



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT THIKA**

**ELC NO 135 OF 2018**

**MONICA WAMUHU MBUGUA.....1<sup>ST</sup> PLAINTIFF**

**HANNAH WAMBUI MBUGUA**

**(Both suing as the legal representatives And co-administrators of the Estate of**

**Wilson Mbugua Njoroge (Deceased).....2<sup>ND</sup> PLAINTIFF**

**VS**

**MARTIN MBUGUA NJENGA (sued as the legal Representative of Mary Njeri Njoroge (Deceased),**

**a co-administrator of the estate of James Njenga Njuguna (Deceased).....1<sup>ST</sup> DEFENDANT**

**MARY NJERI NJENGA (sued as the legal Representative of and co-administrator of the Estate of**

**James Njenga Njuguna (Deceased).....2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR, KIAMBU LAND DISTRICT.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The facts of this case disclose a protracted history of ownership of land pitying family members most of whom are now deceased. The Plaintiffs until the demise of the 2<sup>nd</sup> Plaintiff were co-wives of the late Wilson Mbugua Njoroge. The 1<sup>st</sup> Defendants on the other hand is a grandson of the 1<sup>st</sup> Plaintiff. He is sued in his capacity as the administrator of the estate of his mother who alongside the 2<sup>nd</sup> Defendant was/is the widow of James Njenga Njuguna respectively. Until his death, James was the 1<sup>st</sup> Plaintiff's nephew.

2. Vide a plaint dated 27/4/2018, the Plaintiffs sought Judgment against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally for Orders;

**i. A declaration and order do issue that JAMES NJENGA NJUGUNA (Deceased) holds (sic) all that parcel of land known as L.R No. KARAI/GIKAMBURA/T.510 in trust for WILSON MBUGUA NJOROGE (Deceased) and that L.R No. KARAI/GIKAMBURAT.510 legally and lawfully belongs to the Estate of the late WILSON MBUGUA NJOROGE.**

**ii. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein being the legal representatives of MARY NJERI NJOROGE (Deceased) and JAMES NJENGA NJUGUNA (Deceased) release the said KARAI/GIKAMBURA/T.510 Title Deed to the 3<sup>rd</sup> Defendant herein, being the Lad Registrar, Kiambu Land District, for cancellation and the said 3<sup>rd</sup> Defendant to thereafter forthwith issue a new Title Deed of the said KARAI/GIKAMBURA/T.510 in the name of WILSON MBUGUA NJOROGE (Deceased) after the said cancellation and due registration thereof.**

**iii. A permanent injunction do issue 2<sup>nd</sup> (sic) restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their agents and/or their legal representatives from interfering in any way whatsoever with the title to and possession of LR. NO KARAI/GIKAMBURA/T.510.**

**iv. Costs of the suit.**

3. The Plaintiffs' case is that the James Njenga Njuguna (*James*) and his estate held and holds LR NO. KARAI/GIKAMBURA/T.510 (*the suit land*) in trust for Wilson Mbugua Njoroge (*Wilson*). That this is due to a resulting and constructive trust arising from an exchange of parcels of land between Wilson and the **late Leah Njoki Gitau**, the grandmother of the James and mother in law to Wilson.
4. That the suit land is currently registered in the name of James. The Plaintiffs claim that despite such registration, James never lived on the suit land.
5. The suit is opposed mainly by the 1<sup>st</sup> Defendant. He filed a statement of defence and counter claim dated 25/8/2018. He denied that the suit land was ever held in trust for Wilson since the registration of James as the legal proprietor in 1959. In his counter claim, he was ardent that James was the absolute owner of the suit land and even after his demise, Wilson never claimed any interest thereon. He prayed for a declaration that James is the registered owner of the suit land and a permanent injunction be issued against the Plaintiff from interfering with the land.
6. The 2<sup>nd</sup> Defendant admitted the Plaintiffs' claims that the suit land is held in trust for the late Wilson in her defence dated 29/9/2018.
7. The 3<sup>rd</sup> Defendant filed its statement of defence dated 13/6/2018. It maintained that it was a stranger to the Plaintiffs' averments in the plaint and not privy to the issues therein. It urged the Court to dismiss the suit against it with costs.
8. The Plaintiffs filed a reply to defence and defence to counter claim dated 27/9/2018 by the 1<sup>st</sup> Defendant. They expressly denied the 1<sup>st</sup> Defendant's averments in the CC and reiterated their position that James held the suit land in trust for Wilson.
9. The suit was set down for hearing on 11/11/2021.
10. The Plaintiffs called one witness, **Samuel Thairu Kamau**, James' brother. He adopted his witness statement dated 17/11/2020 as evidence in chief. It was his evidence that the Plaintiffs were married to the late Wilson. That Wilson was an uncle in-law to him and James. That PW1 and James were sons of the late Grace Wanjiru who died in 1967. That the late Grace was a sister to Monicah, the 1<sup>st</sup> Plaintiff.
11. PW1 informed the Court that the suit land was registered under James who held it in trust for Wilson. That their late maternal grandmother, Leah had children including Grace and Monica, and held a certain parcel having been gifted by the European Missionaries. PW1 added that besides James, he had two other siblings; Monica Wambui Gitau and Jane Muthoni Njoroge.
12. PW1 testified that Wilson bought a parcel of land (Parcel B) which was adjacent to Leah's land. That when the process for demarcation began, Leah and the entire extended family agreed that both parcels of land be consolidated and one title be issued thereof. That since James was already an adult with an ID, working and married to the late Mary Njeri Njoroge, the entire land was registered in his name in April 1959 as Title No. KARAI/GIKAMBURA/540 (plot 540) to hold in trust for Leah and PW1 as per Leah's wishes.
13. PW1 added that James was given another plot (*the suit land*) by the authorities again to hold in trust for Leah and PW1 which was registered in September 1959. That James lived on plot 540 with his wife Mary Njeri Njenga, the 2<sup>nd</sup> Defendant and their children. However that the 2<sup>nd</sup> Defendant has been cultivating the suit land as a caretaker with the authority of Wilson who lived in Mombasa with his family. That this was after James' first wife, Mary Njeri Njoroge (**Mary 1**) took off with their children and never to return even after James' demise in 1985. That the Plaintiff's demand over the suit land is justified and the claim by the 1<sup>st</sup> Defendant being a son of **Mary 1** is unfounded. That it is against that background that the 2<sup>nd</sup> Defendant acknowledges the Plaintiffs' claim.
14. PW1 produced the documents in the LOD dated 1/7/2019 as **Pexh. 1 – 10** including a copy of the Green card extract of the suit land.
15. On **cross-examination**, PW1 reiterated his evidence above and added that **Mary 1** lodged a caution on the suit property on 13/2/2013. He admitted that he had no evidence to prove the said mutual agreement for the alleged mutual agreements to register the land in James' name. That it was his grandmother Leah who informed him of the same. That during her lifetime, Leah repeatedly stated that the suit land belonged to Wilson in the presence of family members who have since passed on. That Wilson died in 1996 but never demanded the suit land.
16. Regarding plot 540, PW1 said that it was subdivided in 1964 into parcels 937 and 938 with James transferring the former to PW1 in 1973. Furthermore PW1 explained that he was testifying on behalf of the 1<sup>st</sup> Plaintiff since the 2<sup>nd</sup> Plaintiff died before 2020.
17. On the other hand, the 1<sup>st</sup> Defendant sought to admit the witness statement of **George Watari Karuru** under section 33 of the Evidence Act following his demise. The application was opposed by the Plaintiffs' counsel citing lack of opportunity to cross-examine the maker. The Court declined the application but allowed admission of documents 1 & 2 in the 1<sup>st</sup> Defendant's LOD as evidence namely; Certificate of Confirmation of grant (for Wilson's estate) dated 27/11/2007 and Replying Affidavit dated 14/3/2014 sworn by **Mary 1**.
18. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not call any witnesses.
19. Parties agreed to file their respective submissions.
20. The Plaintiffs' submissions are dated 20/1/2022 filed by the firm of **Wamiti Njagi & Associates**. They submitted that the claim by Wilson's legal representatives is founded on a constructive trust that James held and his estate continues to hold over the suit land. That the Plaintiffs' uncontroverted evidence was that James married the 2<sup>nd</sup> Defendant in 1968. That the 1<sup>st</sup> Defendant's defence is a sham and his Counter Claim must fail for want of proof.

21. On the issue of admissibility **Mary 1** RA, the Plaintiffs' objected that it does not meet the criteria of section 34 Evidence Act on admissibility of evidence given in previous proceedings. That as per **Pexh. 6** being the Ruling in respect of the proceedings of that RA, the Court declined to assume jurisdiction over ownership of the suit and herein and instead directed parties to file the case at ELC.
22. Additionally, the Plaintiffs rehashed the principles governing customary trust as enumerated by the SC in the case of **Isack M'Inanga Kiebia –vs- Isaaya Theuri M'Lintari & Another [2018] eKLR**. That in proving existence of such trust, the root of the trust must be established and in this case it is traced to the consolidation of parcels of land by Leah and Wilson and registration in James' name. That it is further demonstrated by transfer of part of the land (plot 540) to PW1.
23. Moreover, that a constructive trust is an equitable device with dual objectives; to restore property to the rightful owner and to prevent unjust enrichment. That the 1<sup>st</sup> Defendant's intention herein is to unjustly enrich himself which this Court should not allow. Several decisions were cited in support of that proposition including CoA judgment in **Willy Kimutai Kitilit vs Michael Kibet [2018] eKLR** and **Peter Ndungu Njenga vs Sophia Watiri Ndungu [2018] eKLR**. The Plaintiff beseeched the Court to allow their claim with costs to be borne by the 1<sup>st</sup> Defendant personally and dismiss his counter claim for lack of evidence.
24. Conversely, on behalf of the 2<sup>nd</sup> Defendant, the firm of C.N Kinyanjui & Associates filed submissions dated 17/1/2022. On the issue of admissibility of **Mary 1's** RA, it was contended that sections 33,34 and 35(1)(b) Evidence Act were relevant in light of the passage of time and demise of potential witnesses. The Court was urged to adopt the RA as evidence failing which the 1<sup>st</sup> Defendant will greatly be prejudiced. Reliance was placed on cases of **Yasmin Anwar Yusuf v Samuel Gatugi Kimani & 2 others [2018] eKLR** and **Ngoigwa Company Ltd v Dorcas Wanjiku Ikinu [2018] eKLR**.
25. Further, the 1<sup>st</sup> Defendant raised the issue of statutory time bar under section 7 of LAA against the Plaintiffs. That Wilson never agitated for his interest on the suit land, if at all, for the period of almost twenty six years since James' registration in 1959 until his demise in 1985. That no objection has ever been filed by Wilson or his representatives since 1959. The 1<sup>st</sup> Defendant cited the cases of **Kenya Civil Aviation Authority v WK & 2 others [2019] eKLR** and **Nelson Machoka Keraro v Land Registrar Kisii & 3 others [2019] eKLR**.
26. Regarding the prosecution of the Plaintiffs' case, the 1<sup>st</sup> Defendant submitted that the 1<sup>st</sup> Plaintiff's failure to testify on account of illness only meant that the legal burden of proof has not been discharged. Likewise, that the 1<sup>st</sup> Plaintiff failed to inform the Court about the 2<sup>nd</sup> Plaintiff's death and therefore the suit is incompetent for failure to enjoin the 2<sup>nd</sup> Plaintiff's estate. Lastly, PW1's evidence was impugned as hearsay hence inadmissible having testified that at the time of the suit land registration, he was a minor.
27. The 1<sup>st</sup> Defendant also heightened the provisions of Sections 24, 25 and 26 LRA and urged that there is no evidence of registration of a trust in the green card. He denied an existence of a customary trust and reiterated the legal principles in the **Kiebia** case supra. He also impugned the 2<sup>nd</sup> Defendant's failure to testify in support of her admission of the claim. Counsel relied on the case of **Beatrice E.J Yagana v Joseph Yator [2005] eKLR** whereby the Court dismissed the Plaintiff's for failure to testify.
28. Equally, the firm of **Masore Nyang'au & Co. Advocates** filed the 2<sup>nd</sup> Defendant's submissions dated 2/2/2022. It was submitted that Order 13 rule CPR allows any party to a suit to give notice by pleadings or otherwise in writing of any admission of a claim. That it was incumbent upon the Plaintiff to apply for Judgement as envisaged under Order 13 rule 2 CPR and pay her costs.
29. Last but not least, state counsel **Elizabeth Mwalizi** filed submissions dated 8/2/2020 on behalf of the 3<sup>rd</sup> Defendant. According to her, the main issue for determination is whether a matter can be heard without any of the Plaintiffs being present. That generally the death of a Plaintiff does not cause abatement of a suit as s/he can be substituted. However, that when no such substitution is made, the suit automatically abates by operation of law in line with Order 24 rule 1 CPR. That since none of the Plaintiffs prosecuted the case there is no case before Court to be determined and implored the Court to dismiss the suit against it with costs.
30. The issues for determination are; what is the consequence of 2<sup>nd</sup> Plaintiff's death and failure to substitute? Can the 1<sup>st</sup> Plaintiff's suit solely subsist; what is the effect of 1<sup>st</sup> Plaintiff's failure to testify; what is the effect of 2<sup>nd</sup> Defendant's admission of the claim; is the claim for resulting and constructive trust proven; is the suit time barred; admissibility of 1<sup>st</sup> Defendant's prayer to rely on the Replying Affidavit of **Mary Njeri Njoroje**? Who bears costs?
31. On the issue of the 2<sup>nd</sup> Plaintiff's death the same was raised during **PW1** cross-examination by the 3<sup>rd</sup> Defendant's counsel. There is no evidence to support her death before this Court. Be that as it may, the disclosure was made by PW1 who was the Plaintiffs' witness. The Court has no reason to doubt the same because if indeed she passed on, the capacity of the 1<sup>st</sup> Plaintiff to solely proceed with the case must be addressed.
32. The legal provision governing such a scenario is found in Order 24 Rule 3 Civil Procedure Rules inter alia that;

**“(1) Where one of two or more Plaintiffs dies and the cause of action does not survive or continue to the surviving Plaintiff or Plaintiffs alone, or a sole Plaintiff or sole surviving Plaintiff dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the legal representative of the deceased Plaintiff to be made a party and shall proceed with the suit.**

**(2) where within one year no application is made under subrule (1), the suit shall abate so far as the deceased Plaintiff is concerned, and, on the application of the Defendant, the Court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased Plaintiff: provided the Court may, for good reason on application, extend the time.”**

33. Accordingly, it is not in doubt that a suit abates by operation of law and not necessarily by a Court order. Both Plaintiffs rightly described themselves as co-administrators of the estate of Wilson, their husband. P.Exh.1 is a copy of the certificate of confirmation of grant of the estate of the late Wilson Mbugua Njoroge issued in **Msa Succ. Cause No. 38 of 2006** on 27/11/2007. There are three administrators named therein Monica Wamuhu Mbugua (*1<sup>st</sup> Plaintiff*), Hannah Wambui Mbugua (*2<sup>nd</sup> Plaintiff*) and Peter Gitau Mbugua. At **para. 3.1.1** of their written submissions, the Plaintiffs' counsel conceded that the *2<sup>nd</sup> Plaintiff* died in **August 2018** while Peter Gitau Mbugua died in 2015. The *2<sup>nd</sup> Plaintiff* pursuant to the authority to plead dated the 27/4/2018 gave authority to the *1<sup>st</sup> Plaintiff* to execute the pleadings on her behalf. There is no evidence that the said *2<sup>nd</sup> Plaintiff* was substituted within a period of one year or at all. The case against the *2<sup>nd</sup> Plaintiff* therefore abated in the month of August 2019.

34. What then is the position in the law on the death of a co-administrator? Section 81 Law of Succession Act states;

**“81. Powers and duties of personal representatives to vest in survivor on death of one of them**

**Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:**

**Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the Court has made a further grant to one or more persons jointly with him.”**

35. In my view, the powers and duties of the deceased administrators (*Peter and Hannah*) now vest in the *1<sup>st</sup> Plaintiff* as administrator of Wilson. There is no evidence on record to imply a continuing trust for the estate of Wilson. In that respect, the suit subsists in her capacity as the *1<sup>st</sup> administrator*.

36. Concerning the *1<sup>st</sup> Plaintiff's* failure to testify, the *1<sup>st</sup> Defendant* was adamant that her failure to personally testify in Court rendered her pleadings mere averments. That the legal burden of proof was not discharged and thus the plaint must fail. My perusal of the CPA, CPR and Evidence Act do not require that a Plaintiff or Defendant must testify in a matter. Where they choose to testify there is no prescribed order of calling witnesses or producing the documents or marking them before the witness produces them. The parties may call witnesses in any order to produce the documents they are entitled by law to produce provided the rules of evidence are followed. The Plaintiffs' LOD indicated the *1<sup>st</sup> Plaintiff* and any other witness with leave of Court and that objection in my view fails.

37. The next issue for determination is the effect of *2<sup>nd</sup> Defendant's* admission of the Plaintiffs' suit. Upon the *2<sup>nd</sup> Defendant's* admission of the suit, the Plaintiffs were at liberty to apply for Judgment on admission pursuant to Order 13 (2) CPR that provides;

**“2. Judgment on admissions [Order 13, rule 2.]**

**Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment, as the Court may think just.”**

38. The Plaintiffs did not move the Court as appropriate and therefore their case is determined on merits as hereunder.

39. Lastly, have the Plaintiffs' proven their case? It is trite that he who alleges must prove. In civil cases, the burden of proof is on the claimant, and the standard required of them is that they prove the case against the Defendant “on a balance of probabilities”. Sections 107 and 108 of the Evidence Act Cap 80 provide for burden of proof and who is to prove it that;

**“107. Burden of proof**

**(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

**108. Incidence of burden**

**The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”**

40. PW1 was the sole witness in this suit he gave a detailed account of the history of the suit land. Among other exhibits, **Pex.5** was a copy of the green card extract for the suit land. It confirmed that James was registered as the proprietor on 9/9/1959. The next two entries are cancelled out and the last entry shows a registration of caution by **Mary 1** on 13/2/2013. Tasked to explain the source of his evidence, he said his grandmother, Leah gave him all the information thereto. The Court agrees with the *1<sup>st</sup> Defendant* that the evidence of PW1 was purely hearsay and therefore irrelevant. I say so because the witness was neither present nor old enough to understand the goings on then.

41. The Plaintiffs' claim is based on customary and constructive trusts as was the position before the SC established the guiding principles in the **Kiebia** case. That their case relates to the CoA decision in **Kanyi Muthiora vs Maritha Nyokabi Muthiora [1984] eKLR**. In that appeal, *Kanyi* was *Nyokabi's* step-mother and upon the demise of *Muthiora*, *Kanyi's* husband, the suit land was registered in *Kanyi's* name.

Kanyi contended that she was the absolute owner of the land despite being the second wife of Muthiora. Nyokabi's mother was the first wife and had predeceased Muthiora. The Learned Judges upheld the High Court finding in favour of the respondent requiring the appellant to transfer 3 acres of the suit land. They implied a constructive trust in line with Kikuyu customary laws that both Muthiora's wives were entitled to share of the land, the death of Nyokabi's mother notwithstanding.

42. The facts of Kanyi case are fundamentally different and distinguished from the instant suit. This suit is instituted on behalf of a deceased uncle against the estate of his nephew. That the nephew was registered as the suit land owner to hold in trust for his uncle who had exchanged a parcel of land with his mother in law. According to PW1 the suit land was given to James by the authorities after registration of plot 540. Plot 540 comprised a parcel B that Wilson bought next to Leah's land.

43. PW1 further testified that James transferred to him his share of the land in Plot 530. Wilson on the other hand never sought to have the suit land, if at all held in trust by James, to be transferred to him before James' demise. This is so despite PW1 evidence that Leah called for a family meeting and directed James to transfer the suit land. That Wilson travelled all the way from Mombasa and was present in the said meeting.

44. Moreover, PW1 expounded that the reason why James was registered as the owner of the land, was chiefly because he was at the time an adult, married and working unlike PW1 who was a student. No explanation was given as to why Wilson was not considered if at all the intention was to hold land in trust for the family considering he was an adult; married to the 1<sup>st</sup> Plaintiff, James' maternal aunt.

45. The Supreme Court in *Kiebia* supra case stated as follows regarding customary trusts;

**“[52] Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the Court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.**

**Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. 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 land**
- 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.”**

46. Applying the above principles and as already demonstrated above, the suit land was not a family land before registration. PW1 said James was given the land by local authorities. Even the initial parcel B according PW1, was purchased by Wilson and it was adjacent to Leah's land. It was thus not family land. Secondly, the relationship between Wilson and James was that of uncle and nephew. Lastly that in this case, there was no evidence led by the Plaintiff to show any intervening reasons that hampered the registration of Wilson as the owner of the suit land, if indeed it was intended for him.

47. The totality of the evidence led is that the Plaintiffs have not disclosed cogent grounds to support customary or constructive trust in their favor. This suit be and is hereby dismissed.

48. Parties being related, I order that each to bear their own costs.

49. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 28<sup>TH</sup> DAY OF MARCH 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Plaintiff 1 & 2 – Wamiti Njagi

Defendant 1 – Mrs. Kihika

Defendant 2 – Absent

Defendant 3 – Mwalози

Court Assistant - Phyllis