffs – present

Mr. Ombachi for Mahinda for Defendant – present

COURT: Judgment delivered this 18<sup>th</sup> day of September 2015 in open Court.

Mr. Ngigi for Plaintiffs – present

Mr. Ombachi for Mr. Mahinda for Defendant – present

Right of Appeal explained.

**B.N. OLAO**

**JUDGE**

**18<sup>TH</sup> SEPTEMBER, 2015**

Explanatory note on delay

This judgment was due on 5<sup>th</sup> June 2015 but I was bereaved and out of the country until 7<sup>th</sup> July 2015 when I resumed duties and soon thereafter, the Court proceeded on vacation until 16<sup>th</sup> September 2015. That is the reason for the delay in delivering judgment. The same is however regretted.

**B.N. OLAO**

**JUDGE**

**18<sup>TH</sup> SEPTEMBER, 2015**

Mr. Ombachi: I apply for stay of 30 days.

Mr. Ngigi: No objection.

Court: stay for 30 days is granted.

**B.N. OLAO**

**JUDGE**

**18<sup>TH</sup> SEPTEMBER, 2015**