



Macharia v Maina (Suing as Legal Representative of the Estate of Jeremiah Muriithi Macharia) & 4 others (Environment & Land Case 132 of 2017) [2022] KEELC 15681 (KLR) (15 July 2022) (Judgment)

Neutral citation: [2022] KEELC 15681 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 132 OF 2017**

**EC CHERONO, J
JULY 15, 2022**

BETWEEN

JAMES MAINA MACHARIA PLAINTIFF

AND

IRENE NJERI MAINA (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF JEREMIAH MURIITHI MACHARIA) 1ST DEFENDANT

CHARITY WAMBUI MURIITHI 2ND DEFENDANT

ERICK KINYUA MURIITHI 3RD DEFENDANT

RICHARD MACHARIA MURIITHI 4TH DEFENDANT

JACKSON KIHUHIA MURIITHI 5TH DEFENDANT

JUDGMENT

- 1 This suit was commenced by way of a Plaint dated September 11, 2017 seeking the following orders
 - a. A declaration that Jeremiah Muriithi Machari, now deceased, held land parcel Number Kiine/Ruiru/29 in trust for himself and the Plaintiff.
 - b. An order for determination of trust by having land parcel number Kiine/Ruiru/29 shared equally by the Plaintiff and the Defendant.
 - c. Costs of the suit with interest.
- 2 The defendants through the firm of Mercy Kabethi & Company Advocates denied the plaintiff's claim *vide* a statement of defence dated July 18, 2018 and filed in court on July 24, 2018. After the close of pleadings and the parties complying with pre-trial directions under Order 3, 7 and 11 of the [*Civil*](#)



Procedure Rules, this Honourable Court certified the case as ripe and the same fixed for hearing on November 15, 2021.

Plaintiff's Summary Of Facts

- 3 The plaintiff (PW1) was referred his witness statement recorded and filed in court on September 11, 2017 and which he asked the court to adopt in his testimony. According to the plaintiff, his father was known as Macharia Kihuha who was married to three wives and that he was given two parcels of land by the clan during land consolidation and adjudication period. He stated that the first parcel of land was given to the first born son of Kagendo, the second wife by the name Daniel Muriuki Macharia. He further stated that the second portion was given to the first born son of Mary Wangui, the third wife by the name Jeremiah Muriithi Macharia. He said that the first wife had no son but had only one daughter who was married by the time of land consolidation and demarcation. The plaintiff also stated that the family of the third house settled on the suit land parcel No Kiine/Ruiru/29 measuring 3.4 acres and that he has been living on this land since he was young together with his family to-date.
- 4 PW2 was Joseph Mwangi Kariuki who was also referred to his witness statement dated June 17, 2019 and asked the Court to adopt the same in his testimony. In brief, the witness stated that he comes from the same clan with the plaintiff and that at the time of land consolidation and demarcation, he was one of the committee members of the clan and that the plaintiff's father, Macharia Kihuhia had three wives. He said that the first wife did not get a boy but was only blessed with one daughter namely Kabui who was married by then.
- 5 He further stated that the second wife was known as Kagendo who was blessed with 2 sons and one daughter. That the two sons are known as Daniel Muriuki and Laban Mwangi. That the third wife was known as Mary Wangui who was also blessed with two sons and one daughter. The two sons were Jeremiah Muriithi Macharia and James Maina Macharia. The witness stated that as one of the clan members, they gave Macharia Kihuha two parcels of land but he opted that his eldest sons be registered to hold the same in trust. He said that the first parcel of land was registered in the name of Daniel Muriuki Macharia, the eldest son of the house of Kagendo to hold in trust for the house of the said Kagendo and that the said land is measuring approximately 6 acres. He further stated that while Daniel Muriuki Macharia was young, he was known as Gichohi. He said that the second parcel of land was registered in the name of Jeremiah Muriithi Macharia who was also known as Mugo Macharia while he was young, to hold in trust for the house of Mary Wangui, the third wife. He stated that the said parcel of land is measuring 3.4 acres and that the plaintiff and his family settled on this particular land.

The Defendant's Summary Of Facts

- 6 DW1 was Irene Njeri Maina who is also the 1st defendant in this case. She was referred to her witness statement dated September 14, 2020, which she adopted in her testimony. She stated that on June 21, 2016, She was appointed the Administrator of her father's Estate comprised in the suit land vide Kerugoya High Court Succession Cause No 61 of 2016 which was later confirmed on March 2, 2017 vide Baricho Succession Cause No 466 of 2016.
- 7 She stated that when she became of knowledgeable age, she found her grandmother living in the same homestead with the plaintiff herein in a small house adjacent to the grandmother (*cucu's*) house. She said that earlier before the plaintiff got married, her grandmother and aunt were utilizing another family farm known as Kiine/Nyangio/47. She said that the plaintiff was assisting her grandmother in the said land and after the plaintiff got married, her aunt stopped cultivating on the land and the plaintiff was given a portion to cultivate and utilize with his family. That later when her grandmother's health failed due to old age, she also stopped utilizing the said land parcel No Kiine/Nyangio/47 and



came to live in the suit land where her parents were attending to her and left Kamondo land parcel No Kiine/Nyangio/47 exclusively to the plaintiff. She stated that her grandmother even donated her house on the said land to the plaintiff but the plaintiff refused to move his family there.

8 DW2 was Jackson Kihuhia Muriithi who is also the 5th defendant herein. She stated that the 1st defendant is his sister while the plaintiff is their uncle. She referred to her witness statement he recorded on September 14, 2020 and asked the court to adopt the same in his testimony.

9 DW3 was Michael Karuku whose land is adjacent to the disputed land. He was also referred his witness statement dated September 14, 2020 which was adopted by the court as his testimony.

Analysis And Decision

10 I have considered the averments in the pleadings, the testimony by the parties and the witnesses, the witness statements, the list of documents which were also produced as exhibits as well as the submissions by their counsels and the applicable law. From the pleadings and the evidence adduced, the following facts are not in dispute; -

- a. The plaintiff and Jeremiah Muriithi (deceased) were brothers, the late being the elder brother.
- b. Their father was known as Macharia Kihuhia (deceased) and had three wives.
- c. The first wife was known as Kabui who was blessed with only one daughter who got married before Land demarcation and consolidation.
- d. The second wife was known as Kagendo who was blessed with one daughter and two sons, namely Daniel Muriuki and Laban Mwangi.
- e. The third wife was known as Mary Wangui who was also blessed with one daughter namely Lucy Wakiuri Maina and two sons namely; Jeremiah Muriithi Macharia and James Maina Macharia.
- f. The parties herein belong to the third house of Mary Wangui.
- g. The family of the third house of Mary Wangui settled on the suit land parcel No Kiine/Ruiru/29 and that families of the late Jeremiah Muriithi Macharia are on the suit land to date.
- h. The family of the second house of Kagendo settled on a neighbouring land which was given by the clan and got registered in the name of Kagendo's eldest son, Daniel Muriuki.
- i. There is a parcel of land which was purchased measuring 2 acres being LR No Kiine/Nyagio/47 which land is said to be still registered in the name of the seller.
- j. There is yet another land acquired by Jeremiah Muriithi (deceased) being parcel No Gakawa/Githimba/Block/Bugunet/738 measuring 2.44 Ha.

11 Flowing from the pleadings and the evidence adduced, the issues that comments for determination are as follows;-

1. Whether land parcel No Kiine/Ruiru/29 was held by Jeremiah Muriithi Macharia (deceased) in trust for himself and the Plaintiff?
2. If the answer to paragraph (1) above is in the affirmative, whether the interests of the Plaintiff's fiduciary rights can be defeated in Kerugoya High Court Succession cause NO 61 of 2016 and later confirmed vide Baricho Succession cause NO 466 of 2016?



3. Who is liable to pay costs of this suit?

Whether land parcel No. Kiine/Ruiru/29 was held by Jeremiah Muriithi Macharia (deceased) in the trust for himself and the Plaintiff ?

- 12 Customary trust is a concept which is defined by the Court of Appeal in the case of Mbui Mkangu Vs Gerald Wutwiri Mbui, CA No 281 of 200 which held;-

“..... that for one to establish a claim in customary trust, one had to prove that they are in actual physical possession or occupation of the parcel of land.”

- 13 The plaintiff in his testimony stated that the suit land parcel No Kiine/Ruiru/29 was given to his father by the clan during land consolidation and demarcation period but directed that the same be given to the house of his mother Mary Wangui and be registered in the name of his eldest son, Jeremiah Muriithi Macharia to hold in trust for himself and the entire family of Mary Wangui in accordance with Kikuyu Customary law.

- 14 The plaintiff also stated that they settled with their parents on the suit land parcel No Kiine/Ruiru/29 from the time he was young to date. His testimony was corroborated by his witness who was a clan elder, Joseph Mwangi Kariuki. Their evidence was not controverted. The Supreme Court of Kenya set out the principles to establish the existence of trust in the case of *Isack M'inanga Kiebia Vs Isaaya Theuri M'lintari & Another* (2018) e KLR held;

“ 52} Flowing from this analysis, we now declare that a 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. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses such as burials and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting were reserved for various future use, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. 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 Vs Kinuthia*, that what is essential is the nature 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.”

15 Applying these principles to this case, it is clear from the evidence that the plaintiff has been living in the suit land from the time he was young to date. It is not also in dispute that the suit land is a clan land given to the plaintiff’s father by the clan who directed to be registered in the name of his eldest son Jeremiah Muriithi Macharia in trust for himself and the house of his third wife, Mary Wangui. I find that the plaintiff has established that Jeremiah Muriithi Macharia (deceased) was indeed registered as proprietor of land parcel No Kiine/Ruiru/29 to hold in trust for himself and the family of house of the third wife Mary Wangui, including the plaintiff herein.

If the answer to paragraph (1) above is in the affirmative, whether the Plaintiff’s fiduciary right can be defeated in Kerugoya High Court Succession Cause No. 61 of 2016 and later confirmed vide Baricho Succession Cause No. 466 of 2016?

16 The 1st defendant in her testimony stated that on June 21, 2016, she was appointed administrator of her father’s estate comprised in the suit land herein vide Kerugoya High Court Succession Cause No 61 of 2016 which was later confirmed vide Baricho Succession Cause No. 466 of 2016. The question whether the rights of the plaintiff as a trustee can be defeated was aptly discussed in the case of *Henry Mwangi Vs Charles Mwangi*, CA NO 249 OF 2004 where it was held:

“Under Kikuyu Customary law, to which both parties are subject to, the eldest son inherits land as a Muramati to hold in trust for himself and other heirs. It would follow that even when the suit land was under the name of the plaintiff’s father it was subject to customary trust. The registration of the plaintiff pursuant to the grant of administration did not extinguish the trust on behalf of the lineage of Romano Kung’u. The land was already subject to customary trust.”

17 I agree with the above decision by the superior Court which is also binding on me. The original registered owner of the suit land parcel No Kiine/Ruiru/29, held the land in trust for himself and the household of his mother Mary Wangui, including the plaintiff herein and nothing would relieve him or his estate from that duty and obligation. It follows therefore that the grant issued to the first defendant vide Kerugoya High Court Succession Cause No 61 of 2016 and subsequently confirmed vide Baricho Succession Cause No 466 of 2016 is a nullity and of no legal effect.

Who is liable to pay costs of this suit?

18 It is trite that costs ordinarily follow the event, unless the Court for some good reason orders otherwise. In this case, the plaintiff and the defendants are close family relatives. In order to promote cohesion and co-existence between the family unit, I find it compelling reason to depart from the ordinary and do hereby order each party to bear their own costs of this suit.

19 In the final analysis, I find that the plaintiff has proved his claim on a balance of probabilities and do hereby enter Judgment against the defendants as follows;

1. A declaration that Jeremiah Muriithi Macharia, now deceased, held land parcel number Kiine/Ruiru/29 in trust for himself and the Plaintiff.
2. An order for determination of the trust by having parcel No Kiine/Ruiru/29 shared equally by the Plaintiff and the Defendant.



3. The Defendant to surrender the original title deed and execute all the necessary statutory documents for subdivision and transfer of half portion of the suit property to the Plaintiff failing which the Land Registrar, Kirinyaga County is directed to dispense with the production of the statutory documents and transfer half the suit land No Kiine/Ruiru/29 in favour of the Plaintiff.
4. Each party to bear their own costs of this suit.

Judgment READ, DELIVERED and SIGNED in the open Court at Kerugoya this **15th July, 2022.**

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HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

PARA 1.

M/S Wambui holding brief for Maina Kagio for Plaintiff

PARA 2.

Defendant/Advocate - absent

PARA 3.

Kabuta, Court Assistant – present.

<i>ELC NO. 132 OF 2017</i>	0
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