



**Ng'Ang'A v Ndegwa & another (Environment & Land Case
640 of 2014) [2022] KEELC 4924 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 4924 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 640 OF 2014**

**JO OLOLA, J
JUNE 16, 2022**

BETWEEN

JOSEPH WANJIE NG'ANG'A PLAINTIFF

AND

THOMAS KAMAU NDEGWA 1ST DEFENDANT

LAND REGISTRAR, MURANGA 2ND DEFENDANT

JUDGMENT

1. By a plaint dated August 3, 2012 and filed on an even date, the plaintiff herein instituted this suit seeking judgment against the defendants jointly and severally for: -
 - a. An order that Peter Ndegwa Wanjie (deceased) until the time of his death, unlawfully retained title for the parcel of land known as Loc 11 Maragi/1089 (suit land) and that the retention of the title to the suit property and subsequent registration of the suit land in the name of the 1st defendant was unlawful;
 - b. An order that the 2nd defendant does cancel the current registration of the suit land and does issue the plaintiff with a title for LOC 11 Maragi/1762 measuring 6.3 acres as per subdivision done by the deceased before the property suit property was wrongfully transferred to him.
 - c. Costs of the suit.
2. The plaintiff's suit is premised on the grounds that the registration of the deceased and subsequently the 1st defendant as the proprietor of the suit land is subject to a trust in his favour; that in recognition of the pleaded trust, the deceased had subdivided the suit land into three distinct portions to wit LOC 11/Maragi 1760, 1761 and 1762 measuring 4.0, 2.3 and 6.3 acres respectively and that in breach of the trust vested in him, the deceased retrieved the title to the suit land from the 2nd defendant and



retained it making it impossible for the plaintiff to obtain title for his portion to wit Loc 11/Maragi 1762 measuring 6.3 acres.

3. Arguing that upon subdivision of the suit land and registration of the subdivisions therefrom the title to the suit land ought to have been cancelled, the plaintiff laments that in 2011 the 1st defendant unlawfully got himself registered as the proprietor of the suit land.
4. It is the plaintiff's case, that the actions of the deceased and the 1st defendant complained of have caused him great loss and damage.
5. *Vide* his statement of defence filed on September 13, 2012, the 1st defendant denied the plaintiff's contention that in recognition of the pleaded trust, the deceased subdivided the suit land into three portions and that the deceased fraudulently retrieved the title to the suit land from the 2nd defendant. The 1st defendant further denies the contention by the plaintiff that he unlawfully transferred the suit land to himself and that he (the plaintiff) is entitled to 6.3 acres out of the suit land.

Evidence

The Plaintiff's Case.

6. When the suit came up for hearing the plaintiff informed the court that the suit land belonged to his grandmother, Marceline Wambui who assigned the deceased (Peter Ndegwa) as the custodian of the land. The plaintiff informed the court that the suit land was later subdivided under the instructions of the deceased in accordance with the respective interests of the beneficiaries. To prove that fact, the plaintiff produced a letter from the deceased to the Town Clerk, Muranga Town Council dated December 28, 1976 and received by the Town Clerk as Pexbt 1. Through that letter, the deceased informed the Town Clerk how the suit land should be shared between the plaintiff's father and his brother.
7. The contents of the letter are as follows: -

“I would like to request you to allow me to share my land parcel No 1089 which is within Muranga Township to my son and my brother and the other piece to remain with me as shown here below: - The pieces will be used for agricultural purposes: -

Peter Ndegwa Wanjie.....2.3 acres

Michael Ng'ang'a Wanjie.....6.3 acres

George Ngamau Ndegwa.....4.0 acres”
8. The plaintiff informed the court that his father Michael Ng'ang'a Wanjie was registered on his behalf because he was still underage. He pointed out that the proposed subdivision was as per the wish of his grandmother to have the property shared between him and his cousin, George Ngamau Ndegwa.
9. In further proof of his case the plaintiff produced the following documents: -
 - i. Letter from the Town Clerk, Muranga Town Council, to the Commissioner of Lands dated February 18, 1977 informing the Commissioner of Lands the deceased had applied for subdivision of the suit land as per *Pexbt* 1 above and that the council had no objection;
 - ii. Letter from the Commissioner of Lands to the Town Clerk, dated May 31, 1977, returning the proposed scheme of subdivision unapproved for amendment as advised therein;



- iii. Letter from the Town Clerk to Commissioner of Lands dated June 19, 1977, seeking clarification on the amendments that were required in order for him to advise the applicant;
 - iv. Letter from Commissioner of Lands to the Town Clerk dated June 28, 1977 advising that the applicant gets in touch with the Provincial Physical Planner for advice;
 - v. Letter from the Town Clerk to the Provincial Physical Planning Officer dated July 5, 1977 submitting the proposed subdivision plans to the Provincial Physical Planning Officer for advice;
 - vi. Letter from the Provincial Physical Planning Officer to the Town Clerk dated July 14, 1977 responding to the Town Clerk's request for advice concerning the proposed subdivisions;
 - vii. Letter from the Town Clerk to the deceased dated July 29, 1977 to visit the office of the Provincial Physical Planner for advice concerning the proposed subdivisions.
 - viii. Application by the deceased to the Town Clerk to change ownership of the suit land from himself as per Pexbt 1 above;
 - ix. Letter from the Town Clerk to the Provincial Planning Officer, dated August 22, 1977, submitting amended lay out plans for his action and onward transmission to Commissioner of Lands for approval;
 - x. Letter from the Town Clerk to the Commissioner of Lands dated January 3, 1978, requesting for approved copies of lay out plans for the suit land among other properties;
 - xi. Letter from the Town Clerk to the Commissioner of Lands dated April 5, 1978 asking for approved copies of lay out plans for the suit land as per the request made vide Pexbt II above;
 - xii. Proposed subdivision plan of the suit land;
 - xiii. Letter from the town clerk to Fr J Getonga dated May 19, 1978 informing Fr J Getonga that the suit land had gone through the council for subdivision and that it appeared that the Commissioner of Lands had approved it;
 - xiv. Letter from the Town Clerk to the Commissioner of Lands dated June 20, 1978 reiterating his request for approved copies of the proposed subdivision plans for the suit property.
 - xv. Letter from the Town Clerk to the deceased informing him that the request for subdivision of the suit land had been approved by the Commissioner of Lands and advising him to carry out the registration process through the Land Registrar.
10. PW 2, John Gitau Nganga, a younger brother to the plaintiff, relied on his witness statement recorded and signed on July 31, 2014 after the same was adopted as his evidence in chief. He informed the court that the plaintiff was summoned by the chief (Maragi) over his dispute with the defendant over the ownership of the subject matter of this suit. He stated that the defendant offered the plaintiff 3 acres but the plaintiff rejected saying he was entitled to 6.3 acres.

The Defendant's Case.

- 11. DW 1, Rev. Francis Kamau Gitau, relied on his witness statement recorded and signed on March 29, 2014 after the same was adopted as his evidence in chief.
- 12. In cross examination, he stated that he was elected Chairman of Kanja clan in 1994 and re-elected in 2000 and 2007. He stated that he knows where the suit land is located; that it measures 12.6 acres; that



- the land has been unoccupied for a long period of time and that the plaintiff has a house in the suit land and his father is buried thereat; that George Kamau a brother to the 1st defendant lives on the suit land and he has lived there for a long time.
13. The court heard that the plaintiff's father lived in Kihara but he could not tell whether the plaintiff's father had a house in the suit land. He stated that as a clan, they had not received any complaint from the family of Thomas Kamau about the plaintiff's father being buried in the suit land and that he was not aware of any meeting called by the local chief to resolve a dispute between the parties in relation to the suit land.
 14. In re-examination, he informed the court that three days before he attended court to testify, he noted there was a permanent building on the suit land but stated that he does not know the owner of the house although the 1st defendant is currently the registered owner of the suit land.
 15. The 1st defendant, Thomas Kamau Ndegwa, who testified as DW 2 told the court that he is the registered owner of the suit property but he holds it in trust for his siblings. He stated that he acquired the property through succession proceedings for the estate of his father.
 16. He informed the court that vide a letter dated 28th December 1976, his father intended to subdivide his land between his sons. On perusal of the letter, the court observed that the letter is not legible but noted that the same information is clearly captured in the application to change the name of the registered ownership. DW 2, told the court that the application was never considered and was not effected.
 17. DW 2 informed the court that the plaintiff's father, (who is a brother to his father), sold all his land but kept demanding land from his father when he was alive. DW 2 told the court that this is the reason why the plaintiff's father was buried in the suit land.
 18. DW 2 informed the court that the plaintiff visits the suit land but has never lived on the land. He stated that he is not aware whether the plaintiff has ever obtained letters of administration of his father's estate.
 19. In cross examination, he stated that he was born in 1964 and that he was 12 years old in 1976. He maintained that he was registered as a trustee for his siblings through succession proceedings; that his brother George had lived in the land for about 40 years but he is now deceased and is buried on the suit land.
 20. Concerning the summons for confirmation of grant that show that he stated that he be registered as the sole proprietor of the suit land, he stated that he made that application/statement because his brother George was at that time deceased. He admitted that he did not include his brother's wife and children as beneficiaries.
 21. He admitted having seen the original map of the area (produced as Pexbt 15 showing that the suit land was subdivided into three parcels and the Registry Index Map (RIM) was amended to reflex the subdivisions) but stated that according to him, the land was not subdivided into three parcels. He stated that he was not aware of the amendments in the RIM.
 22. He acknowledged that for subdivision to take place, the original title deed must be returned but stated that his father never returned the title to the land office.
 23. He admitted that the land originally belonged to his grandfather and that his father being the first born was registered to hold in trust for his siblings.
 24. He stated that the land was given to his father by his grandmother through a succession process and there was no objection by his siblings.



25. He admitted that his father was alive when the plaintiff's father was buried on the suit land but stated he was bed ridden and could not make a decision. He informed the court that he tried to get a court order to stop the burial on the suit land but did not succeed.
26. He admitted that there was a meeting called by the local chief over the suit land on February 6, 2012 but he denied having offered the plaintiff 3 acres and stated that the chief's letter is clear that there was no resolution.
27. DW 2 informed the court that there are many relatives buried on the suit land and no objections have ever been raised. He further informed the court that his brother's wife and nephew have constructed permanent buildings on the suit land.
28. In re-examination, he stated that the suit land was given to him through succession proceedings; that none of his family members have ever complained or filed any suit challenging the title being registered in his name; that the RIM shown to him by counsel for the plaintiff contains mutations which are not registered; that at all times, his father had the original title deed; that he is the one who surrendered it so that he could be issued with his title. He stated that his father has never held parcel number 1089 in trust for anybody; that he had always been the absolute owner and the plaintiff has no right over the land.
29. DW 3, John Peter Gachahi Ndegwa, a resident of Kiharu Muranga, relied on his statement recorded and signed on March 29, 2014 after it was adopted as his evidence in chief. According to him, the plaintiff has no interest in the suit land because the land is currently registered in the 1st defendant's name having gotten it from his father who was the absolute owner of the suit land.
30. In cross examination, he stated that he knows the plaintiff and the 1st defendant's fathers; that they were cousins to his father. He stated that the plaintiff's father used to live on the land and he had a semi permanent house therein although he did not attend his burial. He stated that he is aware that the plaintiff still lives in the same house his father lived in but was not conversant with the history of the land.
31. In re-examination, he stated that he has never gone to the suit land and does not know whether or not the plaintiff lives in the land; that he does not know whether any of the siblings of the 1st defendant live on the land but he knows that the family of the 1st defendant brother, George (deceased) live on the land.
32. At close of hearing, parties filed submissions which I have read and considered.

Analysis and Determination.

33. From the pleadings filed in this case, the evidence adduced and the submissions, the sole issue for determination is whether the plaintiff has made up a case for being granted the orders sought.
34. In the case of *Isack M'Inanga Kiebia v Isaya Theuri M'Lintari & another* (2018) e KLR the Supreme Court stated: -

“We now declare that customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to section 28 of the *Registered Land Act*. Under this legal regime, (now repealed), the content of such a trust can take several forms.....It is for the court to make a determination, on the basis of the evidence, as to which category of such a trust subsists as to bind the proprietor..... 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:

- i. The land in question was before registration, family, clan or group land
- ii. The claimant belongs to such family, clan, or group
- iii. 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.
- iv. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
- v. The claim is directed against the registered proprietor who is a member of the family, clan or group.

(53) We also declare that, rights of a person in possession or actual occupation under section 30(g) of the *Registered Land Act*, are customary rights.”

35. In applying the above principles to the instant case where the plaintiff has by way of evidence demonstrated the intention of the deceased to determine the pleaded trust and to register part of the suit land in the name of the plaintiff’s father on his behalf because he was a minor at the time, it behooved the 1st defendant to prove the circumstances that led to change of the deceased’s declared intention to subdivide the suit property between himself and his brother, in half shares. That conduct is by itself evidence in support of the plaintiff’s case. I note from the evidence adduced by the plaintiff that the portion claimed by the plaintiff is in use and possession of the plaintiff. The plaintiff’s deceased father is buried thereon. There is also evidence that the Registry Index Map (RIM) was amended to reflect the changes the deceased wanted to effect concerning the suit property. What remained was merely registration of the parcels as desired by the deceased. The parcel in respect of which the 1st defendant holds title no longer exists in the RIM, the same having been amended.
36. In the case *Peter Rugu Gikanga & another vs Hellen Muringe Kabutha & another* (2018) e KLR it was observed:-

“The RIM is used for subdivision of registered land. ... The process of amending the RIM thus is as follows that the surveyor first prepares the mutation form in triplicate and on it he indicates all the measurements and areas of the resultant subplots. In case a landowner has commissioned a licensed surveyor, that surveyor sends the form to the District Surveyor who checks it with regard to the accuracy in measurements, calculation of areas as well as its plot ability for the amendment of the map. He then issues new numbers to the subplots and cancels the old number and presents the form to the Land Registrar for registration and issue of new title deeds. After this, the land Registrar retains (files) one copy and forwards two copies to the District Surveyor or in some cases the Director of surveys to use in the amendment of the RIM Without following this procedure, any amendment of the map as a result of sub division is void. It should be noted that any other change on the RIM should also be supported by a mutation form.”



37. From the documentary and oral evidence produced by the plaintiff and his witness, PW 2, I entertain no doubt that the registration of the deceased and the 1st defendant as proprietors of the suit property is subject of a trust in favour of the plaintiff or the plaintiff's deceased father to the extent of 6.3 acres. With the explanation given by the plaintiff that the intention of their grandmother was to give the land to him and his cousin Ngamau, and there being no basis for not believing in explanation, I find and hold that the registration of the 1st defendant as the proprietor of the parcel of land known as LOC11/Maragi/1069 (which title ceased to exist upon subdivision of the land) is subject of a trust in favour of the plaintiff to the extent of 6.3 acres. Consequently, I order for cancellation of the title held by the 1st defendant and the registration of the plaintiff as the proprietor of Loc 11/Maragi 1762, a subdivision thereof.

38. I award the costs of the suit to the plaintiff.

39. Orders accordingly.

DATED AND SIGNED AT ITEN THIS 19TH DAY OF MAY, 2022.

L. N. WAITHAKA

JUDGE

READ, SIGNED AND DELIVERED AT NYERI THIS 16TH DAY OF JUNE, 2022.

J. O Olola

JUDGE

