



**Muriungi v Mwithimbu & another (Environment & Land Case
41 of 2018) [2022] KEELC 15263 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15263 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 41 OF 2018**

CK NZILI, J

DECEMBER 7, 2022

BETWEEN

ESTHER KANUGU MURIUNGI PLAINTIFF

AND

JOHN MBAABU MWITHIMBU 1ST DEFENDANT

**CHARLES GATOBU MWITHIMBU & ZIPPORAH NDUMBA GATOBU (SUED
AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF (CHARLES GATOBU
MWITHIMBU – DECEASED) 2ND DEFENDANT**

JUDGMENT

1. By an amended plaint dated March 1, 2022, the plaintiff sued her brother in-law the defendant over an acre of LR No Ntirimiti/Settlement Scheme/95 which was subsequently subdivided into LR No's Ntirimiti/Settlement Scheme/1520, 1140, 1518, 1210, 1140, 1144, 1119, 1209, 1210 in favour of the defendant. She averred that her homestead fell under LR No Ntirimiti/Settlement Scheme/1210 which was registered in the names of the defendants who after the death of her mother in law in 2015 allegedly started threatening her with eviction.
2. The plaintiff averred that the defendants were holding the land in trust of her together with her children, yet they have declined to transfer it to her in total disregard to and in breach of the customary trust. She prayed for the declaration that the defendants were holding the suit land in trust; an order directing the land registrar to amend the register by cancelling the names of the defendants and replacing them with her names and for a permanent injunction restraining the defendants from interfering with her beneficial share.
3. In support of her plaint, the plaintiff filed a list of documents dated October 15, 2018 and witness statements.



4. The defendants were duly served with summons to enter appearance but the 1st defendant failed to enter appearance.
5. The 2nd defendant filed a defense dated November 16, 2018 where he denied the alleged subdivision of the original suit land as stated at paragraph 4 of the plaint. On the contrary, the 2nd defendant stated that the Suit land was registered in trust for the plaintiff based on Kshs 90,000/= used in the subdivision which the plaintiff had only refunded Kshs 50,000/= but was recused from clearing the balance of Kshs 40,000/=.
6. Further, the 2nd defendant averred that he had no other interest on the suit land and was willing to sign all the relevant documents and execute the trust in favour of the plaintiff otherwise the suit was unmeritorious.
7. The plaintiff adopted her witness statement dated October 15, 2018 as her evidence in chief and produced documents in support of her claim namely; a copy of the husband's death certificate as P Exh No (1), marriage certificate as P Exh No. (2), letters of grant as P Exh No (3), green card as P Exh No (4), photos on development as P Exh No (5), mother in law's intention letter as P Exh No (6), official search as P Exh No (7), mother in law's letter to the land manager as P Exh No (8), trust agreement as P Exh No (9) and the official search after the subdivisions as P Exh No (10) respectively.
8. The defendants failed to offer any evidence despite service with the hearing notices.
9. It is the plaintiff's submission that as the legal representative of the estate of the late Nahashon Mwirungi Mwithimbu, a brother to the defendants, she has proved customary trust given the initial land belonged to her mother in law, due to the long occupation coupled with an extensive development of the land and lastly, the intention to create a trust in her favour which has been admitted by the 2nd defendant. She urged the court to find that she had discharged the burden of proof as required under section 107 of the *Evidence Act*.
10. The ingredients to found a claim on customary trust were settled in the case of *Isack M'Inanga Kiebia vs Isaaya M'Lintari & another* [2018] eKLR.
11. In *Omollo v Oduor* (Civil Appeal No 46 of 2017 (2022) KECA 371 (KLR) February 18, 2022 (Judgment), the dispute was between sisters in law both married by two brothers, both of whom were deceased at the time of filing the suit. The appellant was asking for a share of her inheritance from the parties deceased parents held by the respondent as the eldest son in trust for her. She further alleged that the respondent had breached the customary trust, converted the land to her own use and refused to surrender it to her.
12. The court held that customary trust was one of the overriding interests recognized under sections 27 & 28 (b) of the *Land Registration Act* and evidence must be led to prove its existence and that each case has to be considered depending on the quality of the evidence presented before the court.
13. From the caselaw of *Isack Kiebia supra* party must establish that:
 - a. The land in question before registration, family, clan or group land.
 - b. He belongs to such family, clan or group
 - c. His relationship to such family is not remote or tenuous to make the claim idle or adventurous
 - d. The claimant could have been entitled to be registered as an owner save for some intervening circumstances and



- e. The claim is directed as a proprietor who is a family, clan or group member.
14. In the evidence before court, the plaintiff has through pleading and documentary evidence proved that she is related to the defendants as a sister in law. She has also explained and proved that the suit land she occupies was given to her late husband by her late mother in law prior to his and her demise respectively.
 15. Exh's (6) and (7) are documents expressing the intention to bequeath the plaintiff the suitland. The 2nd defendant's defence at paragraphs 9, 10 and 11 has admitted the circumstances under which the suit property came under the defendant's names in trust for the plaintiff. The 2nd defendant has admitted that the monies for the subdivisions which the plaintiff had not cleared have now been settled and was willing to transfer the land into her names.
 16. In my considered view the plaintiff has satisfied all the requirements under the *Isack Kiebia (supra)*.
 17. Therefore, I find the suit meritorious. A declaration be and is hereby issued that the defendants holds LR No Ntirimiti/Settlement Scheme/1210 in trust for the plaintiff. Consequently, an order be and is hereby issued for the defendants to transfer the same LR No Ntirimiti/Settlement Scheme/1210 to the plaintiff within 2 months from the date hereof in default of which the Deputy Registrar of this court shall sign the transfer forms.
 18. Each party to bear their own costs, since this is a family matter and the 2nd defendant has admitted the claim.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 7TH DAY OF DECEMBER, 2022.

In presence of:

C/A: Kananu

Karanja for plaintiff

HON CK NZILI

ELC JUDGE

