



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Charagu & another (Environment & Land Case 39 of 2018)
[2022] KEELC 15319 (KLR) (9 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15319 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 39 OF 2018**

JO OLOLA, J

DECEMBER 9, 2022

BETWEEN

JANE NYAWIRA MWANGI APPLICANT

AND

MWANGI CHARAGU 1ST RESPONDENT

EVA WANJA MWANGI 2ND RESPONDENT

JUDGMENT

1. By the originating summons dated August 2, 2018 as filed herein on August 3, 2018, Jane Nyawira Mwangi (the applicant) prays for:
 1. A declaration that the 1st respondent held the parcel of land LR No Konyu/Baricho/456 (“the suit land”) subject to a customary trust and the subsequent transfer of the suit land to the 2nd respondent is subject to that trust in favour of the two houses of the 1st respondent in equal shares;
 2. An order that the pleaded trust be determined with the suit land being shared equally between the two houses of the 1st respondent, with the applicant being registered for the half share due to the 1st respondent’s house where she belongs in trust (for) the identified beneficiaries of that house; and
 3. That costs be provided for.
2. The originating summons is supported by an affidavit sworn by the applicant wherein she avers *inter alia*, that the suit land originally belonged to her grandfather one Chanji Mwituria who was the father to the 1st respondent herein. The applicant avers that following the death of both her grandfather and grandmother, her father, the 1st respondent, was left in possession of the land.



3. The applicant further avers that the 1st respondent married two wives, Eva Wanja Mwangi (the 2nd respondent therein) as the 1st wife and the applicant's mother Esther Nyaruai Mwangi (now deceased) as the 2nd wife. The applicant avers that the marriage between his father the (1st respondent) and the 2nd respondent did not bear any children while that of the 1st respondent and the applicant's mother brought forth 11 children.
4. It is the applicant's case that with the intention of excluding her mother from the suit land, the 1st respondent purchased another parcel of land in Rumuruti, Laikipia where he ordered the applicant's mother to settle. The applicant's said mother passed away in February, 2018 and the applicant has since learnt that the 1st respondent had on or about September 21, 2010 transferred the suit land to the 2nd respondent. It is her case that the suit land is for the benefit of the 1st respondent's two families and hence the orders sought herein.
5. Mwangi Charagu (the 1st respondent) is opposed to the grant of the orders sought. In a replying affidavit sworn on September 18, 2018 and filed herein on September 21, 2018, the 1st respondent asserts that the 2nd respondent is his first wife and that the applicant herein is his daughter from his second wife Esther Nyaruai Mwangi who is now deceased.
6. The 1st respondent avers that he married the 2nd respondent before independence in the 1950's. He asserts that though they have no biological children with the 2nd respondent, they had legally adopted a daughter called Miriam Nyaguthi Mwangi in the year 1988.
7. The 1st respondent further avers that he met and married the applicant's mother while working at Warazo, Kieni where they lived as the 2nd respondent remained on and worked on the suit land. The 1st respondent avers further that he thereafter proceeded to purchase four parcels of land being Laikipia/Salama/Muruku Block 4/475, 530 and 229 (pesi) all measuring eleven (11) acres all of which he registered in the name of the applicant's mother. Thereafter he relocated the applicant's mother and her family from Warazo village to the newly acquired land.
8. The 1st respondent avers that neither the applicant nor her deceased mother had ever lived on the suit land and that after giving the applicant's mother the 11 acres of land in Laikipia, he also transferred the suit land to the 2nd respondent in order to safeguard her interest. The 1st respondent asserts that the applicant has no legal claim over the suit land and that no trust can be inferred in her favour in the manner sought herein.

Analysis and Determination

9. Following directions given herein on December 15, 2021, the parties agreed to have the matter proceed by way of affidavit evidence as well as submissions. I have accordingly carefully perused and considered the pleadings filed herein as well as the annexures attached. I have similarly perused and considered the written submissions and authorities placed before me by the Learned Advocates representing the parties herein.
10. By the originating summons before me, the applicant prays for a declaration that the 1st respondent held the suit land – LR No Konyu/Baricho/456 measuring some 2.8 acres subject to a customary trust and that the subsequent transfer of the same to the 2nd respondent is subject to the said trust. In addition, the applicant urged the court to determine the said trust and to direct that the suit land be shared equally between the 1st respondent's two houses with the applicant being registered for the half-share in trust for the beneficiaries of her mother's house.



11. From the material placed before me, the applicant is the daughter of the 1st respondent and his second wife one Esther Nyaruai Mwangi who passed away in February 2018, some six (6) months before this suit was instituted. The said Esther Nyaruai Mwangi had eleven (11) children, including the applicant herein, with the 1st respondent. On the other hand, the 2nd respondent is the first wife to the 1st respondent. While they did not have any biological children, the 1st and 2nd respondent adopted a daughter in the year 1988.
12. According to the applicant, her mother's house is entitled to one half share of the suit land as the said land originally belonged to her grandfather one Chanji Mwituria. While the said parcel of land was transferred by her father to the 2nd respondent in the year 2010, it is the applicant's case that the said transfer was subject to a customary trust that requires that the disputed parcel of land be shared equally between her father's two wives.
13. While confirming that the applicant is his daughter with the said Esther Nyaruai Mwangi, the 1st respondent avers in response to the originating summons that he met the applicant's mother while working at a place known as Warazo in Kieni. It is his case that they settled in the said Warazo village before he purchased land parcel Nos Laikipia/Salama/Muruku Block 4/475, 530 and 229 (Pesi) measuring some 11 acres in Laikipia. He then settled the applicant's mother on the land in Laikipia. It is the 1st respondent's case that neither the applicant nor her late mother ever lived on the suit land and that the applicant has no claim whatsoever to the suit land.
14. As it were, customary trust is one of the overriding interest hinged on the land that is given recognition under the [Land Registration Act, 2012](#). This as it were is a carry-over of the provisions of sections 27 and 28 of the now repealed [Registered Land Act](#) (cap 300) which provided that the rights of a registered proprietor of land registered under the Act were absolute and indefeasible and only subject to the rights and encumbrances noted on the register or the overriding interests which were set out under section 30 of the Act.
15. The provisions of sections 27 and 28 of the repealed Act are similar to the provisions set out in sections 24, 25, 26 and 28 of the [Land Registration Act, 2012](#). In this respect, section 28(b) of the new Act specifically provides for overriding interest as may subsist on the land and affect it without it being noted on the register. Customary trust is one such interest.
16. As the Court of Appeal stated in [Mbui Mukangu -vs- Gerald Mutwiri Mbui](#) (2004) eKLR; customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations.
17. In the matter before me, the applicant avers as follows at paragraphs 14, 17 and 18 of the supporting affidavit to the originating summons:
 - “ 14. That the 1st respondent settled his two wives on the suit land, using the land as their only residence and source of sustenance as by then there was initially with no alternative land (*sic*);
 17. That with the intention of excluding my mother's house from the suit land, the 1st respondent purchased another land in Rumuruti, Laikipia, where he ordered my deceased mother to settle; and
 18. That my mother died in February, 2018.”
18. As it were, the applicant did not provide any evidence whatsoever that her mother and the family had occupied or been in possession of the suit land at any particular time during her marriage to the 1st



respondent. From the respondent's Exhibit 1, it is apparent that the 1st respondent held 3 shares in Kieni East Farmers Company Limited and that it is the same that were converted to the three (3) parcels of land measuring 11 acres. It is apparent that the said 11 acres of land were registered in the name of the applicant's mother in the year 2003.

19. From the record, I was unable to find anything to even remotely suggest that the applicant's mother was unhappy with the arrangement which rewarded her with 11 acres of land at the expense of her co-wife who came to be registered as the proprietor of the suit land measuring 2.8 acres in the year 2010. According to the 1st respondent, he decided to register his first wife as the proprietor of the suit land after he had registered the applicant's mother as the owner of the Laikipia properties in order to protect her interest.
20. As it were, equity is about fairness and justice and he who seeks equity must do equity, and one who comes to equity must come with clean hands. In the matter before me, while the applicant acknowledges that his father purchased another land at Rumuruti, Laikipia, she does not state how big the land is nor if now that it was bought by the 1st respondent, her family is ready to share the same with the 2nd respondent.
21. In the circumstances herein, I find and hold that it would be unfair and inequitable to sub-divide the suit land merely because the same originated from the applicant's grandfather. The applicant's father (the 1st respondent) herein has already made adequate compensation for the applicant's family which had indeed never occupied or been in possession of the suit land.
22. It follows that I do not find any merit in the originating summons. The same is dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 9TH DAY OF DECEMBER, 2022.

In the presence of:

Mr. King'ori for the Plaintiff

Ms Mwai Lucy for the Defendants

Court Assistant - Kendi

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J. O. Olola

JUDGE

