



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 694 OF 2014

(Formerly Nyeri HCCC 20 OF 2009)

JOSEPH MITHAMO KARIUKI.....1ST PLAINTIFF

MARGARET NYAWIRA GAKENGE.....2ND PLAINTIFF

-VERSUS-

NELSON KINYUA MUIGA *alias*

KINYUA S/O MUIGA.....1ST DEFENDANT

CHARLES MUCHOKI MUIGA.....2ND DEFENDANT

JOHN WAMBATU.....3RD DEFENDANT

DAVID MUIGA MUCHOKI.....4TH DEFENDANT

ROBERT MAINA MUCHOKI.....5TH DEFENDANT

JUDGMENT

BACKGROUND

1. This suit was initially instituted on 3rd February, 2009 being Nyeri High Court Civil Suit No. 20 of 2009. By their Plaint dated 31st January, 2009, the two Plaintiffs – Joseph Mithamo Kariuki and Margaret Nyawira Gakengi pray for the following orders against the five (5) Defendants:

(i) A declaration that the Defendants herein have either held or continue to hold either jointly and or severally in trust for the Plaintiffs as beneficiaries of Kaburu Kabaragu the following parcels:

(a) Half share of land parcel No. Iriani/Kairia/254;

(b) Half share of land parcel No. Iriani/Kairia/233;

(c) Half share of Iriani/Kiaguthu/140;

(d) Half share in Kiriani/Kaguyu/220; and

(e) Half share in land parcel Iriani/Kaguyu/221.

(ii) An order for the rectification of the registers to the above parcels;

(iii) An order for the determination of the said trust;

(iv) An order for the subdivision and excision of the Plaintiff's parcels from the above titles or any of the resultant titles; and

(v) Costs of the suit and interest at Court rates.

2. Those prayers arise from the Plaintiffs' contention that they are related to the Defendants by blood all being the children and/or grandchildren of one Ngungi. It is the Plaintiffs' case that during the time of land adjudication, demarcation, consolidation and registration, the entire family of the late Ngungi became entitled to various fragmented parcels of land which when consolidated were to amount to 49 acres or thereabouts.

3. The Plaintiffs aver that the said parcels of land were to be shared equally among the late Ngungi's three children (*and or their respective beneficiaries*) being the households of:

(i) Kaburu Kabaragu;

(ii) Wambui alias Wagikonyo; and

(iii) Kwenjera Kanjuri.

4. It is the Plaintiffs' case that at the material time, the said Kaburu Kabaragu was in detention following the declaration of emergency and that he died shortly thereafter in 1956. In the absence of any male heir at the time for the late Kaburu's household, it was resolved by the clan members that his parcels of land be registered and held in trust by the beneficiaries of the household of Wambui.

5. The Plaintiffs assert that following the resolution, various parcels of land were so registered in the name of one Harun Muiga s/o Kago who is the father of the 1st, 2nd and 3rd Defendants and the grandfather of the 4th and 5th Defendants. Despite the Plaintiffs' demands and notices of intention to sue, the Defendants have failed, refused and or neglected to surrender the said portions of land thereby rendering this suit necessary.

6. But in their joint Statement of Defence dated and filed herein on 10th March 2009, the five Defendants – Nelson Kinyua Muiga alias Kinyua s/o Muiga, Charles Muchoki Muiga, John Wambutu, David Muiga Muchoki and Robert Maina Gachoki jointly and severally deny the allegations contained in the plaint.

7. In particular, the 1st Defendant denies being the registered proprietor of land parcel No. Iriani/Kairia/1136 and asserts that the same belongs to a tea-buying company. The 3rd Defendant equally denies being the registered proprietor of Title No. Iriaini/Kiaguthu/140 and avers that the said title was closed on sub-division and was therefore extinguished.

8. The Defendants aver that they have no relationship either by blood or otherwise with the Plaintiffs and assert that the Plaintiff do not belong to the household of Kiguthu Muhoro who was the grandfather of the 1st, 2nd and 3rd Defendants. The Defendants however admit that they belong to the same clan with the Plaintiffs.

9. While admitting that the Plaintiffs' father was the said Kaburu Kabaragu, the Defendants deny that the said Kaburu had a brother by the name Kwenjera Kanuri and or a sister by the name Wambui alias Wagikonyo. While the said Kwenjera belonged to the Plaintiffs' clan, Wambui alias Wagikonyo who happens to be the grandmother of the 1st, 2nd and 3rd Defendants, did not belong to the Plaintiff's household.

10. The Defendants deny that the listed parcels of land belonged to the Plaintiffs family and or that the same were held by the Defendants in trust for the Plaintiffs and they invite the Plaintiffs to strict proof. It is the Defendants' case that if the Plaintiffs, their predecessor or any relative had any claim or dispute over land with the Defendants' family, the same ought to have been raised, addressed and determined by the Land Adjudication Committee and/or the Arbitration Board pursuant to the provisions of the **Land Adjudication Act (Cap. 284)** and the same cannot be raised at this juncture.

11. The Defendants deny receiving any notice of intention to sue and assert that the proceedings herein are belated, incompetent and devoid of merit.

THE PLAINTIFFS' CASE

12. On 30th July, 2018 when the suit came up for hearing, the Defendants did not attend court and the court ordered that the matter proceeds as an undefended suit. The Plaintiffs then proceeded to call one witness who testified on their behalf before the case was closed.

13. PW1 – Joseph Mithamo Kariuki is the 1st Plaintiff and a brother to the 2nd Plaintiff herein. He relied on his recorded and signed statement filed herein on 10th November, 2011 as well as a List of Documents filed on 7th June, 2018.

14. ANALYSIS AND DETERMINATION

I have carefully perused and considered the pleadings filed herein, the testimony of the 1st Plaintiff and the evidence adduced at the trial by the Plaintiffs. I have also considered the Plaintiffs submissions and authorities. The Defendants as it turned out were absent on the date fixed for hearing. They did not therefore testify or produce any documents in support of their case.

15. This matter was first instituted in the High Court on 3rd February, 2009 before being transferred to this court in the year 2014. In the course of time, the 1st Defendant passed away on 29th August, 2012 and was substituted by Juliet Wangechi Kinyua and Albert Muiga Kinyua on 8th October, 2013.

16. The two Plaintiffs herein who are a brother and sister have urged the Court to declare that the five Defendants herein have been holding five (5) parcels of land in trust for themselves as the beneficiaries of one Kaburu Kabaragu who is said to have passed away in 1956. It is the Plaintiffs' case that they hold half a share of the said parcels of land being Iriaini/Kairia/254; Iriaini/Kairia/233; Iriaini/Kiaguthu/140; Iriaini/Kaguyu/220 and Iriaini/Kaguyu/221 as registered respectively in the names of the Defendants.

17. Accordingly the Plaintiffs urge the court to determine the trust and to order a rectification of the registers to the said parcels of land as well as an order for their sub-division and excision from the cited or any resultant parcels of land.

18. In their joint Statement of Defence dated and filed herein on 10th March, 2009, the five Defendants denied being blood relatives of the Plaintiffs and or holding any land in trust for themselves. As it turned out the Defendants did not come to court on the date fixed for hearing to defend that position.

19. Be that as it may **Section 107 of the Evidence Act** places an obligation on a party who wishes the court to give judgment or to declare any legal right dependent on a particular fact or sets of facts, to provide evidence that proves the existence of those facts. It is trite law that a party relying on the existence of a trust must discharge the onus placed upon him by proving its existence through evidence.

20. Otherwise as the Court of Appeal stated in **Peter Ndungu Njenga -vs- Sophia Watiri Ndungu (2000) eKLR:**

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

21. In the matter before me, the two Plaintiffs assert that they are together with their brother one Kabuku Kaburu, whom they refer to as mentally challenged, the only children of the said Kaburu Kabaragu Ngungi and one Jedida Wakonyo Kaburu both of whom have since passed on. It is the Plaintiff's case that the dispute herein relates to the property left behind by their grandfather one Ngungi.

22. According to the Plaintiffs, the said Ngungi had three children, namely, the Plaintiffs' father Kaburu Kabaragu, their uncle one Kwenjera Kanjuri and their aunt named Muthoni Wambui alias Wagikonyo. The Plaintiffs told the Court that their aunt, the said Muthoni Wambui alias Wagikonyo is the mother of Harun Muiga who is said to be the father of the 1st, 2nd and 3rd Defendants and the grandfather to the 4th and 5th Defendants.

23. The Plaintiffs told the Court that during the period of Land demarcation, consolidation and registration, the 3 children of Ngungi became entitled to certain fragmented parcels of land which the Plaintiffs estimated to amount to 49 acres situated within Iriaini and Magutu areas of what was previously known as Mathira District.

24. The Plaintiffs told the Court their father passed on after the adjudication process and that since they (the Plaintiffs) were still minors, the shares of their father and aunt Muthoni Wambui were registered in the name of their aunt's son Harun Muiga to hold in trust for himself and the household of the Plaintiffs' father Kaburu Kabaragu in half shares as the Plaintiffs' mother, being a woman, could not customarily be registered as proprietor of the land.

25. Testifying at the trial herein, the 1st Plaintiff told the Court that by the agreement of clan members, some 7 parcels of land namely Iriaini/Kairia/254; Iriaini/Kiaguthu/140; Iriaini/Kaguyu/220; Iriaini/Kiaguthu/268; Iriaini/Kaguyu/440 and Iriaini/Kiaguthu/139 were then registered in the name of the 1st, 2nd and 3rd Defendants' father.

26. In support of their case, the Plaintiffs produced copies of the Green Cards for the parcels of land in contention as well as a Death certificate for their mother Jedida Wakonyo Kaburu. A perusal of the various Green cards annexed reveal that the said Haron Muiga, invariably referred to also as Haron Muiga s/o Kago and or Muiga s/o Kaguthu was registered as the proprietor of the said parcels of land on various dates being 23rd December 1957, 3rd February, 1959 and 4th March 1959.

27. There is however no reference to the creation of a trust on any of the said titles either for the Plaintiffs or any other person. It was also clear from a perusal of the Green Card for Land Parcel No. Iriaini/Kairia/233 that the same was registered on 4th March 1959 in the name of the Plaintiffs' brother Warui s/o Kaburu.

28. While the Plaintiffs describe their brother Warui as being mentally retarded, no evidence of any such mental retardation was placed before the Court. I have agonized over the issue but I was unable to find why the Plaintiffs' elder brother would have land registered in their name when the Plaintiffs' portion was not registered in the name of their said brother in trust for themselves.

29. While the Plaintiffs told the Court that the land could not be registered in the name of their mother Jedida Wakonyo on the basis that she

was a woman, it was clear that as at the time of registration, the said Jedida had an adult son Warui in whose name Land Parcel No. Iriaini/Kairia/233 was registered at the same time that the father of the 1st, 2nd and 3rd Defendants was also registered as the proprietor of the other parcels of land.

30. It was also clear to me that as at the time, the Plaintiffs uncle one Kwenjera Kanjuri was still alive and if culture dictated that the Plaintiffs mother could not be registered on the basis of being a woman, the nearest kin, if the Plaintiffs' brother Warui was said to be mentally unstable, was the uncle.

31. None of the clan members who are said to have arrived at the decision that the parcels be registered in the names of Harun Muiga were called to testify and it was unclear to me why land belonging to the Plaintiffs' father was being placed in the hands of his sister's son. Indeed while the Plaintiffs continuously refer to their aunt as unmarried, it is apparent that she was married to the father of the 1st, 2nd and 3rd Defendants though it was not clear when.

32. It was also evident from the Certificate of Death produced by the Plaintiffs that their mother Jedida lived on to the ripe age of 80 and that she did not pass away until 13th April 2008, some eight months before the Plaintiffs would institute this suit. While the Plaintiffs told the Court that they previously lived on land parcel No. Iriaini/Kairia/254 and that they were evicted therefrom in 1966 by the 1st Defendant, no reason was offered at all why the Plaintiffs' mother took no action to reclaim the land and/or to have the alleged trust determined at the time.

33. As it were the existence of a customary trust can only be proved by way of evidence. In the matter before me, even though the defendants did not present any evidence before the Court, it was clear to me that the Plaintiffs' claim herein is belated and devoid of merit.

34. In the premises I hereby dismiss the same. I make no order as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 10TH DAY OF MARCH, 2022.

In the presence of:

The 1st and 2nd Plaintiffs present in person

No appearance for the Defendants

Court assistant - Kendi

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J. O. Olola

JUDGE