



REPUBLIC OF KENYA



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**Kamau v Ndikwe (Environment & Land Case 172 of 2013)
[2022] KEELC 13399 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13399 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 172 OF 2013**

JO OLOLA, J

SEPTEMBER 28, 2022

BETWEEN

VERONICA WANGU KAMAU PLAINTIFF

AND

PRISCILLA NYOKABI NDIKWE DEFENDANT

JUDGMENT

1. By an Originating Summons dated 28th August, 2013 as amended on 15th July 2015, Michael Muchiri Nderitu as later substituted upon death by Veronica Wangu Kamau (the Plaintiff) prays for the determination of the following questions:
 1. (Whether) the Defendant herein Priscilla Nyokabi Ndikwe (is) registered as proprietor of land parcel numbers Nanyuki/Marura Block 4/1101, Nanyuki/Marura Block 4/1102 and Nanyuki/Marura Block 4/1040 measuring (approximately) 46.425 Hectares in trust for the family of the late Ndikwe Mungatu;
 2. (Whether) Veronica Wangu Kamau the Plaintiff herein (is) entitled under trust to 23.2125 Hectares out of land parcel numbers Nanyuki/Marura Block 4/1101, Nanyuki/Marura Block 4/1102 and Nanyuki/Marura Block 4/1040;
 3. (Whether) the Honourable Court should terminate the trust and order the Defendant to transfer 23.2125 Hectares out of the suit land to the Plaintiff who is the granddaughter of the late Ndikwe Mungatu; and
 4. Who should bear the costs of this suit?
2. The Amended Originating Summons is supported by an Affidavit sworn by the said Veronica Wangu Kamau wherein she avers that the subject parcels of land are all registered in the names of the Defendant – Priscilla Nyokabi Ndikwe. The Plaintiff avers that land parcel numbers Nanyuki/Marura Block



- 4/1101 and 1102 are resultant sub-divisions of the original parcel number Nanyuki/Marura Block 4/1043 whose original registered owner was the late Mathai Ndikwe Mungatu who passed away in 1968.
3. The Plaintiff further avers that the late Maathai Ndikwe Mungatu had two wives – Ngunju Ndikwe and Julia Ndikwe. The Plaintiff avers that the suit properties herein were meant for the benefit of the first household of Ngunju Ndikwe but the Defendant herein who is a widow of one of the sons of Ngunju Ndikwe has caused all of them to be registered in her name without any regard to the Plaintiff's interests based on the trust.
 4. But in a Replying Affidavit sworn and filed on 17th September 2013, Priscilla Nyokabi Ndikwe (the Defendant) denies holding the subject parcels of land in trust for the family of the late Ndikwe Mungatu and/or for the first household thereof. The Defendant avers that Ndikwe Mungatu was her father-in-law and if indeed he holds the said parcels in trust, it is the children of Ndikwe Mungatu who would have lodged a claim and not the Plaintiff who is a grandson to her father-in-law.
 5. While conceding that those listed at Paragraphs 7 and 8 of the Plaintiff's Supporting Affidavit are the sons of the said Ndikwe Mungatu, the Defendant avers that it is not true they have all died as Wambugu Ndikwe and Gikunju Ndikwe who were the sons of the second wife – Julia Ndikwe are still alive.
 6. The Defendant avers that none of the children of Ndikwe Mungatu had laid claim to the subject parcels of land as they were all aware that the land though registered in Ndikwe's name belonged to the Defendant's husband. The Defendant avers that the parcels of land were initially registered in Ndikwe's name jointly with one Catherine Ngima Ndegwa who was entitled to half a share. The other share was to go to the Defendant's husband as he is the one who had raised the purchase price.

The Plaintiff's Case

7. The Originating Summons was disposed of by way of viva voce evidence and the Plaintiff called three witnesses in support of her case.
8. PW1 – Veronica Wangui Kamau is the Plaintiff herself and a resident of Mwea in Kirinyaga. PW1 told the Court she was the grand-daughter of Ndikwe Mungatu alias Maathai Mungatu. The grandfather had 2 wives namely Ngunju Ndikwe and Julia Ndikwe.

The Defendant herein is the wife to the last born of the 1st wife. PW1 told the Court her grandfather had two parcels of land, one in Mathari Nyeri and the other in Timau Nanyuki.
9. PW1 told the Court that following succession proceedings in 1988, the properties in Mathari were shared out as listed in the confirmation of Grant arising from Succession Cause No. 18 of 1988. Paul Mundia and Simon Ndikwe were chosen as the representatives of the two houses to hold the land in trust for the 2 families. The two representatives however passed away before transferring the land. They were then replaced by the Defendant for the 1st house and William Wambugu Ndikwe for the 2nd house.
10. PW1 told the Court that the land in Timau measuring 400 acres was bought by his grandfather jointly with another man by the name Kaigwa Munyuira. Each was entitled to 200 acres each. PW1 told the Court that when the Timau land was divided in 1989, the grandfather's share of 200 acres was divided equally with each of the households being given 100 acres. However while the 2nd house shared out the land as required, the 1st house in which the Defendant was the administrator never got their portion.
11. PW1 testified that their other family members Joseph Tumuti, Teresia Gathoni, Mary Wathima and James Kigute are not interested in the land because their fathers had bought their own land. PW1's father Gabriel Nderitu is however claiming a portion of the land being a half thereof. PW1 told the



- Court it was not true that the Defendant's husband had bought the land as by the time it was bought, the husband was still in college.
12. On cross-examination, PW1 testified that she was born in 1949. Her father passed away in 1959 while her grandfather died in 1968. She conceded that only her father's household was claiming the land. PW1 further told the Court that her mother never claimed the land. She was also aware that her other uncles and aunties from the Ngunju house have stated that the suit properties belong to the Defendant and that she does not hold it in trust for any person.
 13. PW1 told the Court she was claiming half of the land because although her father is only entitled to one sixth thereof, she was entitled to divide the land in half with the Defendant since the others have no interest. PW1 further told the Court they had decided not to challenge the Succession Cause and instead decided to file this case. She told the Court she does not live on the land as she is married and lives elsewhere.
 14. PW2 – William Wambugu Ndikwe is a resident of Nanyuki. He told the Court his mother was Ndikwe's second wife and that the Plaintiff was a daughter to his step-brother Nderitu. PW2 told the Court the land in Nanyuki (Kimuri) was purchased by a group of 10 men among then his uncles, brothers and step brothers. It was bought as one share which was equivalent to 400 acres.
 15. PW2 told the Court that as far as he knew, his father financed his share. Some of his step-brothers did the same. The land was divided into two as his father had jointly purchased it with someone. Thereafter it was further sub-divided between the two houses and when the original administrators died, PW2 and the Defendant became the administrators representing the two houses.
 16. PW2 told the Court the Defendant's husband Wamithi was born in 1944. He was unaware if at the time of the purchase of the land Wamithi contributed thereto. PW2 told the Court her mother's house shared out their portion and the Defendant should have done so for the first house.
 17. On cross-examination, PW2 told the Court the Defendant's husband was working when the land was purchased. PW2 did not contribute towards the purchase price and he does not know if the Defendant's husband did contribute. He was also unaware if the group of buyers took any loan and whether the Defendant's husband paid the loan. PW2 conceded that no family member objected to the Defendant being named as an administrator or to the land being registered in her name. PW2 further told the Court he was aware all other family members except the children of Nderitu had stated they had no interest in the land.
 18. PW3 – Monica Muthoni Kinyua is a sister to the Plaintiff and a daughter of Gabriel Nderitu. PW3 told the Court the suit land was one of the properties purchased by their grandfather. Her uncles including PW2 and the Defendant's husband assisted the grandfather to pay for the land. PW3 told the Court their mother had never asked the Defendant for the land and that she told them to pursue the issue themselves. Their mother was poor and did not have the ability to ask for the land.
 19. PW3 told the Court her aunties did not claim a portion of the land because they have their own portions. She further told the Court the land does not belong to the Defendant's husband and that they were not informed of the Succession Cause until after it was over.

The Defence Case

20. The Defendant called two witnesses who testified in support of their case at the trial.



21. DW1 – Priscilla Nyokabi Ndikwe is a subsistence farmer in Gatung'ang'a and the Defendant herein. She told the Court the Plaintiffs were the children of the brother to her husband. Their father was Gabriel Ndikwe while her husband is Simon Wamithi Ndikwe.
22. DW1 denied that she holds the suit properties in trust for the Plaintiff. On the contrary, she told the Court the land belongs to her husband who had bought it together with other partners. They bought the shares in a Ranch which was initially Kimuri Marura Block 4. DW1 told the Court the land was initially known as Marura Block 93 and 95. It later became known as 1040 and 1043 after sub-division.
23. DW1 told the Court her father-in-law passed away in 1968 and that in 1973 she had also assisted her husband to pay for the land with her gratuity. DW1 denied that the niece and nephew were left landless. On the contrary she told the Court the Plaintiffs had already inherited land from her father-in-law and that their land was known as Kirimukuyu 498.
24. On cross-examination, DW1 testified that her father-in-law had died intestate in 1968. A Succession Cause No. 18 of 1988 was then filed in the Principal Magistrate's Court at Nyeri. Before the death of her husband, the Defendant's husband represented the 1st house while Paul Mundia Ndikwe represented the 2nd House in the administration of the estate.
25. DW1 further told the Court the farm in Kimuri was half a share owned by his father-in-law. The other share was owned by one Kaigwa Munyweria. Each half-share comprised of 200 acres which is what came to be listed in the Certificate of Grant as Kimuri farm.
26. DW1 testified that before the estate could be administered, the two administrators both passed away. DW1 then replaced her husband while Paul Mundia was replaced by William Wambugu Ndikwe. Accordingly Parcel No. 93 93 Kimuri came to be registered in the name of the Defendant and that of William. Later the land was sub-divided so that William's mother's house could get their own. That produced Kimuri Block 1040 measuring 3.3 Ha. and which was registered in the Defendant's name. The other half block 1039 went to the other family.
27. DW1 told the Court the upper parcel of land which was bigger was known as Nanyuki/Marura/Block 4 (Kimuri 95). It measured 86.20 Ha. She told the Court this parcel was equally sub-divided into two portions with her own becoming Kimuri Block 1043 measuring 43.1 Ha. the other half Kimuri 1042 went to Julia's household. DW1 told the Court she later sub-divided her portion into parcel numbers 1001 and 1002.
28. DW1 told the Court the other half portion was given to the other house because half of the land had been contributed by her father-in-law. DW1 conceded that if the one-half belonged to Ndikwe Mungatu, then everyone being the survivor including Gabriel's children would have been given their portion. She further conceded that the parcel of land on which she lives being Ruguru/Kairuthi/747 is one of the parcels listed in the Certificate of Confirmation of Grant.
29. DW1 testified that her husband was paying the loan in AFC through cheques, salaries and even from her own gratuity. She told the Court the contribution was recorded in the minutes of the company to which she was paying and conceded she could not tell how much her husband contributed for the land as he had all the documents with himself.
30. DW1 further told the Court that her husband was the last born in the 1st house and that he was born in 1944. The land was acquired in 1964 when her husband was finishing his Form Four.



31. DW2 – Alice Kiguta Ndikwe hails from Gatung'ang'a and is a daughter-in-law to Maathai Ndikwe Mungatu. DW2 told the Court the Plaintiffs are the children of his brother while the Defendant is also the wife to her other brother.
32. DW2 testified that their father Ndikwe asked them to help buy them Kimuri land. DW2's husband and their elder brother refused to help as they were committed. The younger brother Simon Wamuthi agreed to help pay and their father agreed he would give him the land.
33. DW2 told the Court that for some 20 years after her father-in-law died, the Defendant's husband paid for the land and that there was no dispute before he completed making the payments. DW2 further told the Court that her husband was the chair of Kimuri and that she was aware it is the Defendant's husband who had paid for the land.
34. On cross-examination, DW2 testified that by the time she got married, the Plaintiff's father had passed away. She had heard that the Plaintiffs were given land in Kirimukuyu measuring 4.1 acres. DW2 further testified that her father-in-law had paid for the land upto some point. He could have paid for almost half the price of the land. DW2 conceded she did not know how much the Defendant's husband had paid for the land.
35. DW2 recalled that there was a Succession Cause filed at Nyeri in which each household contributed an Administrator. She further conceded it was true that each household got half of the deceased's properties upon distribution. She told the Court it was true the Defendant was given half the land while the other half went to the other family of Julia.

Analysis And Determination

36. I have carefully perused and considered the Originating Summons filed by the Plaintiff as well as the response thereto by the Defendant. I have similarly considered the testimonies of the witnesses herein, the evidence adduced at the trial as well as the rival submissions and authorities placed before me by the Learned Advocates representing the parties herein.
37. The suit herein was commenced in August, 2013 by one Michael Muchiri Nderitu against the Defendant – Priscilla Nyokabi Ndikwe. Following Michael's death in the year 2014, his sister Veronica Wangu Kamau took over the proceedings after being substituted in his stead.
38. From the material placed before me, the current Plaintiff and her deceased brother Michael were the children of one Gabriel Nderitu who passed away way back in 1959. The said Gabriel Nderitu was the first born son of one Ndikwe Mungatu with Ndikwe's first wife Ngunju Ndikwe. The said Ndikwe Mungatu also known as Maathai Ndikwe Mungatu had a second wife by the name Julia Ndikwe.
39. It was also clear that other than Gabriel, his mother Ngunju had three other sons and two daughters with Ndikwe Mungatu. As fate would have it, the old man Ndikwe Mungatu died intestate in 1968 leaving behind various properties in Nyeri and Nanyuki. Some 20 years after the old man's death, the family decided to distribute his estate. Apparently to start off the process, the family approached the Ngorano Location Area Chief who by a letter dated 20th January, 1988 addressed to "To whom it may concern" wrote as follows:

“ Re: Maathai Mungatu alias Ndikwe Mungtu “dcd”

The above named person who hailed from my location died on 26th May, 1968.

He is however having two surviving sons who will be administering his estate. Their names are:



(1) Simon Wamuthi Ndikwe ID No.

(2) Paul Mundia Ndikwe ID No.

I have therefore no objection for the above two sons to be the administrators of the said estate.”

40. Subsequent to the said letter, the family instituted Succession Cause No. 18 of 1988 at the then Principal Magistrates Court at Nyeri for purposes of distributing the estate. From a perusal of a Certificate of Confirmation of Grant issued in the said cause on 24th August, 1990 the family shared the properties equally with the administration thereof being placed in the hands of the two sons mentioned in the Chief’s letter aforesaid.
41. While the Plaintiff told the Court that the two sons were chosen by the two households to represent the interests of each house and to hold the properties in trust for the others, it was the Defendant’s position that the interest of Ndikwe Mungatu in the suit properties were specifically to go to her husband - Simon Wamuthi Ndikwe as he is the one who had raised the purchase price.
42. As it turned out the two appointed administrators passed away before the distribution of the estate. Following their death, the Defendant herein replaced her husband together with William Wambugu Ndikwe who testified herein as PW2 as the joint administrators. While the Plaintiff herein contends that the choice of the two was again informed by the need to have them represent the two households of Ndikwe Mungatu, the Defendant asserts that she was chosen as her husband’s representative and that unlike in the second household where PW2 held the properties in trust for his siblings, the property that came to be registered in her name were her own as she was the person legally entitled thereto by way of transmission.
43. It was however difficult to find any justification for the position taken by the Defendant herein. From the letter written by the Ngorano Location Area Chief dated 28th January 1988, it was clear that her husband’s name was proposed by the family as an administrator of the estate of her father-in-law and not on the basis that her husband was a co-owner of the land.
44. While she took the position that her husband and herself had helped to raise the purchase price, neither herself nor her sole witness could tell the Court the amount her father-in-law had paid and the portion of contribution her husband and herself had made towards the acquisition of the suit properties. At the point in time of distribution, neither the Defendant nor her now deceased husband had raised the issue of the land not belonging to her father-in-law. If indeed her husband claimed the land as his own and not to the father’s estate he ought to have had that issue raised and determined first prior to the distribution of the estate.
45. From the Defendant’s own admission during cross-examination herein, the two original administrators represented the two households of Ndikwe Mungatu and the properties were divided equally amongst them. When both her husband and the representative of the second household died, she did not inherit the properties as claimed but only took the representative position that her husband had held over the suit properties on behalf of Ndikwe’s first house. From the testimony of her brother-in-law William Wambugu Ndikwe (PW2) it was clear that just as William did, she was required to distribute the estate to the rest of the family members from the house of Ndikwe’s first wife.
46. Even where it was to be taken that her husband had made a contribution to the purchase of the land, which contribution she did not prove, there was no explanation offered why the family of Gabriel Nderitu could not inherit a portion of the properties for whose purchase the late Ndikwe Mungatu



had contributed to. According to DW2, that contribution was in the region of 50% and the whole family was therefore entitled to a share of the inheritance.

47. It follows that I am persuaded that there was a constructive trust in favour of the Plaintiff as against the Defendant. The Defendant's husband came into the picture to administer the estate of his father on behalf of the household of the first wife. He died before completing the distribution of the estate to the beneficiaries. That the Defendant was brought in to stand for her deceased husband did not vest the properties in her sole ownership. She was expected to finish the distribution process and not to take advantage of her position to disinherit those who were entitled to the properties.
48. As was stated by Lord Denning MR in *Hussey v Palmer* [1972] 3 All ER 744, a constructive trust is a trust imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the Court can enable an aggrieved party to obtain restitution. In the circumstances herein I am persuaded that justice and good conscience require that such a trust be imposed herein.
49. I was however not persuaded that the Plaintiff is entitled to half the suit properties merely because her three (3) uncles and two (2) aunties have failed to express any interest in the properties. As one of the six (6) sons and daughters of Ngunju Ndikwe, Gabriel Nderitu was only entitled to one sixth (1/6) of the suit properties being Nanyuki Marua Block 4/1101 (Kimuri), Nanyuki Marura Block 4/1102 (Kimuri) and Nanyuki Marua Block 4/1040 (Kimuri).
50. Accordingly I hereby answer the three questions posed in the Originating Summons in the affirmative and hereby declare and order as follows:
 - (i) The Defendant herein Priscilla Nyokabi Ndikwe is registered as proprietor of land parcel numbers Nanyuki/Marura Block 4/1101, Nanyuki/Marura Block 4/1102 and Nanyuki/Marura Block 4/1040 measuring approximately 46.425 Ha. in trust for the family of the late Ndikwe Mungatu and Ngunju Ndikwe.
 - (ii) Veronica Wangu Kamau the Plaintiff herein and the family of the late Gabriel Nderitu are entitled under trust to 7.7375 Ha. out of land parcel Numbers Nanyuki/Marura Block 4/1101; Nanyuki/Marura Block 4/1102 and Nanyuki/Marura Block 4/1040.
 - (iii) The said trust is hereby terminated and the Defendant is hereby directed to forthwith transfer the said 7.7375 Ha. out of the said suit properties to the Plaintiff to hold in trust for herself and the other members (if any) of the family of Gabriel Nderitu (deceased).
 - (iv) The Defendant shall bear the costs of this suit.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 28TH SEPTEMBER, 2022.

In the presence of:

Mr. Kimunya for the Applicant/Plaintiff

Ms Lucy Mwai for the Respondent/Defendant

Court assistant - Kendi

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J. O. Olola

JUDGE

