



**Gicheru v Gicheru (Environment & Land Case 783 of 2013)  
[2022] KEELC 2239 (KLR) (22 April 2022) (Judgment)**

Neutral citation: [2022] KEELC 2239 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 783 OF 2013**

**EC CHERONO, J**

**APRIL 22, 2022**

**BETWEEN**

**MICHAEL GACHOKI GICHERU ..... PLAINTIFF**

**AND**

**JOSEPH KAROBIA GICHERU ..... DEFENDANT**

**JUDGMENT**

1. This suit was instituted by the plaintiff vide a plaint dated October 30, 2013 whereby he seeks the following orders;
  - a. A declaration that the defendant holds LR No Inoi/Thaita/160 in trust for himself and the plaintiff.
  - b. A declaration that the plaintiff is entitled to 2 acres out of LR No Inoi/Taitha/160 to be registered in his names.
  - c. Costs and interest at court rates.
2. The suit was filed contemporaneously with a notice of motion under certificate of urgency dated the same day seeking temporary injunction orders pending inter-partes hearing of the said application and the main suit. The defendant denied the plaintiff's claim vide a statement of defence dated March 31, 2015 and filed on April 20, 2015. After complying with the procedural requirements under Order 11 *Civil Procedure Rules*, the suit was set down for hearing.

**Plaintiff's Summary of Facts**

3. The plaintiff took the witness stand as PW1 on 5/5/2021 and was referred his witness statement filed in court on October 30, 2013 which he adopted in his evidence. According to the plaintiff, the suit land parcel number Inoi/Thaita/160 Measuring approximately 5 acres is a clan land given to his brother Joseph Karobia Gicheru(defendant) to hold in trust for himself and the plaintiff. The plaintiff further



stated that he had even filed a reference before Kirinyaga Central Land Disputes Tribunal under the Land Disputes Tribunal Act No. 18 of 1990(repealed) where he was awarded 2 acres by the Elders and the Defendant appealed to the Provincial Appeal Tribunal Committee at Nyeri who upheld the said award by the Kirinyaga Central Division. The Defendant was not also satisfied and appealed to the High Court where he also lost. The defendant the appealed to the court of Appeal where the decision of the High court and the Tribunal were set aside for want of jurisdiction. He referred to the proceedings and the decision before Kirinyaga Central Land Disputes Tribunal contained in his list of documents which he produced as P-Exhibit No. 1

4. The plaintiff called one witness namely Samuel Mwai Rimbi who also adopted his statement dated 18/04/2016. The witness stated that he comes from the same clan as the defendant and being the eldest sons in their respective families, they were given land by the clan to hold for their own behalf and on behalf of their respective families. The witness further stated that they were given land together with the defendant as trustees since his father and that of the Defendant were not alive during land demarcation and consolidation period.

### **Defendants Summary of Facts**

5. The defendant, Joseph Karobia Gicheru died during the pendency of this suit and was substituted by his son Elias Ngugi Karobia who adopted his late father's witness statement filed in court on November 3, 2016. According to him, his late father was registered as the proprietor of the suit land parcel No. Inoi/Thaita/160 on August 16, 1958 where he has lived quietly and peacefully with his family. He further stated that sometime around April 29, 1998, the plaintiff a claim at the Kerugoya Central district land Disputes tribunal which went all the way to the court of appeal where the Highest court overturned the award by Kirinyaga central land disputes Tribunal which was confirmed by the Provincial land disputes appeals committee and the High court at Nyeri. He said that current suit is an afterthought barred under the Limitation of Actions Act as he has grown up children who have built on the suit land
6. On cross-examination, the defendant admitted that his grand-father died long before the land demarcation and consolidation in the year 1948. The defendant further stated that he did not know if his father and his family was given the suit land to hold in trust for himself and the rest of the family. He confirmed that his late father was the only one given land in their family.

### **Legal Analysis and Decision**

7. I have considered the evidence adduced and the documents relied by the parties. I have also considered the applicable law. The issues for determination in this dispute are as follows;
  - a. Whether the defendant is holding land parcel number Inoi/Thaita/160 for himself and the plaintiff?
  - b. Whether the plaintiff is entitled to 2 acres of the suit land parcel number Inoi/Thaita/160 ?
  - c. Who will bear the costs of this suit ?

Whether the Defendant is holding land parcel No. Inoi/Taitha/160 for himself and the plaintiff ?



8. It is trite law that customary trust is an overriding interest over land which need not be noted on the register. Section 25(1) of the Land Registration Act No 3 of 2012 is the guiding law which stipulates as follows;

“(1) The rights of a proprietor whether acquired on the 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 lease, 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.”

In the same vein, section 28 of the same Act also provides as follows;

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

- (a) -----
- (b) trusts including customary trusts;  
-----’

9. Several Court decisions have affirmed the law regarding the position that customary trust is an overriding interest on land and nothing can relieve a registered proprietor of any duty and/or obligation to which the person is subject as a trustee. In the case of Isack M’ Inanga Kebia v Isaaya Theuri M’ Lintari & Isack Ntongai M’ Lintari SCK Petition 10 of 2015 [2018] eKLR, the Supreme Court of Kenya held thus-;

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of 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 land intention of the parties. If the said holding were for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such 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-;

- a. The land in question was before registration family, clan or group land.
- b. The claimant belongs to such family, clan or group.
- c. 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.



- d. The claimant could have been entitled to be registered as an owner of other beneficiary of the land but for some intervening circumstances the claim is directed against the registered proprietor who is a member of the family, clan or group”(Emphasis mine).
10. From the guiding principles set out by the supreme court in the above case and in view of the evidence adduced, the following issues are not in dispute-;
  - a. The plaintiff and the then defendant are blood brothers and sons of the late Gicheru and that the plaintiff is an uncle to the present defendant.
  - b. The defendant’s father was the sole registered owner of the suit land LR No Inoi/Taitha/160 Measuring about 1.78 Ha or thereabouts.
  - c. The defendant’s father was the eldest son of the late Mr. Gicheru (Senior chief) and that the said Mr Gicheru was not given any other land by the clan.
  - d. The plaintiff is the only surviving son of his father senior Chief Gicheru.
  - e. The defendant’s father though a minor, was given the suit land by Umbui Mbari ya Ngima Clan and got registered as proprietor in accordance with kikuyu customary law.
  - f. The plaintiff utilized a portion of the suit land for some time until he bought his own land and settled with his family.
11. Having carefully considered the evidence adduced and the materials placed before me, I have no doubt in my mind that the suit land parcel Number Inoi/Thaita/160 is a clan/ Customary land given to the Defendant’s father especially during the land Adjudication and Consolidation period to hold in trust for himself and the rest of the family members. This is true especially where no other member of that family was given land by the clan during land demarcation and consolidation. The plaintiff also admitted in his testimony that they were bred and brought up in the suit land and he even built his house and planted crops. He further stated that sometime in 1971 or thereabouts he bought his own land and moved out from the suit land to the acquired land. The plaintiff’s movement out of the suit land in 1971 or thereabouts in my view cannot be taken/deemed as a surrender/forfeiture of his right over ancestral land. A claim under customary trust is not subject to *limitation of actions Act*. It is my finding that the Defendant is holding the suit land in trust for himself and the plaintiff.

**Whether the plaintiff is entitled to 2 acres of the suit land Number Inoi/Thaita/160?**

12. Having found that the Defendant is holding the suit land Number Inoi/Thaita/160 Measuring approximately 5 acres in trust for himself and the Gicheru family and there being no other member of the family who sought to be joined as a party for purposes of determining the trust, I find that the most appropriate way of determining the trust is that the plaintiff is entitled to 2 acres out of LR No Inoi/Thaita/160. The Defendant’s argument that the plaintiff demolished his house and moved from the suit land which is an ancestral land years ago cannot relieve him of his obligation as a trustee. The Defendant’s duty and obligation remains as a Judiciary trustee, whether all the beneficiaries are in occupation/possession of the land or not.
13. The other issue raised by the defendant in his defence is that the plaintiff’s claim should fail since the same had been commenced under the Land Disputes Tribunal(repealed) and went all the way to the Court of Appeal where it was dismissed. The Defendant also argued that since the plaintiff bought his own land and moved from the suit land which is ancestral, he should not get a share. Those arguments



in my view are untenable in law. First, the dismissal of the plaintiff's claim of a share of the suit land on Appeal was not based on merit but for want of jurisdiction which is a technical ground. On the second issue, it is my respective view that by buying his own land and moving out to settle therein did not relieve the Defendant's duty and/or obligation as a registered proprietor over ancestral land.

### **Final Orders**

14. In view of my analysis above, I find that the plaintiff has proved his claim against the Defendant for a share of the suit land on a balance of probabilities. In the result, I enter judgment in the following terms-;
  - a. A declaration that the Defendant holds LR No Inoi/Thaita/160 in trust for himself and the plaintiff.
  - b. A declaration that the plaintiff is entitled to 2 acres out of LR No Inoi/Thaita/160 to be registered in his names.
  - c. Since the relationship between the plaintiff and the defendant are close, I order each party to bear their own costs.

**READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 22<sup>ND</sup> APRIL, 2022.**

**HON E.C. CHERONO**

**ELC JUDGE**

**In the presence of :-**

Otuke holding brief for Chomba for the Plaintiff

Mr. Ng'ang'a for the Defendant

Kabuta – Court clerk.

