



**Ndiangui v Ndiangui (Environment and Land Appeal E010 of 2021)
[2022] KEELC 15276 (KLR) (9 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15276 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E010 OF 2021**

JO OLOLA, J

DECEMBER 9, 2022

BETWEEN

CYRUS NDUNG’U NDIANGUI ALIAS NDUNG’U NDIANGUI APPELLANT

AND

CHARLES MACHARIA NDIANGUI RESPONDENT

JUDGMENT

1. This is an Appeal arising from the Judgment and Decree emanating from the decision of the Honourable M Okuche, Principal Magistrate as delivered on March 9, 2021 in Nyeri MCELC No 43 of 2020 (OS).
2. By an Originating Summons dated September 1, 2020 as filed in the Trial Court, Charles Macharia Ndiangui (the Respondent herein) had sought orders against Cyrus Ndungu Ndiangui alias Ndungu Ndiangui (the Appellant herein) as follows:
 1. That a declaration does issue that Title Number Thegenge/Karangia/540 and Tile Number Thegenge/ Karangia/541 registered in the name of the Defendant are held in trust for the Plaintiff;
 2. The Defendant as the trustee for the Plaintiff be ordered to transfer the trust properties Title Number Thegenge/Karangia/540 and Title Number Thegenge/ Karangia/541 to the Plaintiff herein and that Title Deeds be issued by the Land Registrar Nyeri in the name of the Plaintiff herein;
 3. An order that the Land Registrar Nyeri do cancel the name of Ndungu Ndiangui in the Land Registers of the pieces of parcels of land known as Title number Thegenge/Karangia/540 and Title Number Thegenge/



Karangia/541 and do register in substitution thereof the name of Charles Macharia Ndiangui.

3. Those prayers by the Respondents herein were premised on the grounds inter alia that:
 - (i) The said properties are registered in the name of the Appellant as the proprietor in trust for the benefit of the Respondent;
 - (ii) The said properties were as a result of the sub-division of Title Number Thegenge/Karangia/260 which was registered in the name of Peter Ndiangui Githongo, a father to the Appellant;
 - (iii) The Appellant is a brother to the Respondent's mother, Grace Njeri Ndiangui who is now deceased;
 - (iv) On August 17, 1980, the Appellant's father had bequeathed Title Number Thegenge/Karangia/260 to the Respondent as a trustee for himself and the house of his mother, one Grace Njeri Ndiangui;
 - (v) The Appellant's father had two houses, and four parcels of land which he bequeathed to his two houses;
 - (vi) The Title Number Thegenge/Karangia/260 was at the instance of the Appellant transferred to him and sub-divided into three portions – 539, 540 and 541 against the pleaded and established trust as follows:
 - (a) Title No Thegenge/Karangia/539 registered in the name of Grace Njeri Ndiangui;
 - (b) Title No Thegenge/Karangia/540 registered in the name of Ndungu Ndiangui; and
 - (c) Title Number Thegenge/Karangia/541 registered in the name of Ndungu Ndiangui; and
 - (v) The Appellant has resisted any attempts to determine the trust.
4. In response to the Originating Summons, the Appellant herein filed a Replying Affidavit sworn on September 22, 2020 wherein he told the court that he was the absolute registered proprietor of LR No Thegenge/Karangia 540 and 541. It was the Appellant's case that his registration as the proprietor of the two parcels of land was done in accordance with the law and that there were no trusts held on behalf of the Respondent.
5. The Appellant averred that the Respondent's mother Grace Njeri Ndiangui was lawfully given her share by the Appellant's deceased father and that the Respondent and his siblings should look for their inheritance from the mother. The Appellant further told the Court that there was no way he could have been registered to hold land in trust for the Respondent as the Respondent was an adult male during the said registration.
6. The Appellant further avers that it has been 39 years since he took continuous and uninterrupted possession of the said parcels of land and that the Respondent never petitioned for his alleged share of the land from his father who passed on in October, 1989.



7. Having heard the suit and in his Judgment delivered as aforesaid on March 9, 2021, the Learned Trial Magistrate found and determined that the Appellant held the suit properties in trust for the Respondent and granted the prayers sought in the Originating Summons with costs.
8. Aggrieved by the said determination, the Appellant lodged an 8-point Memorandum of Appeal herein dated March 2, 2021 seeking to have the Judgment and decree set aside on the grounds that:
 1. The Learned Trial Magistrate erred in law and in fact in holding that the Appellant held land title No Thegenge/Karangia/540 and Thegenge/Karangia/541 in trust for himself and the Respondent;
 2. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the Respondent's mother had been allocated land parcel No Thegenge/Karangia/539 and the Appellant (had been allocated) Thegenge/Karangia/540 and 541 out of land parcel (No) Thegenge/Karangia/260 by their grandfather one Peter Ndiangui Githongo;
 3. The Learned Trial Magistrate erred in law and in fact in basing his decision on a deed of gift that was neither signed by the deceased one Peter Ndiangui Githongo, the alleged witness to it and nor did it mention (sic) any of the properties as having been bequeathed to any of the beneficiaries;
 4. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the deceased one Peter Ndiangui Githongo could not read and write and hence it was not possible for him to have prepared the deed for gift;
 5. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the Appellant has been living on the suit property for 39 years where he had since built and cultivated the land and was entitled to the same by adverse possession;
 6. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the deed of gift did not gift any properties and neither did it mention anywhere that the Appellant held the suit properties in trust for the Respondent;
 7. The Learned Trial Magistrate erred in law and in fact in failing to discern the authenticity of the deed of gift produced as evidence in Court; and
 8. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the suit properties were transferred as a gift and a title issued to the Appellant by his deceased father one Peter Ndiangui Githongo and the Respondent herein never questioned his grandfather's move then during his lifetime.
9. This being the first appellate Court, this Court is mandated to re-evaluate the evidence before the trial Court as well as the Judgment and to arrive at its own independent Judgment on whether or not to allow the Appeal.
10. From a perusal of the record, the Respondent as the Plaintiff in the Trial Court had pleaded that the Appellant herein (as the Defendant) was a brother to his mother one Grace Njeri Ndiangui who is now deceased and that the suit properties were registered in the name of the Appellant in trust for the Respondent. It was the Respondent's case that the suit properties were the result of the sub-division



of LR No Thegenge/Karangia/260 which parcel of land was hitherto registered in the name of the Appellant's father – Peter Ndiangui Githongo.

11. The Respondent told the Court that on August 17, 1980, his grandfather the said Peter Ndiangui Githongo had bequeathed to him (the Respondent) the said LR No Thegenge/Karangia/260 as a trustee to hold for himself and the house of his mother the said Grace Njeri Ndiangui. It was his case that his grandfather had two wives and that he had by a deed of gift dated August 17, 1980 bequeathed to his two houses as represented by the wives his four parcels of land as follows:
 - (a) Title No Thegenge/Karangia/260 to the Respondent;
 - (b) Title No Thegenge/Karangia/218 to Matega Ndiangui;
 - (c) Title No Thegenge/Karangia/219 to the Appellant; and
 - (d) Title No Thegenge/Karangia/273 to Njagura wife of Muchemi.
12. The Respondent further told the Court the property known as LR No Thegenge/Karangia/260 was, at the instance of the Appellant transferred to himself (the Appellant) and were sub-divided into three portions, against the pleaded and established trust, as follows:
 - (a) Thegenge/Karangia/539 registered in the name of Grace Njeri Ndiangui (Mother to the Respondent);
 - (b) Thegenge/Karanga/540 registered in the name of the Appellant; and
 - (c) Thegenge/Karangia/541 also registered in the name of the Appellant.
13. In support of his position, the Respondent produced before the Trial Court a document said to be a deed of gift dated August 17, 1980 by virtue of which the Appellant's father was said to have distributed his four parcels of land to his two wives – Warukira and Wanjiku. In addition, the Respondent produced various certificates of official search to demonstrate how the three sub-divisions were subsequently registered – one in the name of his mother and the other two in the name of his uncle (the Appellant).
14. Having heard the dispute the Learned Trial Magistrate proceeded to frame six (6) issues for determination as follows:
 - (a) Does the Plaintiff have a relation to the Defendant?
 - (b) Did the Plaintiff have entitlement to the estate of Peter Ndiangui Githongo?
 - (c) Did Peter Ndiangui Githongo bequeath any property to the Plaintiff?
 - (d) Did the Defendant if (c) above if true, register the said property in his name?
 - (e) Did the registration crystallise to customary trust for the benefit of the Plaintiff?
and
 - (f) If (e) above is true what are the remedies available to the parties?
15. Having so framed the issues, the Learned Trial Magistrate proceeded to deliver himself at Pages 10 to 12 of the impugned Judgment as follows:

“The Defendant in his evidence states that the Plaintiff is the son (of) Grace Njeri (his) sister. Therefore he does not discount the fact that they are not related. He states further that Grace



Njeri is her biological sister. Grace Njeri is her biological sister. Grace Njeri is now deceased. Grace Njeri having (been) the daughter of Peter Ndiangui Githongo was definitely entitled to benefit from his estate.

The Defendant states that his late father did sub-divide his parcels of land to his children before he passed on. The said is also confirmed by the Plaintiff. They only differ at the time when this sub-division was done. The Plaintiff avers that it was done in the year 1980, while the Defendant states it was in the year 1987. The Plaintiff went ahead and produced a transferred deed of (gift) dated August 17, 1980. The Defendant stated that the deed of (gift) is a forgery. However the law is very clear that he who alleges must prove. The Defendant have alleged that the deed of (gift) dated August 17, 1980 is a forgery and his deceased father did not know how to read and write and hence he could not have authored the document. However, he has not proved his allegations and (I) will find that the said deed of (gift) dated August 17, 1980 is authentic.

In essence and (I) will find that the Plaintiff was granted parcel of land number Thegeenge/Karangai/260. This is the parcel of land which was granted to her mother. The house of the Defendant's mother had been bequeathed two parcels of land to wit No Thegeenge/Karangai/260 and 219.

The evidence on record is that the Defendant went ahead and subdivided the parcel of land No Thegeenge/Karangai/260 into the following parcels of land:

- (a) No Thegeenge/Karangai/539 which is registered in the name of Grace Njeri Ndiangui; (and)
- (b) No Thegeenge/Karangai/540 and 541 which he registered in his names.

I saw because at the time of distribution of these parcels of land in the year 1980, the only numbers which existed were numbers Thegeenge/Karangai/260, 218, 219 and 273, the numbers 539, 540 and 541 are definitely two regimes. The Defendant claims that he was granted No 540 and 541 by his father, while in his evidence he states that his father owned only the four parcels of land earlier stated. Therefore there is no way that he himself could benefit from these parcels of land.

The Defendant (has) acquired the parcel of land No Thegeenge/Karangai/260, he must have held it in trust to the Plaintiff. His act creates a customary trust for the benefit of the Defendant. The Plaintiff has proved a family relationship to the Defendant and that he was entitled to benefit from the property of the Defendant's father.

In a nutshell I find that the Plaintiff have proved his case on a balance of probabilities and I will grant him his prayer in the Originating Summons. I will also award him with costs of this suit.”

16. As it were, it is settled that the onus lies on a Party alleging the existence of a trust to prove it through evidence. This is because the law never implies and the Court never presumes a trust but in the case of absolute necessity. A Court of law will not imply a trust save in order to give effect to the intention of the Parties. Such intention of the Parties to create a trust must therefore clearly be determined before a trust is implied (see *Peter Ndung'u Njenga v Sophia Watiri Ndungu (2000) eKLR*).
17. In the matter herein, the Respondent placed great reliance on a document described as a deed of gift said to have been made by the Appellant's father on August 17, 1980. A translation of the document originally prepared in Kikuyu language and headed “Distribution of Land” appears at Page 27 of the Record of Appeal. I have looked at the same. While the document refers to four parcels of land, it



neither refers to the parcels of land by their registration numbers as referred to herein in court nor does it specify which of the four properties were given to any of the parties herein.

18. While the Learned Trial Magistrate made a finding that the document was authentic, I was unable to find the basis for such a finding. That document was neither executed by the alleged maker nor by the witnesses whose names are listed therein. Given the Appellant's challenge as to the authenticity of the document, it was incumbent upon the Respondent to provide a basis for the same and the conclusion by the Trial Magistrate that it was the Appellant to prove that the document was a forgery was in my view erroneous.
19. As it were, it was not disputed that the Appellant's father lived for another 9 years after the alleged distribution before he passed away in 1989. According to the Respondent, the original title No Thegenge/Karangia/260 was transferred and sub-divided into three portions at the instance of the Appellant who then caused one portion to be registered in the Respondent's mother's name while taking up the other two portions. In support of that contention, the Respondent produced Certificates of Official Searches for the respective parcels of land.
20. A perusal of the Green Card produced by the Respondent himself (page 12 of the record) reveals that the title for the said parcel number Thegenge/Karangia/260 was cancelled on 23rd December, 1981 on sub-division and that the resultant parcels were the said Parcel Nos 539, 540 and 541. These sub-divisions therefore occurred during the lifetime of the Respondent's grandfather and from his testimony in court, he was aware of the Appellant's registration to the portions Nos 540 and 541 from that point in time.
21. The question then that begs the answer is, if indeed the Respondent's grandfather had bequeathed the Respondent the said parcel of land in 1980, why didn't the Respondent complain to his grandfather to reverse the same and/or take any steps to wrest control of the same from the Appellant.
22. The only answer I have to that question is that it was the Respondent's grandfather Peter Ndiangui Githongo who during his lifetime sub-divided the said parcel of land No Thegenge/Karangia/260 into the three portions being Thegenge/Karangia/539, 540 and 541. For whatever reason it was, the old man gave his daughter Grace Njeri Ndiangui (the Respondent's mother) parcel No 539 while the other two were given to the Appellant.
29. There was absolutely no evidence placed before the Court from which an inference would be made that the parcel Nos 540 and 541 were registered in the Appellant's name in trust for the Respondent. The Respondent did not deny that at the time of registration, he was an adult and that if his grandfather had wanted to, he would have caused either of the two parcels to be registered directly in his name or in the name of his mother Grace Njeri Ndiangui to hold the same in trust for himself.
30. From a perusal of the proceedings, the claim based on customary trust was far-fetched and clearly an afterthought. While the Respondent purported that he learnt of the Appellant's occupation of the suit land around 1980 when he went to the land and found that the Appellant had sub-divided the same, he did not tell the Court why he did not take any action against the Appellant. He chose to wait another 40 years until the year 2020 to lodge this claim. His suit was stale and time-barred under Section 7 of the *Limitations of Actions Act* and was indeed dead on arrival.
31. It follows that I am in agreement with the Appellant that the Learned Trial Magistrate misdirected himself and hence arrived at the wrong conclusion that the two parcels of land were registered in the name of the Appellant in trust and for the benefit of the Respondent.



32. Accordingly I hereby allow the Appeal, set aside the Judgment of the Learned Trial Magistrate dated March 9, 2021 and substitute therefore an order dismissing the Respondent's (Plaintiff's) suit with costs to the Appellant (Defendant).

33. The Appellant shall also have the costs of this Appeal.

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

In the presence of:

Ms Wambui Mwai for the Appellant

Mrs Magua holding brief for Magua for the Respondent

Court assistant - Kendi

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J O OLOLA

JUDGE

