



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCC No. 279 OF 2016

MARY WANJIRU MWANGI.....1ST PLAINTIFF

JULIA WANGECHI NJIRI Suing as the administrator of the estate of the late

MONICA WANGARI NJIRI (DECEASED).....2ND PLAINTIFF

PAULINE NJOKI KUNG'U.....3RD PLAINTIFF

GLADYS WAMBUI THUKU.....4TH PLAINTIFF

NYAMBURA NJOROGE.....5TH PLAINTIFF

VERSUS

EUNICE WANJIRU IGAMBA Sued as the administrator of the

estate of the late PETER IGAMBA NJOROGE.....1ST DEFENDANT

JOHN NJOROGE IGAMBA Sued as the administrator of the

estate of the late PETER IGAMBA NJOROGE..... 2ND DEFENDANT

JUDGMENT

1. Proceedings in this matter commenced when the plaintiffs filed plaint dated 26th July 2016. They later replaced the original plaint with amended plaint dated 23rd October 2017. It was averred in the amended plaint that Njoroge Igamba (deceased) was the biological father of the plaintiffs, Peter Igamba Njoroge (deceased) and Geoffrey Waithaka (deceased). That Njoroge Igamba (deceased) was the registered owner of the parcels of land known as Shawa/Rongai Block 1/220, Elburgon/Elburgon Block 3/163 and Elburgon/Elburgon Block 1/21 (Kamirithu) and that the suit properties were transferred to Peter Igamba Njoroge (deceased) to hold in trust for all the plaintiffs herein and Peter Igamba Njoroge (deceased).

2. The plaintiffs further averred that upon the demise of Peter Igamba Njoroge, the defendants secretly obtained letter of administration in respect of Peter Igamba Njoroge's estate. That the suit properties ought to have devolved to all the siblings in equal status. The plaintiffs therefore prayed for judgment against the defendants for:

a) A declaration that the deceased Peter Njoroge Igamba was registered as the owner of parcels number Shawa/Rongai Block 1/220, Elburgon/Elburgon Block 3/163 and Elburgon/Elburgon Block 1/21 (Kamirithu) in trust for himself and the Plaintiffs.

b) An order of Permanent Injunction restraining the Defendants herein by themselves, their agents and/or servants from dealing, disposing off, charging, alienating or in any way interfering with parcels Shawa/Rongai Block 1/220, Elburgon/Elburgon Block 3/163 and Elburgon/Elburgon Block 1/21 (Kamirithu) respectively.

c) Cost of this suit.

3. The defendants filed statement of defence in which they admitted that the plaintiffs and Peter Igamba Njoroge were biological children of Njoroge Igamba. They averred that Peter Igamba Njoroge was the absolute proprietor of the suit properties having acquired them from

Njoroge Igamba for consideration following payments towards their acquisition. They denied the plaintiff's other allegations and urged the court to dismiss the suit.

4. At the hearing, Joram Mundia Ngaruiya testified as PW1. He stated that he is a founder member of Matuiku Company Limited, a company which was formed around the year 1966. That he was the secretary and treasurer of the company at various times and that the company bought parcels of land known as Elburgon/Elburgon Block 3 around 1968 and Shawa/Rongai Block 1 around 1971. He added that initially, Plot No. 220 in Shawa Rongai was registered in the name of Njoroge Igamba and that Njoroge Igamba later instructed the company to transfer the plot to his son Peter Igamba Njoroge. He further stated that Plot No. 163 Elburgon/Elburgon was also initially registered in the name of the said Njoroge Igamba but was later on transferred to his son Peter Igamba Njoroge and that he never heard that Njoroge Igamba sold any of the said parcels to his said son.

5. Next, Paul Matheri Kinoo testified as PW2 and stated that he is a former chairman of Kamirithu Farmers. That the plot which belonged to Njoroge Igamba according to the company records was plot Number 21 which is now known as Elburgon/Elburgon Block 1/21 (Kamirithu). That Njoroge Igamba was old, had difficulty walking and could not attend company meetings. That Njoroge Igamba asked the company to change ownership records to his son Igamba Njoroge who would be attending meetings on his behalf and who would also represent his other children. He added that Njoroge Igamba did not sell the plot to Igamba Njoroge and that title was issued in the name of Igamba Njoroge as a guardian of the land.

6. Next on the stand was the first plaintiff, Mary Wanjiru Mwangi, who testified as PW3. She stated that the other plaintiffs are her sisters. That the second plaintiff Monica Wangari Njiru passed away and was substituted by Julia Wangechi Njiri. That the defendants are widow and son, respectively, of the plaintiffs' late brother Peter Igamba Njoroge. That the defendants obtained letters of administration in respect of the estate of Peter Igamba Njoroge on 14th December 2009 and that the grant was confirmed on 13th October 2010.

7. PW3 further stated that the suit properties belong to the plaintiffs' father and that the plaintiffs' father transferred the plots to Peter Igamba Njoroge so that Peter Igamba Njoroge could be the guardian of the plots as a trustee. That their father did not give or sell the suit properties to Peter. That some of the parties' family members are buried on Elburgon/Elburgon Block 1/21 including their brother Geoffrey Waithaka Njoro, Pw3's mother Wangechi Njoroge, the plaintiffs' father Njoroge Igamba, Geoffrey Waithaka Igamba a grandson to Njoroge Igamba, the plaintiffs' brother Peter Igamba Njoroge and Peter Igamba Njoroge a great grandson to Njoroge Igamba. She added that they were buried on the land because it is family land bought by Njoroge Igamba. That as at the date of her testimony, the suit properties were occupied by the 1st defendant. That their father Njoroge Igamba would have told them if he sold the suit properties to Peter Igamba Njoroge and further that Peter Igamba Njoroge would also have told them if he purchased the suit properties from their father.

8. PW3 added that prior to filing this case, the parties tried to resolve the matter through the area chief. That the chief heard both sides on 10th July 2014 and that the 1st defendant asked that she be given a period of 1 month to return the titles to the family. That despite being given the 1 month, the 1st defendant did not return the titles and instead informed the plaintiffs that her children told her not to return the titles. As a result, the chief advised them to go to the succession court, which they did, by filing an application for revocation of grant. That the court heard the application and delivered a ruling on 9th June 2016, whose outcome led to the filing of this case. She added that the suit properties should be subdivided among the seven children including the 1st defendant who represents the plaintiffs' brother Peter Igamba Njoroge. That Peter Igamba Njoroge was the eldest son of their father Njoroge Igamba and that traditionally, he was supposed to take care of the suit properties.

9. PW3 further stated that while he was alive, the plaintiffs did not ask Peter Igamba Njoroge how he came to own the suit properties. That when Peter Igamba Njoroge constructed stone houses on the suit properties, the plaintiffs neither assisted him with the construction nor objected to the construction. That Peter Igamba Njoroge passed away on 5th July 2009. That the plaintiffs' father was about 90 years old when he passed away and that the plaintiffs are all married and live in their husbands' homes.

10. The plaintiffs' last witness was Simon Kinuthia, Senior Assistant Chief Ndimu Sub-Location in Molo Sub-County, who testified as PW4. He stated that he summoned Eunice Wanjiru Igamba, the first defendant, who appeared in his office on 10th July 2014, following a complaint by the plaintiffs. That the plaintiffs were also present in his office on 10th July 2014. That the first defendant requested for one month so that she could consult her children with a view to returning the suit properties to the family. That he gave her time and they agreed to reconvene on 11th August 2014. That on 11th August 2014, the parties met again and the first defendant told the meeting that she could do nothing because her children said the land belonged to them.

11. The plaintiffs' case was then closed.

12. Although given sufficient opportunities to cross examine PW1, PW2 and PW4, defence counsel was not present in court on the appointed occasions. As such, the evidence of PW1, PW2 and PW4 was not subjected to any cross-examination.

13. Owing to non-appearance by defence counsel, defence case was closed without any evidence being adduced by the defence. An application seeking to reopen the defence case was filed and the court allowed it and gave a new date for defence hearing. Yet again, there was no appearance for the defendants at the time the defence case was scheduled for hearing. Upon an application by plaintiffs' counsel, defence case was closed again and parties ordered to file submissions. Following yet another application by the defendants seeking to set aside proceedings, a consent was recorded pursuant to which the defendants opted to file written submissions on the suit as opposed to setting aside the proceedings. The long and short of it is that the defendants did not offer any evidence.

14. In their submissions, the plaintiffs referred to **Sections 25 (1) and 28 of the Land Registration Act** as well as the Supreme Court case of **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR** and argued that they had established the existence of trust. They urged the court to grant them the orders sought.

15. In response, the defendants argued that from the circumstances exhibited in transferring the suit properties to Peter Igamba Njoroge, no trust was envisaged. Reliance was placed on the Court of Appeal case of **Mbui Mukangu v Gerald Mutwiri Mbui Civil Appeal No. 281 OF 2000** (reported as **Mbui Mukangu v Gerald Mutwiri Mbui [2004] eKLR**). Further, citing the Court of Appeal case of **Mwangi Mbothu & 8 others v Gachira Waitimu & 11 others [1986] eKLR**, the defendants argued that trust is a matter of evidence and that the court ought not to presume it except in cases of absolute necessity. That the circumstances of transfer of the titles to Peter Igamba Njoroge demonstrate a gift in contemplation of death as opposed and not a customary trust. That the plaintiffs have neither possessory nor occupational rights over the suit properties that can be protected as an overriding interest under **Section 30 (g)** of the repealed **Registered Land Act**.

16. I have considered the pleadings, the evidence and the submissions. The issues that emerge for determination are whether the plaintiffs have established trust and whether the reliefs sought should issue.

17. From the onset, it must be remembered that the defendants did not offer any evidence and that they only cross examined one out of the four witnesses who testified in support of the plaintiffs' case. Thus, the plaintiffs' evidence has largely remained uncontroverted.

18. Existence of trust is a question of fact which must be proven through evidence. In **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR**, the Supreme Court stated as follows:

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.

19. There is no dispute that prior to issuance of titles, the suit properties were owned by Njoroge Igamba who was the biological father of the plaintiffs and Peter Igamba Njoroge (deceased) in respect of whose estate the defendants are administrators. As such, I have difficulty in finding, as I do, that the suit properties are family land in so far as the parties herein are concerned and that the plaintiffs are members of the subject family. As daughters of the original owner Njoroge Igamba, the plaintiffs' relationship to the family cannot be said to be remote or tenuous as to make their claim idle or adventurous.

20. It is also not in dispute and it is indeed confirmed by the material on record that Peter Igamba Njoroge (deceased) became the registered proprietor of the parcels of land known as Shawa/Rongai Block 1/220 on 24th November 1988, Elburgon/Elburgon Block 3/163 on 3rd December 1990 and Elburgon/Elburgon Block 1/21 (Kamirithu) on 28th October 1988. As daughters of the original owner Njoroge Igamba, the plaintiffs could have been entitled to be registered as owners or beneficiaries of the suit properties but for the intervening circumstances comprised in registration of the suit properties in favour of Peter Igamba Njoroge (deceased). Needles to reiterate, the claim herein is directed against the estate of Peter Igamba Njoroge (deceased) who was a member of the family and who is the registered proprietor of the suit properties.

21. The defendants have argued that from the circumstances exhibited in the transfer of the suit properties to Peter Igamba Njoroge, no trust was envisaged. They have however not offered any evidence to demonstrate the particular circumstances that they are referring to. On the other hand, the plaintiffs have placed on record uncontroverted evidence that Peter Igamba Njoroge became registered proprietor by virtue of being the eldest son of their father Njoroge Igamba and that traditionally, he was supposed to take care of the suit properties.

22. The defendants averred in their statement of defence that Peter Igamba Njoroge was the absolute proprietor of the suit properties having acquired them from his father Njoroge Igamba for consideration following payments towards their acquisition. Now, that is a bold claim. When one sibling claims to have purchased from his parent(s) what would be otherwise family property thereby potentially disinheriting the other siblings, he must know that he bears a heavy burden of demonstrating such purchase. The defendants have not offered an iota of evidence to demonstrate any payment either to the parties' father or to the land buying companies from which the parties' father acquired the suit properties. Indeed, an official of one of the land buying companies who testified as PW1 expressly excluded any possibility that Njoroge Igamba sold any of the suit properties to Peter Igamba Njoroge.

23. I further bear in mind the testimony of Simon Kinuthia, the area Assistant Chief Ndimu to the effect that the first defendant appeared in his office and requested for one month so that she could consult her children with a view to returning the suit properties to the family. She wouldn't have considered surrendering back the suit properties if it wasn't the case that they were family land. I am in the circumstances persuaded that the plaintiffs have established that Peter Njoroge Igamba was registered as the proprietor of the suit properties in trust for himself and the plaintiffs.

24. It follows therefore that the plaintiffs are entitled to prayer (a) of their amended plaint. Regarding the permanent injunction sought at

prayer (b) of the amended plaint, I bear in mind that the defendants are members of the family and that it would not be prudent to wholesomely restrain them from dealing with the suit properties. The parties' share of the suit properties will have to be determined by the relevant court pursuant to the **Law of Succession Act**. For now, it suffices to preserve the suit properties by restraining any disposition or alienation pending distribution of the estate of Peter Igamba Njoroge (deceased). I note that proceedings towards distribution of the said estate are pending in **High Court Succession Cause No. 432 of 2009 (Nakuru)** and that on 9th June 2016 the said court stayed distribution of the estate pending determination of the plaintiffs' claim.

25. In the result, I make the following orders:

a) It is hereby declared as between the parties to this case, that Peter Njoroge Igamba (deceased) was registered as the owner of the parcels of land known as Shawa/Rongai Block 1/220, Elburgon/Elburgon Block 3/163 and Elburgon/Elburgon Block 1/21 (Kamirithu) in trust for himself and the plaintiffs.

b) Pending distribution of the estate of Peter Igamba Njoroge (deceased) in High Court Succession Cause No. 432 of 2009 (Nakuru), an injunction is hereby issued restraining the defendants herein by themselves, their agents and/or servants from disposing off, charging or alienating the parcels of land known as Shawa/Rongai Block 1/220, Elburgon/Elburgon Block 3/163 and Elburgon/Elburgon Block 1/21 (Kamirithu).

c) In view of the close family relationship between the parties, I make no order as to costs of the suit.

Dated, signed and delivered at Kakamega this 27th day of April 2022.

D. O. OHUNGO

JUDGE

Delivered through electronic mail in the presence of:

Court Assistant: E. Juma