



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Civil Case 286 of 2012**

**PETER MOTURI OGUTU.....PLAINTIFF**

**VERSUS**

**ELMELDA BASWETI MATONDA.....1<sup>ST</sup> DEFENDANT**

**CHARLES BARONGO OGUTU.....2<sup>ND</sup> DEFENDANT**

**JOSEPH NYABERA OGUTU.....3<sup>RD</sup> DEFENDANT**

**THOMAS OGUTU.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff brought this suit on 24<sup>th</sup> July, 2012 against the defendants seeking the following reliefs;-

**i. Cancellation of the titles for LR. Nos. East Kitutu/ Kebirichi/ 2811, 2812, 2813 and 2814 (hereinafter referred to where appropriate only as “Plot. Nos. 2811, 2812, 2813 and 2814”) and an order compelling the 1<sup>st</sup> defendant to sub-divide LR. No. East Kitutu/Kebirichi/661(hereinafter referred to as “the suit property”) into four equal portions in favour of the Plaintiff, the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants;**

**ii. Costs and interest;**

**iii. Any other relief that the court may deem just and expedient to grant.**

2. The plaintiff’s case against the defendants as set out in the plaint dated 24<sup>th</sup> July, 2012 was that, at all material times, the 1<sup>st</sup> defendant who is the mother of the Plaintiff and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants was the registered proprietor of the suit property. The Plaintiff claimed that the suit property was ancestral land and as such the 1<sup>st</sup> defendant held the same in trust for the Plaintiff, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. The Plaintiff claimed that on or about 4<sup>th</sup> November, 2011, the 1<sup>st</sup> defendant caused the suit property to be subdivided into four portions, namely, LR. No. East Kitutu/ Kebirichi/ 2811, 2812, 2813 and 2814(**Plot Nos. 2811, 2812, 2813 and 2814**), retained Plot No. 2811 in her name and transferred Plot Nos. 2812, 2813, and 2814 to 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants respectively. The Plaintiff claimed that the suit property having been ancestral land which the 1<sup>st</sup> defendant held in trust for the Plaintiff and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants as aforesaid, the 1<sup>st</sup> defendant was under a duty to share the same equally between the Plaintiff and the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants. The Plaintiff claimed that the 1<sup>st</sup> defendant’s failure to

give the Plaintiff a portion of the suit property amounted to a breach of trust. It is for the foregoing reasons that the Plaintiff brought this suit to seek the reliefs set out in the Plaintiff's particulars of which I have set out above.

3. The defendants filed a joint statement of defence to the plaintiff's claim on 10<sup>th</sup> August, 2012 in which they admitted that the suit property was ancestral land and that the same was held in trust by the 1<sup>st</sup> defendant for the Plaintiff, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. The defendants admitted further that the Plaintiff was entitled to an equal share of the suit property with the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants. The defendants denied however that the titles for Plot Nos. 2811, 2812, 2813 and 2814 should be cancelled for the purposes of fresh subdivision. The defendants claimed that the 1<sup>st</sup> defendant had intended to subdivide the suit property equally among her four sons namely the Plaintiff, the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants. The Plaintiff however refused to contribute money towards the sub-division exercise. In view of non-co-operation on the part of the Plaintiff, the defendants proceeded with the subdivision of the suit property and had one portion registered in the name of the 1<sup>st</sup> defendant to hold in trust for the Plaintiff while the other three portions were transferred to the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants as aforesaid. The defendants averred in their joint defence and in the statements that they filed in court that the 1<sup>st</sup> defendant is willing to transfer the portion of the suit property that was registered in her name to the Plaintiff.

4. The suit came up for hearing before me on 31<sup>st</sup> January, 2013. On that day, only the Plaintiff and his advocate appeared in Court. After satisfying myself that the defendants were duly served with a hearing notice, I allowed the hearing to proceed. The Plaintiff gave evidence and did not call any witness. In his evidence, he testified as follows; he stated that the 1<sup>st</sup> defendant is his mother while the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants are his brothers and that their father's name was **Ogutu Nyambane**. Ogutu Nyambane was the son of **Matonda Ogutu**. Matonda Ogutu who was the Plaintiff's grandfather was the first registered proprietor of the suit property. The Plaintiff's father, Ogutu Nyambane predeceased his father, Matonda Ogutu. When his grandfather died, the suit property was transferred to the Plaintiff's mother, the 1<sup>st</sup> defendant herein. Due to the foregoing, the suit property according to the Plaintiff was ancestral land. The 1<sup>st</sup> defendant caused the suit property to be subdivided into four portions one of which she retained in her name while the other three she transferred to the 2<sup>nd</sup> to 4<sup>th</sup> defendants. The Plaintiff produced as exhibits, a copy of the register for the suit property to show the proprietors over the years and copies of the certificates of official search for Plot Nos. 2811, 2812, 2813 and 2814 which show that the same are registered in the names of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants respectively. The Plaintiff stated that he was not given a share of the suit property during the subdivision aforesaid. He prayed that the said subdivision conducted by the 1<sup>st</sup> defendant be cancelled and the same be conducted a fresh with a view to the Plaintiff and the defendants getting portions of the suit property equally. After the close of his case the Plaintiff's advocate filed written submissions.

4. I have considered the pleadings filed by the parties, the evidence tendered and exhibits produced before the court. I have also considered the written submissions filed in court by the Plaintiff's advocate. The register for the suit property that was produced in evidence by the Plaintiff shows that the first registered proprietor of the suit property was one, Matonda Ogutu whom the Plaintiff had said was his grandfather. Matonda Ogutu was registered as the proprietor of the suit property on 24<sup>th</sup> November, 1966. The property was thereafter transferred to the 1<sup>st</sup> defendant on 22<sup>nd</sup> March, 1978 through what is indicated in the said copy of the register as "succession" of the estate of Matonda Ogutu. On 4<sup>th</sup> November, 2011, the 1<sup>st</sup> defendant changed her name in the title of the suit property from Basweti w/o Matonda to Elmelthah(sic) Basweti Matonda. Thereafter on 25<sup>th</sup> November, 2011, the 1<sup>st</sup> defendant subdivided the suit property into 4 portions and four new titles were issued and registered in the names of the defendants as indicated above. The certificates of official search for the said new titles produced by the Plaintiff in evidence show that the same are registered in the names of the defendants in the manner that the Plaintiff had stated in his evidence. The Plaintiff testified that he was 48 years old as at the date of his evidence. This means that he was born sometimes in the year 1965. The Plaintiff was therefore barely 13 years old when the 1<sup>st</sup> defendant became registered as the proprietor of the suit property. The Plaintiff

claims that the 1<sup>st</sup> defendant held the suit property in trust for him and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. The Plaintiff did not come out clearly how this trust came about. It is true from the evidence adduced by the Plaintiff that the 1<sup>st</sup> defendant inherited the suit property from her father in law who was the Plaintiff's grandfather. Does this inheritance of ancestral property alone make the 1<sup>st</sup> defendant a trustee of the property on behalf of her children? A trust whether implied, constructive, resulting or customary must be established. It is not clear whether Matonda Ogutu, the Plaintiff's grandfather who was the first registered proprietor of the suit property died testate or intestate. It is also not clear whether the Plaintiff and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants were indicated as heirs of his estate in the succession cause through which the suit property was transferred to the 1<sup>st</sup> defendant. Under section 35 of The Law of Succession Act, Cap. 160 Laws of Kenya, a wife has a life interest on the whole of the residue of the net estate of her husband where the husband dies intestate. In such a case, the wife enjoys the benefit of such property during her life time but holds the same in trust for her children and other heirs and dependants of the estate of the deceased husband the benefit of which accrues to such children upon the demise of the wife. In the present case, the 1<sup>st</sup> defendant was not the wife of Matonda Ogutu and as such could not without more be said to hold a life interest only in the suit property and the reversion in trust for her children. There was also no evidence placed before the court to the effect that the Plaintiff and the 2<sup>nd</sup> to 4<sup>th</sup> defendants were heirs or dependants of the said Matonda Ogutu or that the suit property was transferred to the 1<sup>st</sup> defendant in the said succession proceedings to hold in trust for the Plaintiff and the 2<sup>nd</sup> to 4<sup>th</sup> defendants. There was also no evidence that the suit property was transferred to the 1<sup>st</sup> defendant to hold on behalf of the estate of her deceased husband, Ogutu Nyambane, the Plaintiff's father. In the circumstances, I don't see any basis under the law of succession on which it can be said that the 1<sup>st</sup> defendant held the suit property in trust for the Plaintiff and the 2<sup>nd</sup> to 4<sup>th</sup> defendants. I don't think that the mere fact that the suit property was ancestral land before it was registered in the name of the 1<sup>st</sup> defendant *per se* made the 1<sup>st</sup> defendant a trustee of the same on behalf of Matondu Ogutu's descendants like the Plaintiff herein.

5. As I have stated herein above, the Plaintiff had to establish the existence of a trust on which his case could be hinged or mounted. The Plaintiff from the facts set out in the Plaint and from the evidence adduced in court seems to have been basing his claim on customary law trust which he fell short of proving. In the court of appeal cases of, **Muthuita .vs. Muthuita (1982-88) 1 KAR 42 at 44** and **Njenga Chogera .vs. Maria Wanjira Kimani & Others [2005] e KLR**, it was held that customary law trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded. Interests in land arising from customary law trusts are now expressly recognized under the provisions of **section 28 (b) of the Land Registration Act, No.3 of 2012**. The suit property was registered under the **Registered Land Act, Cap. 300 Laws of Kenya** (now repealed). Previously, it was debatable whether or not customary law rights which were not indicated in the register should be given recognition as overriding interests over land registered under the Registered Land Act, Cap. 300 (now repealed). The courts however recognized the existence of customary law trusts. In the case of **Gathiba -vs- Gathiba [2001] 2 E.A 342, Khamoni, J.** stated as follows (at page 348) with regard to section 30 and section 28 of the Registered Land Act, Cap. 300(now repealed):-

***“The position as I see it is therefore as follows:- correctly and properly, the registration of land under the Registered land Act extinguishes customary land rights and rights under customary law are not overriding interest under section 30 of the Registered land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to section 28 and section 126 (1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity***

***under any of the customary laws has the piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to section 28 of the Registered Land Act such registration does not relieve a proprietor from any duty or obligation to which he is subject as a trustee”.***

7. This statement by **Khamoni, J.** was approved by the court of Appeal in the case of **Mukangu –vs- Mbui, KLR (E&L)1,622** where the court stated as follows at page 633;-

*“We have also examined other authorities and we think it cannot be argued too strongly that the proper view of the qualification or proviso to section 28 is that trusts arising from customary law claims are not excluded in the proviso. Such claims may stem from the possession and occupation of part of the Registered land which although strictly it may not be an overriding interest under section 30(g), it nevertheless gives rise to a trust which is capable of protection under the Act”.*

In this case the court held that a trust arose in favour of a son from the son’s possession and occupation of his father’s land which trust was protected under sections 28 and 30(g) of the Registered Land Act, Cap. 300 (now repealed).

8. It will be noted that in the cases that I have highlighted above, it was maintained and held by the courts that rights under customary law were not overriding interests under section 30 of the Registered Land Act, Cap. 300 (now repealed). The courts however recognized the existence of customary law trusts and tried through statutory interpretation to secure their protection under the Registered Land Act, Cap.300 (now repealed). This position prevailed prior to the enactment of the Land Registration Act, 2012 which now gives express statutory recognition to customary law trusts as overriding interests over registered land. The Plaintiff herein could therefore establish a valid claim to the suit property based on customary trust. The Plaintiff did not however place sufficient evidence before the court on which the court could find such a trust. The fact that the suit property was ancestral land was not enough to establish the existence of a trust relationship between the Plaintiff and the 1<sup>st</sup> defendant in relation to the suit property. Due to the foregoing, I am not satisfied that the Plaintiff has proved a case based on trust.

9. I have noted however that the defendants have admitted in their defence that the suit property was ancestral land and that the 1<sup>st</sup> defendant held it in trust for the Plaintiff and the 2<sup>nd</sup> to 4<sup>th</sup> defendants. The defendants have also admitted that the 1<sup>st</sup> defendant is ready and willing to transfer the portion of the suit property registered in her name to the Plaintiff as she was holding the same in trust for him. This being the case, it may be argued that it was not necessary for the Plaintiff to prove facts that were admitted. I went to great length to analyze the Plaintiff’s case as pleaded and proved because the defendants did not file a statement of admission but a defence. It is in this defence that they admitted the averments of fact contained in the Plaintiff’s case save only for the reliefs sought. Instead of the titles issued pursuant to the subdivision of the suit property that was carried out by the Plaintiff being cancelled and a fresh subdivision carried out as prayed for by the Plaintiff in the Plaintiff’s case, the defendants have proposed that the 1<sup>st</sup> defendant do transfer a portion of the suit property that was registered in her name and which she has admitted to be holding in trust for the Plaintiff to the Plaintiff. I have noted that the suit property was subdivided into four equal portions. According to the 1<sup>st</sup> defendant, her intention was to transfer the four portions to her four sons the Plaintiff included. The portion meant for the Plaintiff was however retained in her name because the Plaintiff was not willing to contribute towards the expenses for the subdivision. The Plaintiff did not file a reply to the defendants’ defence to deny this allegation. I am therefore inclined to enter judgment for the Plaintiff against the 1<sup>st</sup> defendant not as prayed for in the Plaintiff’s case but on the defendants’ admission. I enter judgment for the Plaintiff against the 1<sup>st</sup> defendant and order that the 1<sup>st</sup> defendant do transfer to the Plaintiff forthwith all that parcel of land known as **LR. No. East Kitutu/ Kebirichi/ 2811**. The Plaintiff shall meet the costs of the said transfer and proportionate share of the subdivision costs. Each party shall bear its own costs of this suit.

**Dated, signed and delivered at Kisii this 31<sup>st</sup> day of May, 2013**

**S. OKONG’O,  
JUDGE**

**In the presence of:**

Mr. B. Masese for Plaintiff  
No appearance for Defendants  
Mobisa Court Clerk.

**S. OKONG'O,  
JUDGE.**