REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAMIRA

ELC NO. 66 OF 2021

(Formerly at Environment and Land Court at Kisii Case No. 31 of 2019)

TERESIA KWAMBOKA MAUTI

(Suing as the Administratix of the estate of DAVID MAUTI NYARANGO (Deceased).....1ST PLAINTIFF

ELIJAH ONDIEKI NYARANGO.....2ND PLAINTIFF

=VRS=

EZEKIEL NYARANGO MAUTI.....1ST DEFENDANT

MARY NYARANGO.....2ND DEFENDANT

MONICAH NYARANGO.....3RD DEFENDANT

DINAH NYARANGO.....4TH DEFENDANT

THE LAND REGISTRAR, NYAMIRA COUNTY.....5TH DEFENDANT

THE HON. ATTORNEY GENERAL.....6TH DEFENDANT

JUDGMENT

The First Plaintiff is the First Defendant's daughter in-law. She is also a sister in-law to the 2nd, 3rd and 4th Defendants. She filed a suit on 07/10/2019 urging the court to declare that the First Defendant's oral will made on 24/04/2005 and which was witnessed by Pastor Nyagaka in respect to **NORTH MUGIRANGO/ NYANKONO SETTLEMENT SCHEME./17** is valid and subsisting, and that in the alternative the Plaintiffs have an overriding interest in the suit property and that the 1st Defendant holds 7 Acres out of the suit land in trust for the 1st Plaintiff and that a permanent injunction should be issued against the 1st Defendant from entering, disposing, transferring, mortgaging, charging and/or interfering in any manner with the 14 Acres comprised in **L.R. NO. NORTH MUGIRANGO/ NYANKONO SETTLEMENT SCHEME/17** which the Plaintiffs are now occupying. She named Elijah Ondieki Nyarango as the Second Plaintiff and contemporaneously with the Plaint, she also filed what was said to be Elijah Ondieki Nyarango's Authority to her to file the suit on her behalf. When this case was going on, the court realized that the temperatures were very high and the animosity between the parties rose to enormous heights. The court therefore asked the parties to seek a reconciliation. They met in Nairobi on 07/12/21 with Pastor Oindi of the S.D.A Church as mediator and elder Obare and Pastor Washington Momanyi of the Pentecostal Assemblies of God. It is at this meeting that the 1st Defendant calmed down and forgave the Plaintiffs for what he termed as disrespect for dragging him to court over his own property. By then the First Defendant was very sick and on artificial oxygen. When the matter came to court for mention on 09/12/2021, the First Defendant came to court to express his frustrations occasioned to him by the Plaintiffs and to explain to the court that he did not want a curse to befall any of them. He was on a wheelchair and was meant to leave the country for further treatment in the U.S.A. the following week.

The court decided to take his evidence *de bene esse*. For the sake of smooth flow, we shall reproduce it after the Plaintiffs' evidence.

The 1st Plaintiff's averments contained in the Plaint dated 07/10/2019 were expounded in the 1st Plaintiff's undated statement filed in court on 07/10/2019 where she describes herself as the Administratix of the estate of David Mauti Nyarango, the late son to the 1st Defendant. She adopted this statement in court as her evidence in chief. She testified that on 24/01/2005 the 1st Defendant sub-divided the 22 Acre parcel of land known as L.R. **NO. NORTH MUGIRANGO/ NYANKONO SETTLEMENT SCHEME/17** into 3 portions allocating 7 Acres to

each of his 2 sons, viz. the Plaintiff's late husband and the 2nd Plaintiff and then retained 8 Acres to himself and the land was demarcated accordingly. On the strength of this representation, the 1st Plaintiff developed her portion and has used it to earn a living. She said that by virtue of occupying the 7 Acres with her family for over 40 years and by putting up her matrimonial home thereon, she is now entitled to an equitable interest over the 7 Acres and accordingly the 1st Defendant holds the same in trust for her and her children. She further proceeded to testify that her sisters in-law i.e. 2nd, 3rd and 4th Defendants hatched a scheme against her and conspired to have the suit land distributed amongst themselves. This they wanted to achieve by first trying to have the oral will reversed on 24/01/2005 and by entering the suit land forcefully on 20/06/2019 and attempting to evict the 1st Plaintiff and finally by inviting the Land Registrar, Nyamira and the County Surveyor on 3rd and 4th July 2019 to come and take the measurements of the suit land. She produced the following documents in support of her case:

1. A copy of the ad litem No. 54 of 2019 in respect to the estate of David Mauti Nyarango.

2. A copy of the caution lodged against L.R. NORTH MUGIRANGO/NYANKONO SETTLEMENT SCHEME/17.

3. A copy of Official Search in respect to L.R. NO. NORTH MUGIRANGO/ NYANKONO SETTLEMENT SCHEME/17 showing the caution lodged on 4th July, 2015.

4. A copy of the area chief's letter dated 2nd September, 2015 confirming that the Plaintiff has been living on the suit land since the year 1976 when she was married.

5. A copy of the official search in respect of L.R. NO. NORTH MUGIRANGO/ MAGWAGWA/IKONGE/877 dated 7th September, 2019

6. A copy of the official search in respect of L.R. NO. NORTH MUGIRANGO/ MAGWAGWA/IKONGE/2071 dated 7th September, 2019.

She accused the 2nd, 3rd and 4th Defendants of having chased her from the suit premises and told her to go to her parents since, according to the new Constitution of Kenya, 2010, she should get a share of her biological father's properties and they were to share their father's properties. She protested because her father's land had already been distributed among her brothers. She concluded her testimony by saying that she had sued the 1st Defendant because the latter is the registered owner of the suit land.

On cross-examination, Teresia said that she was the brains behind this case and that she did not know what a will is. She admitted that the 1st Defendant never wrote a will. She said that the 1st Defendant was registered the owner of the suit land in 2015. Before then it belonged to the Government until 1965 when the 1st Defendant purchased it and that her name does not appear in the Title Deed nor does the 2nd Plaintiff's. She further said that she was born in 1958 and that the 2nd, 3rd and 4th Defendants were living on the suit land when she got married. She admitted that the land is not ancestral. The ancestral land is elsewhere, in Nyamaiya. She claimed that on 07/04/2014, the 1st Defendant bequeathed **L.R. NORTH MUGIRANGO/ MAGWAGWA/877** to his grandson. The 3rd Defendant was also given **NORTH MUGIRANGO/IKONGE/2071** but that she has no documentary proof. She also said that she has nothing to show that she has been allocated 7 Acres out of the suit land. She admits that the land belongs to the 1st Defendant. When challenged about the role of the 2nd Plaintiff in the suit, she admitted that the latter did not participate in the institution of this suit and that she was not there to witness the 2nd Plaintiff sign the alleged authority to her permitting her to file the suit on 04/10/19. Her Advocate Mr. Migiro never met the 2nd Plaintiff even after she gave him the 2nd Plaintiff's phone number. On re-examination by Mr. Migiro, Teresia re-iterated that the 1st Defendant has allowed her to live on the suit land for over 40 years.

When the 2nd Plaintiff was put on the witness box and sworn he said that he was not a party to the suit. He said that he never recorded a statement in this case but he knew the 1st Plaintiff as the wife of his late elder brother, David Mauti Nyarango and that she lives in his (2nd Plaintiff's) father's land whose acreage is 22 Acres but does not know the acreage occupied by the 1st Plaintiff. On cross-examination by Mr. Nyachiro, the 2nd Plaintiff said that their father has never given them land. He only showed the Plaintiffs where to cultivate, albeit temporarily. He lamented that the 1st Plaintiff associated him with the case without his consent and/or knowledge. He also disowned the authority to sue dated 4/1/19, allegedly by him. He said that he saw it for the first time in court and that whoever filed it must have forged his signature. He said that the suit land was purchased by his father and that he never contributed to its purchase. It is not their ancestral land. Their ancestral land is in Bomabacho in Nyamaiya. While answering a question from the court, Elijah said that he was ready to abide by his father' wishes concerning the suit land.

Coming now to the First Defendant's evidence which was adduced de bene esse and preserved, he introduced himself as Ezekiel Nyarango Mauti and said that he was staying in Nairobi with his daughter, the 4th Defendant, Dina Nyarango where he was undergoing treatment. He adopted his statement dated 21/02/2020 where he said that the suit land belonged to him solely. He bought it from his own savings and with the help of his wife who is now deceased. He lamented that he had been assaulted and abandoned by the Plaintiffs forcing him to seek refuge at his daughter's home and also at one of his grandsons' house. The Plaintiff did not care about him and did not even give him food. He complained that the Plaintiffs had forcefully cut down the trees on his land. He also adduced evidence to the effect that he had given the Plaintiffs 2 Acres of the land each but the two had exceeded what was given to them. He produced documents Nos. 1 to 27 (inclusive) to back up the ownership of the suit land. He ended his testimony by saying that his wish and his last word is to sub-divide the suit land to all his children equally be they sons or daughters and that even after death, this is the wish he would want carried out in respect to all the properties still registered in his name. The parcel of land known as **L.R. NO. NORTH MUGIRANGO / NYANKONO SETTLEMENT SCHEME/17** should be sub-divided and distributed among his children in the aforesaid formula.

On cross-examination by Mr. Migiro for the Plaintiffs, Mr. Mauti said that the Second Plaintiff had fought his (1st Defendant's) late wife

over the suit land. He said he had not yet sub-divided his land save that he gave his grandson Joseph Getino Nyagonchonga some piece of land to cultivate without conferring ownership of the same. He did so because nobody wanted to cultivate the land he gave to the grandson. He acknowledged that the 1st Plaintiff had planted tea and Eucalyptus trees on the suit land. He said that the Plaintiffs have not been taking care of him and he reiterated that his properties will be distributed equally among all his children regardless of their gender, either during his lifetime or after his death.

The 2nd and 3rd Defendants all testified that **NORTH MUGIRANGO/NYANKONO SETTLEMENT SCHEME/17** is not their ancestral land. They were unanimous that the same should be left to their father to give to whoever he wished and that the 1st Plaintiff should not dictate to him how he should share out the land.

Mr. Charles Mwendwa Mutua, the Land Registrar, Nyamira adduced evidence in court and said that **NORTH MUGIRANGO/MAGWAGWA/877** was transferred to one Joseph Getuno Nyagonchonga. He also said in cross-examination by Mr. Migiro for the 1st Plaintiff that when he was invited by the 1st Defendant to sub-divide the suit land among his children, he went to the land with instructions to sub-divide the suit land into sub-divisions of 4 Acres each among the Plaintiffs, the 2nd, 3rd and 4th Defendants equally. This was the 1st Defendant's desire. To do this, the Land Registrar told the court that any caution against the land must be removed first. But the 1st Plaintiff entered a second caution thus inhibiting the work. As he and the County Surveyor were trying to establish the acreage of the land, they received summons to enter appearance in this case. They then stopped the process. Mr. Mutua is now surprised that the 2nd Plaintiff is the 2nd Plaintiff in the suit before court.

The matter in court has generated emotions for no good reason. It is not in dispute that the suit land, **L.R. NO. NYANKONO SETTLEMENT SCHEME/17** has always been the property of the 1st Defendant, ever since he bought it in 1965. It was not even ancestral land. This was long before the 1st Plaintiff joined the family of the 1st Defendant through marriage to the latter's late son, David Mauti Nyarango. When the 1st Defendant's wife, Neema Turusira Bochaberi Nyarango fell sick and the 1st, 2nd, 3rd and 4th Defendants were catering for her medical treatment and got so drained and fatigued and after struggling with the sickness and the hospital bills, the 1st Defendant decided to sell a portion of the suit land. This appears to have angered the 1st Plaintiff so much that she decided to file this case in court barring him from disposing of the land. She saw this as a conspiracy hatched by the 1st Defendant and his 3 daughters to dispose of the land and dispossess her. She filed an Application under certificate of urgency on 07/10/2019 and sought for restraining orders against the Defendants from disposing of the suit land or any part thereof on the ground that there was a 14 year old oral will in existence which will was allegedly made on 24/4/2005 allocating her part of the suit land measuring 7 Acres over which she had now acquired ownership by what she termed "equitable interest", developed it with a permanent house and eucalyptus trees and that the 1st Defendant, having disposed of the 8 Acres, now held it in trust for the 1st Defendant and Others. Of course, the same was vehemently opposed on the ground that she had no capacity to sue the 1st Defendant's and that the land belonged to the 1st Defendant. This Application was eventually disposed on 16/12/2019 by way of a consent order as follows: -

> **1. The 1st Respondent is hereby allowed to sub-divide parcel NO. NORTH MUGIRANGO/NYANKONO SETTLEMENT SCHEME/17 into 2 portions of 14 Acres and 8 Acres.**
>
> **2. The First Respondent is at liberty to sub-divide or sell the 8 Acres.**
>
> **3. The Title Deed for 14 Acres to remain in the name of the First Respondent (Defendant) with a permanent injunction not to sub-divide, dispose, transfer or mortgage until final determination of the suit.**
>
> 4. **The parties to comply with order 11 CPR before the next Hearing date**.
>
> **5. A Hearing date to be taken on priority basis as the Plaintiff's is in a poor health.**

I have carefully analyzed the pleadings and the testimony before this Honourable Court and I have formulated the issues as follows:

1. Was there an oral will or at all made by the 1st Defendant?

2. Is the Oral will allegedly made on 24/4/2005 (still) valid and subsisting and if yes does it form an overriding interest over the suit land?

3. Does the 1st Plaintiff have an equitable interest in the suit land as matrimonial property and if yes is the 1st Defendant holding the land in trust?

4. Is the 1st Plaintiff entitled to a permanent injunction against the 1st Defendant over the suit land?

The first issue I wish to deal with is the validity of the oral will said to have been made on 24/04/2005. A will as described by Black law's dictionary 9th Edition is

> **"The legal expression of an individual's wishes about the disposition of his or her property after death; especially a document by which a person directs his or her Estate to be distributed upon death."**

An oral will is one that is made verbally with the intent of ensuring that the wishes of the dying are carried out. It does not take a written

form. It is a will spoke to witnesses during sickness or made just before death or when the Testator is in the war. Oral wills are also referred to as a nuncupative will or deathbed will. Oral wills are made in special circumstances, often in dangerous situations when there may not be adequate or reasonable time to reduce it in writing. The oral will may be accepted if the person making it was in a state of danger or suddenly became ill and was unable to make a written will to ensure that his wishes would be honoured. For example, if the Testator is a member of the armed forces and is on active duty or in war or armed conflict or if the individual works in conjunction or by accompaniment of the armed forces during war or in active duty or is a mariner at sea.

At times proving an oral will is often subject to challenge. Because it was not written, it may be difficult for the witnesses to remember all the terms that the Testator provided. Witnesses may have different interpretations as to what was said. The oral will may have been delivered during a stressful time, such as the Testator being struck with a sudden illness. Individuals who are disadvantaged by the oral will may not want the instructions in the oral will to be carried out. Those trying to prove the provisions in the oral will may not be able to show that all of the requirements were met, such as the person being in peril of death. That is why it is quite paramount for an oral will to be reduced in writing as soon as is practicable.

Under Section 9 of the Law of Succession Act, CAP 160 Laws of Kenya,

> (1) No oral will shall be valid unless—
>
> (a)it is made before two or more competent witnesses; and
>
> (b) the testator dies within a period of three months from the date of making the will:
>
> Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.
>
> (2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided by sections 18 and 19.

It is now 17 years since the will was allegedly made. We are not told the special circumstances under which it was made. Secondly, we are talking about the validity of a will made by a person who is still alive and who has even testified in court. He should be allowed to speak for himself and he has actually spoken. And contradicted the alleged Will. It was therefore too pre-mature for the 1st Plaintiff to mention of a will (of a living person). If for sure there was a will, then the same lapsed on 24/07/2005, 3 months after the same was pronounced since it was never put down in pen and paper.

Without going deeper into whether or not the 1st Defendant made an oral will, the requirements for validating an oral Will have not been met since death has to occur within 3 months after the making of the said Will. From 2005 to date is over 3 months and the 1st Defendant is still alive and is likely to live much longer. We should therefore not waste time talking about ifs validity or otherwise. It ought to have been reduced in writing by now.

Further, an oral will cannot be described as an overriding interest since it is not listed in section 28 of the Land Registration Act. It automatically fails.

> **The 1st Defendant as the registered owner of the suit property is still alive. His property is not yet available for sub-division and distribution among his children except if he personally on his own free will decides to subdivide and distribute it among them. He cannot therefore be commanded, directed or ordered to do it against his own will.**

As to the Plaintiffs' interest, there is no law in Kenya that obligates parents to distribute land to their children during their lifetime. There is also no such a thing under Kenyan law as equitable interest over land. All rights over land are governed by statute. The First Plaintiff is stretching the law too far by asking the Court to declare the suit matrimonial land in her favour. That can only be the case where the land belongs to her husband and not her father in law.

In ***Nahashon Karenge & another v Lawrence Karenge [2014] eKLR*** ***Civil Appeal No 222 of 2010 Nyeri*** the Court of Appeal had this to say;

> ***"There is no vested right to inheritance during the lifetime of parents. Let it be known that during the lifetime of their parents, and subject to beneficial and occupation rights, a child cannot force parents to sub-divide and distribute their land or assets unless the said land or assets were acquired and held in trust prior to the parents' acquisition of title to the same".***

In the case of ***Marigi vs. Muriuki & 2 Others Civil Case No. 189 of 1996 (2008) e KLR 1073***, the Court held as follows;

> ***"It was stated that the law recognizes the rights of Children over their father's estate. These rights are inchoate and accrue upon the death of the father. The inchoate rights of the Respondent to the land owned by the 1st Appellant had not accrued at the time of filing suit before the High Court and at the time when this appeal was lodged. If the Respondent has any claim of land against his father, his inchoate rights accrued when his father (the 1st Appellant) died. …….. Further, the Learned Judge ignored the fact that the 1st Appellant was the registered proprietor of the suit property and it was an error of law to restrain the 1st appellant from trespassing and dealing with his own land".***

The rights of a registered owner of land is protected under section 25 of the Land Registration Act and the only exception is Trusts and overriding interests under section 28 of the Act. Even then the pleader of Trust must prove the presence of Trust in evidence. The Plaintiffs have not claimed any Trust and even if they had, they were obligated to prove the same in evidence. The law provides under section 26 of the Land Registration Act, subject to proof of ownership, the instances when a proprietor's right to land can be challenged, none of which include rights by children whether by birth or through marriage.

For the avoidance of doubt, it is clear that the Plaintiffs have no such rights in law over the suit land. There is unanimity between the Plaintiffs and the Defendants that the Plaintiff is the registered owner of the suit property and that the same is not Trust land nor is it inherited land. The suit land does not even fall under *the categories of a customary trust. What would have happened if the First Defendant had decided to drink all his earnings without investing anything as many parents normally do? What would the First Plaintiff have done? Why should he then be dragged in Court because of his being so considerate to acquire land?*

It is very shameful, sickening, disgusting, dishonourable and disgraceful that the First Plaintiff has the audacity to urge this Court to grant orders:

> *"restraining the 1st Defendant from* ***entering or interfering in any manner with the 14 Acres comprised in L.R. NO. NORTH MUGIRANGO/NYANKONO SETTLEMENT SCHEME/17"***

on the misguided and misinformed basis that she has acquired "equitable interest" over the same.

Section 24(a) of the Land Registration Act states as follows: -

> ***"the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto".***

No one can deny any proprietor of land such rights and privileges. I find it as spiting a parent when one goes to court to have him ordered not to enter his legally acquired land, from his hard earned labour and that he be ordered to distribute it among some of his children and more so when such children are living and earning a living out of the said land and particularly when the Defendant is on artificial oxygen with his health being very feeble. It is a sign of insensitivity, selfishness, thoughtlessness, heedlessness and ungratefulness. It is as if such children are concerned that he is taking too long to die. It is also unfortunate that when the 1st Defendant invited the Land Registrar and the County Surveyor to sub-divide the land among his children so that the children were at peace with one another, the 1st Plaintiff went to the Land's Office and cautioned it so that the exercise is not commenced and/or completed. And when she could not get support from anybody, the 1st Plaintiff instructed an Advocate to file a suit and included the name of his brother in law, the 2nd Plaintiff in the suit who did not participate at all in the filing of the suit.

The 1st Plaintiff ought to have been advised to be contented with what the 1st Defendant was going to give her. It is so gluttonous and preposterous that as the 2nd, 3rd and 4th Defendants were concerned about their mother's treatment and the escalating medical bills, the 1st Plaintiff went to court to injunct the 1st Defendant from disposing of part of the land to try and save her life. Documents have been produced in court to show that some of the Defendants have had to scale down their lifestyles so that they can take loans in order to prolong their parents' lives. They will surely get parental blessings. This case was at one time adjourned and given a distant date because the 1st Defendant had to be taken out of the country for treatment by his co-Defendants. While this was happening, the 1st Plaintiff was still pushing the court to restrain the 1st Defendant from even entering his own property, bought by himself and not even inherited. I pose this Question to the 1st Plaintiff. If I grant the prayers sought, that the 1st Defendant should not enter the suit land, where he has his own home and where he buried his wife who was mother to the 2nd, 3rd and 4th Defendants, do you have an alternative home for him? He is the only one who possesses rights over the suit land, which are sacrosanct and protected by the Constitution of Kenya, 2010. This court can therefore not deny him such rights or even curtail them. For the avoidance of doubt, the 1st Defendant has said in court that the suit property will be divided amongst all his children equally, regardless of sex. It is for him to decide whether this will be done during his lifetime or when he is dead. I have no reason to push him to do it now and as I have said earlier on, the alleged oral will is not and has never been there. But his wish is now on record and falls part of these proceedings courtesy of this suit. It is no longer left to guesswork. It is for him to decide when to make his wishes come to fruition, without any push or pull. The 1st Plaintiff is reminded here that it is not for her or for the court to decide when the 1st Defendant will give any of his properties to anybody. He is free to do so as long as he is alive. No one would even stop him from donating or bequeathing any or all of his properties to a charitable institution or even to strangers. I would advise the parties herein to allow the First Defendant to live in peace. Anyone who feels that he is taking too long to distribute his properties is free to leave the suit property and work for his own wealth.

The upshot of the above is that the suit dated 04/10/2019 and filed on 07/10/2019 is hereby dismissed. Any orders issued and anchored on the said Plaint are hereby vacated forthwith. Likewise, all the cautions placed on the suit land are hereby removed. Costs follow the event. And because the 2nd Plaintiff disowned this suit, it is clear that he was not privy to the filing of the same and never gave anybody any authority to file the suit, he will be spared any costs. All the costs herein i.e. those of the 2nd Plaintiff and of all the Defendants herein shall be borne by the 1st Plaintiff. The suit property is the property of the 1st Defendant and he has absolute rights to deal with the same as he wishes. Those rights are not subject to any of the parties in this suit. They are only subject to the limitations under the Constitution and any other written law. They cannot be impeached unless for a good cause and the 1st Plaintiff's claim does not fall in that category.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 4TH DAY OF APRIL 2022.

MUGO KAMAU

JUDGE

<u>In the Presence of</u>: -

Court Assistant: Sibota

Plaintiffs: 1st and 2nd Plaintiff Mr. Migiro

Defendants: 1st to 4th Defendants Mr. Nyachiro