



**Mwai v Ngari (Environment & Land Case 171 of 2016)
[2022] KEELC 15226 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15226 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 171 OF 2016
JO OLOLA, J
DECEMBER 8, 2022**

BETWEEN

MARGARET KIRIGO MWAI PLAINTIFF

AND

PAUL MURIUKI NGARI DEFENDANT

JUDGMENT

1. By a plaint dated and filed herein on August 3, 2016 Margaret Kirigo Mwai (the plaintiff) prays for orders that:-
 - (a) The defendant's father is registered (as the proprietor of) Magutu/Gaikuyu/750 in trust for himself and the husband of the plaintiff;
 - (b) The trust be terminated by the honourable court and half of Magutu/Gaikuyu/750 be excised and transferred to the plaintiff before the net estate of Ngari Kagurukia is distributed among his beneficiaries;
 - (c) The defendant to pay the costs of this suit; and
 - (d) (This court grants) any other or further relief the court may deem fit to grant.
2. Those prayers arise from the plaintiff's contention that she is the wife and Administratrix of the estate of Watson Mwai Kagurukia who was a step-brother to one Ngari Kagurukia who is equally now deceased. The plaintiff brings the suit against the defendant in her capacity as the administrator of the estate of the said Ngari Kagurukia and avers that when land parcel No Magutu/Gaikuyu/335 was sub-divided among the three sons of Kagurukia Kamuru, the said Ngari Kagurukia was registered as proprietor of the land in trust for the other family members.



3. The plaintiff avers that both her husband and Ngari Kagurukia passed away before they shared out their father's land and that Ngari's family have now filed succession proceedings seeking to inherit the whole parcel of land without sharing the same with the plaintiff and hence the suit herein.
4. Paul Muriuki Ngari (the defendant) is opposed to the suit herein. In his statement of defence dated and filed herein on September 13, 2016, the defendant denies the averments made by the plaintiff and asserts that LR No Magutu/Gaikuyu/750 was registered in his father's name pursuant to a court order.
5. The defendant avers that the plaintiff and her family have always utilized and lived on LR No Magutu/Gaikuyu/748 belonging to Gibson Ngure Kaiguri and that during the hearing and determination of Nyeri CMCC No 275 of 1989 between the plaintiff's father and the said Gibson Ngure Kaiguri, the plaintiff's husband had teamed up with the said Gibson Ngure in his efforts to disinherit the defendant's father of his rightful share in LR No Magutu/Gaikuyu/335.

The Plaintiff's Case

6. In support of her case, the plaintiff called a total of two witnesses at the trial.
7. PW1 – Margaret Kirigo Mwai is the plaintiff and a resident of Mathira. She told the court her now deceased husband and the father to the defendant were step-brothers. PW1 further told the court that her husband called Watson Mwai Kagurukia passed away and that the defendant's father has also since passed away.
8. PW1 testified that their family land was Magutu/Gaikuyu/335 and that the same was registered in the name of Gibson Ngure Kaiguri who was also a step-brother to her husband and also the administrator of the estate of their grandfather. The land belonged to the grandfather who had 3 sons.
9. PW1 told the court that when they moved into the land, they did not sub-divide the same and the family members would randomly cultivate the same. Later on the land was sub-divided between the 3 sons with each one getting 3 acres for their respective houses. Kaiguri got 3 acres to share with his household while Gibson Ngure got 4.4 acres for the same purpose.
10. PW1 told the court Ngari Kagurukia died before he could sub-divide the land between himself and his brother who was PW1's husband. Their parcel after sub-division was No 750. At no time did Ngari deny that the land belonged to them. PW1 told the court her house is presently not on Plot No 750 as it remained where it had been built after the defendant's family declined to allow her to move with them to the parcel No 750. The other families however moved to their respective portions.
11. PW1 testified that she had about 2,000 tea bushes planted on parcel No 750 but she was unable to pick the tea after being chased by the defendant's family. The defendant is the one who currently picks the tea. PW1 further testified that the defendant had filed a succession case on behalf of his late father's estate without recognizing the interests of the plaintiff's husband thereon and the plaintiff was thereby forced to lodge a protest upon which the succession proceedings were stayed pending a determination of the issue of trust herein.
12. On cross-examination, PW1 testified that she presently resides on parcel No 748 belonging to Gibson Ngure. Her husband and her grandmother are buried on the said Parcel No 748. PW1 denied that she obtained letters of administration *ad litem* in Succession Cause No 33 of 2001 through fraud. She had applied for those letters to enable her participate in the succession cause after her husband died. She denied that she had filed two cases in Karatina and Nyeri in regard to the tea bushes and/or that she had lost the case.



13. PW1 further denied obtaining the tea picking permit through fraud. She told the court she used the permit given to her husband and other documents from Kenya Tea Development Agency. While conceding she did not have any documents showing the defendant's father held the land in trust, PW1 testified that a decision in that regard had been made by the clan.
14. PW2 – Anthony Munyiri Mutahi is a farmer in Mathira. Replying on his statement dated December 5, 2016 as filed herein on December 6, 2016, PW2 testified that the land in dispute originally belonged to one Kagurukia Kamuru who had 2 wives – Ngima and Hira. Each of the wives had one son. Ngima had Mwai and Hira gave birth to Ngari. When the clan shared out Kagurukia's land, it told Ngari to hold the land in trust for the family of Kagurukia. So Ngari became the registered owner in trust for the two wives of Kagurukia.
15. PW2 further testified that the land originally belonged to Kamuru Thimbui who was the father to Kaiguri, Thimbui and Kagurukia. The clan had divided the land to the 3 sons and Ngari later took Kagurukia's share which is now in dispute. PW2 testified further that after the emergency, the family of Kamuru moved to the original land. After sharing it out some family members moved to their rightful portions but when the plaintiff who is the wife of Mwai tried to move to her husband's land, Ngari refused. That was the reason the plaintiff failed to move and remains where she went from the "emergency" village.
16. In cross examination, PW2 conceded he did not have any documentation to show that Ngari Kagurukia was given the suit property to hold in trust for the family of Kagurukia Kamuru. He told the court the mother to Watson Mwai was buried in 2015 in the land that belonged to Ngari Kagurukia. He was not aware that the original suit parcel had been sub-divided into 748, 749 and 750 and therefore cannot state precisely on which parcel number Mwai's mother was buried.

The Defence Case

17. On his part the defendant testified as the sole witness in his case. Testifying as DW1, Paul Muriuki Ngari Kagurukia told the court he is the first born son of Ngari Kagurukia (now deceased). He told the court Watson Mwai was a son of Kagurukia Muchanga and that his father and Watson were distant cousins.
18. Relying on his statement dated and filed in court on September 13, 2016, DW1 testified that his father Ngari Kagurukia is the registered proprietor of LR No Magutu/Gaikuyu/750 the same having been awarded to him by the court in Nyeri SRMCC No 275 of 1989 wherein he had successfully sued one Gibson Ngure. During the trial in the said case, the plaintiff's husband Watson Mwai teamed up with Gibson so as to frustrate the defendant's father's claim. That however failed after the defendant's father was awarded 3 acres of land which was registered as Magutu/Gaikuyu/750.
19. DW1 told the court he has along occupied the said land together with his mother and his siblings. On the other hand, the plaintiff has always lived on and cultivated LR No Magutu/Gaikuyu/748 belonging to Gibson Ngure Kaiguri and that is where she has buried her family. DW1 told the court the plaintiff has tried severally to forcefully occupy the suit property and has even filed a case but the same was dismissed after the court found that she lives on and utilizes LR No Magutu/Gaikuyu/748. He denied that his father held the suit property in trust for the plaintiff or her husband.
20. In cross examination, DW1 told the court his grandfather Kagurukia wa Kamuru was the owner of land parcel No 335. He did not recall how many sons his grandfather had. In 1989, the parcel No 335 was sub-divided into 3 portions. Kaigure's share was taken by Ngure Thimbu. Ngina was given 4.4 acres while Gakuo was given 3 acres. The defendant's father was given 3 acres.



21. DW1 told the court his grandfather had one wife – Mary Muthoni. DW1 denied knowledge of a wife by the name Hira. Mary Muthoni was his father’s mother. Mwai’s mother was called Mary Ngima but she was not a wife to Kagurukia. Mwai was therefore not entitled to the land registered in the name of the defendant’s father.
22. DW1 testified that even though his own mother had recognised Mwai as a step-brother to his father in the succession cause she had filed, Mwai was not a step-brother to the defendant’s father. He denied that the plaintiff had planted tea bushes on the suit land and told the court that the verification documents produced by the plaintiff belonged to her husband and not herself. The plaintiff herself does not pick tea from the suit land. DW1 told the court the area District Commissioner had only allowed the plaintiff to pick tea from the suit land because the plaintiff had bribed the District Commissioner.

Analysis and Determination

23. I have carefully perused and considered the pleadings filed herein, the testimonies of the various witnesses as well as the evidence adduced before the trial court. I have similarly perused and considered the submissions placed before me as well as the authorities to which I was referred by the Learned Advocates acting for the parties herein.
24. The plaintiff herein has urged the court to determine that the parcel of land LR No Magutu/Gaikuyu/750 was registered in the name of the defendants’ father Ngari Kagurukia in trust for himself and the plaintiff’s husband one Watson Mwai Kagurukia. Accordingly the plaintiff prays that this court now determines the said trust and orders that half of the said parcel of land be excised and transferred to the plaintiff before the net estate of Ngari Kagurukia is distributed among his beneficiaries.
25. It is the plaintiff’s case that her husband and the defendant’s father were step-brothers being the sons of one Kagurukia Kamuru who, according to the plaintiff had two wives. It was further the plaintiff’s case that at the point in time of registration of the suit property, the defendant was registered as the proprietor in trust for himself and the rest of the family of Karugukia Kamuru. The plaintiff told the court that both her husband and the defendant’s father died before sharing out the property and that the defendant as the administrator of his father’s estate is now determined to disinherit the plaintiff and kick her out of the portion of land she has been utilizing.
26. On the other hand, the defendant denies the plaintiff’s claim and asserts that the parcel of land in dispute was registered in the name of his father Ngari Kagurukia after his father successfully sued one Gibson Ngure Kaiguri vide Nyeri SRMCC No 275 of 1989. The defendant avers that in filing the said case, his father sued in his own capacity and not on behalf of anyone else. The defendant further asserts that contrary to the claims made by the plaintiff, her husband was a distant cousin of his father and not a step-brother as stated by the plaintiff.
27. Going through the pleadings and the proceedings herein that took place before my sister Lady Justice Waithaka, one got the impression that both parties could have done better in the formulation of their pleadings and the presentation of their evidence before the court. Whatever the case it was clear to me from the perusal of the file that the parties herein were clan members related one way or the other to one Kamuru Thimbui who had occupied the land before the declaration of the state of emergency in Kenya by the Colonial Government in 1952.
28. Apparently the said Kamuru had three sons named Kaiguri, Thimbui and Kagurukia. It was also apparent that following the death of the said Kamuru Thimbui, the original larger parcel of land which had since been registered as Magutu/Gaikuyu/335 came to be registered in the name of his grandson Gibson Ngure Kaiguri apparently himself the son of Kamuru Thimbui’s first born son Kaigure.



29. The newly registered proprietor of the property known as Magutu/Gaikuyu/335 was apparently reluctant to sub-divide the land to his other relatives and this led to the institution of Nyeri SRMCC No 275 of 1989 instituted against himself by his cousins Joseph Gakuu Thimbui and Ngari Kagurukia (the defendant's father). That case was subsequently referred to by consent to the District Officer Mathira to arbitrate thereon with the help of the elders. The District Officer and the elders rendered an award filed in court on January 15, 1992.
30. The suit was subsequently settled by consent in terms of the arbitration award which shared the said LR No Magutu/Gaikuyu/335 between the parties as follows:
- (a) Gibson Ngure Kaiguri – 4.4 acres
 - (b) Joseph Gakuu Thimbui – 3.0 acres
 - (c) Ngari Kagurukia – 3.0 acres
31. It was not in dispute that the parcel of land awarded to Gibson Ngure Kaiguri was registered after sub-division as LR No Magutu/Gaikuyu/748 while that awarded to Joseph Gakuu Thimbui came to be known as LR No Magutu/Gaikuyu/749. The suit property awarded to the defendant's father Ngari Kagurukia became LR No Magutu/Gaikuyu/750.
32. It is the plaintiff's case that such registration of the defendant's father's name was to enable him hold the same in trust for the larger family of the late Kagurukia Kamuru's family and that the said family consisted of two wives each of whom had a son. According to Anthony Munyiri Mutahi (PW2), Kagurukia Kamuru's first wife was known as Hira and she is the one who gave birth to the defendant's father Ngari Kagurukia. The second wife Ngima gave birth to Mwai who was the plaintiff's husband.
33. Testifying on cross examination herein, the defendant told the court he could not recall the number of sons his grandfather had. He further differed with the plaintiff's case pointing out that his father's mother was known as Mary Muthoni and not Hira as had been stated by the plaintiff and her witnesses. While he agreed that Mwai's mother was known as Mary Ngima, the defendant vehemently denied that the said Mary Ngima was a wife to his father.
34. That denial did not appear to me to have any basis. In his own written statement dated and filed herein on September 13, 2016, the defendant states as follows in regard to the suit property:
- “My father Ngari Kagurukia is the registered proprietor of LR No Magutu/Gaikuyu/750. He was awarded the land by the Resident Magistrate in Nyeri after he successfully sued one Gibson Ngure vide SRMCC No 275 of 1989 at Nyeri. During the trial in the said case the plaintiff's husband one Watson Mwai who was a distant relative to my father teamed up with Gibson so as to frustrate my father's claim. This however failed and my dad was awarded 3 acres which were registered in as (*sic*) LR No Magutu/Gaikuyu/750. I have occupied this land with my mother and siblings all along. The plaintiff on the other hand has always lived, cultivated and buried her family on LR No Magutu/Gaikuyu/748 belonging to Gibson Ngure Kaiguri.”
35. As it were, the defendant himself told the court that the suit property came into existence in 1989 following the sub-division of his grandfather's parcel of land known as Magutu/Gaikuyu/335. That is the same sub-division that created the parcel of land he says has been occupied by the plaintiff and her husband. He does not explain why the person he describes as a distant relative was previously sharing the same parcel of land he lived in with his own father.



36. It was indeed telling that while his own mother Nyawira Ngari whom he substituted in these proceedings recognised the plaintiff's husband as a step-brother to the defendant's father in the succession proceedings she had instituted, the defendant insisted that the plaintiff's husband was not a step-brother to his father. I did not think that the defendant was better suited than his own mother to know who were the brothers of his father.
37. From a perusal of the verification certificate issued by the Kenya Tea Development Agency Limited dated March 9, 2009 (PEXh. 1) it was evident that the plaintiff was recognised to have some 1679 tea bushes on the suit property said to have been planted in 1975. While the defendant insisted that those documents were in the name of the plaintiff's husband and not that of her own, he was still unable to explain why the plaintiff's husband had tea bushes on that particular parcel of land.
38. The only logical explanation for the use of the said land was the fact that the plaintiff's husband was a close relative of the defendant's father and that as stated by the plaintiff and acknowledged by the defendant's mother, the plaintiff's husband was a step-brother to the defendant's father.
39. That being the case, it was apparent that the effect of sub-division of Magutu/Gaikuyu/335 as per the order issued in Nyeri SRMCC No 275 of 1989 was to share the same to the three (3) original sons of Kamuru Thimbui. Those sons were Kaiguri, Thimbui and Kagurukia. Having determined that Kagurukia had two wives and two sons, it follows that the registration of the suit property in the name of Ngari Kagurukia was to enable him hold the same for himself and in trust for the rest of the family including that of the plaintiff's husband.
40. Accordingly, I am persuaded that there was merit in the plaintiff's case and that the same has been proved to the required standard. In the premises, I hereby make orders as follows:
 - (a) The defendant's father Ngari Kagurukia is registered as the proprietor of LR No Magutu/Gaikuyu/750 in trust for himself and the husband of the plaintiff;
 - (b) The said trust is hereby terminated with an order that one half of the said LR No Magutu/Gaikuyu/750 be excised and transferred to the plaintiff before the net estate of Ngari Kagurukia is distributed among his beneficiaries; and
 - (c) The defendant shall bear the costs of this suit.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 8TH DAY OF DECEMBER, 2022.

In the presence of:

Mr. Kebuka Wachira for the Plaintiff

Ms Nanjala holding brief for Warutere for the Defendant

Court assistant - Kendi

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J. O. Olola

JUDGE

