

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 913 OF 2002

TERESIA WANGECI MACHARIA.....1ST PLAINTIFF

SAMUEL MWANGI MBUGUA.....2ND PLAINTIFF

MWANGI MACHARIA THIGA.....3RD PLAINTIFF

-VERSUS-

MBUGUA THIGA.....DEFENDANT

RULING

In the suit giving rise to this application, the applicants, Teresia Wangeci Macharia and her grandson and son are suing the respondent, Mbugua Thiga, who is the first registered owner of a piece of land known as Location 7/Gathera/392 for a declaration that he holds 0.789 hectares thereof in trust for the applicants and pending the determination of the issue, the applicants are beseeching this court to inject the respondent against alienating and destroying the plants and crops now there as they would thereby suffer irreparable injury. The respondent however strongly opposes the application on the grounds inter alia that the respondent as the first registered owner cannot in law hold the land in trust for anyone else.

It is contended on the part of the applicants that when the land was first registered in the names of the respondent it contained parts of their husband's and/or father's land as stated in the plaint. According to the applicants, the respondent was to hold the land in trust for her husband and his children. As such the respondent was now under a duty to carry out the trust.

On his part, the respondent contended that he was the first registered owner of the suit premises. He also stated that "no trust, customary or otherwise exists and or existed to do with the said land and I hold no land for the plaintiffs as alleged in the plaint" and that "even if there was a trust created which is denied, the plaintiffs are guilty of laches and inordinate delay in making any claims and are barred by the limitations of Actions Act" and that "the matter is res judicata" as it had been determined by an appeal arising from the decision of land disputes tribunal.

According to the guidelines on which the court acts in considering such applications, the first point, which the court has to consider, is the likelihood of the success of the case. It also has to consider if a denial would result or is likely to result in a loss to the applicant, which may not be adequately compensated by an award of damages. If the court entertains a doubt on any of the above matters, then it can determine the matter on balance of convenience. While the applicants allege that the respondent holds part of the suit premises in trust for them despite the registration being a first one under the Registered Land Act, the respondent contends to the contrary and avers that there can be no trust through a first registration. To support he applicants submissions, Mr. Kinuthia, the Learned Counsel for the applicants referred the court to the cases of **Limuli Vs. Marko Sabayi (1979) KLR 251, Nairobi HCCC No. 377 of 1986 Mwangi Muguthu Vs. Maina Muguthu (unreported) and Nairobi CA No. 171 of 1994 Joseph Muchina Kamau Vs. National Housing Corporation Limited (unreported)** in which it was held that a first registration was not a bar to creation of a trust. On the other hand, Mr. Mwangi referred the court to the cases of **Esiroyo Vs. Esiroyo and Another (1973) EA 338 and Obiero Vs. Abiero (1972) EA 227** where the High Court held that no trust could be implied on first registration as according to these cases all other rights including trusts, customary or otherwise were extinguished on first registration. The matter could therefore go either way. Although at the moment, I cannot say that the suit can succeed, all I can say for sure now is that it is not a frivolous case.

The subject matter herein is land and some crops growing thereon. If the orders sought herein are not granted, the defendant may so deal with the subject matter as to go beyond the court's recall. In the event therefore the applicants suit is successful, it may be rendered barren and success of no consequence. The applicants are therefore likely to suffer a loss, which may not be adequately compensated by an award of damages. I need not now concern myself with the balance of conveniences or prejudices as it is clear that the applicants would suffer greater prejudices than the defendant if the orders are not granted. I am therefore satisfied that the applicant have made out a case for the grant of the orders beseeched from this court. In the result, I award prayers (b) and (c) as prayed in this application. Orders accordingly.

Dated and signed at Nairobi this 20th day of June, 2002.

G.P. Mbito
JUDGE