



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 270 OF 2014 'B'**

**JANE WANJIRU NDUNGU.....1<sup>ST</sup> PLAINTIFF**

**ERIC MUNENE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**EUNICE WANJIKU MUNENE.....1<sup>ST</sup> DEFENDANT**

**PETER KARIMI MUNENE.....2<sup>ND</sup> DEFENDANT**

**JOHN GACHOKI MUNENE.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Summary of facts**

The plaintiff filed plaint on 2<sup>nd</sup> October 2014 in which they sought the following orders:-

*(a) A declaration that initial land parcel No. MUTIRA/KAGUYU/702 was an ancestral/clan land and therefore customary trust exists in respect of the said parcel of land and the plaintiffs are beneficiaries of the same, having equal rights with the 2nd and 3rd defendants and the 1st defendant was under a duty to transfer resultant portions of sub-division to the plaintiffs the way she said to her children.*

*(b) An order for determination of the customary trust and for transfer of land parcel No. MUTIRA/KAGUYU/5038 to the 1st plaintiff and land parcel No. MUTIRA/KAGUYU/5034 to the 2nd plaintiff.*

*(c) Costs of the suit with interest.*

According to the evidence adduced, the 1st plaintiff avers that her father one Munene Kigundu was given land parcel Number MUTIRA/KAGUYU/702 by the clan in 1959, which portion measures 1.62 Hectares. The 1st plaintiff further stated that her father had two wives, the first wife being the 1st defendant and the 2nd wife was one Mary Wathoko (deceased) who is her mother. She also stated that her mother passed away before her father and that upon the demise of her father, the entire of the suit property was transferred to the 1st defendant as the sole surviving spouse. It is further alleged that the 1st defendant refused to transfer the suit property to the second house, which prompted her to file a civil suit being SPMCC No. 23 of 2011 (Kerugoya). The 1st plaintiff further testified that a consent order was agreed by the parties which was subsequently adopted as an order of the Court on 30th November 2011. It is further stated that in the alleged consent order, the parties agreed to have the suit property sub-divided into 14 portions of  $\frac{1}{4}$  plots to be distributed among the deceased's beneficiaries. She also stated that although the consent order filed in Court indicated her name, she was not given any portion. Being aggrieved by failure to share the suit land as agreed, the plaintiff filed the instant suit after the 1st defendant retained the entire  $4\frac{1}{4}$  acres which she has since transferred to the 2nd and 3rd defendants. The 2nd plaintiff on the other hand averred that he was not also given any portion of the land from his grandfather's inheritance which he alleges was being held in trust by the 1st defendant and that he was not aware of the consent in PMCC No. 23 of 2011. His prayer is to be given a quarter ( $\frac{1}{4}$ ) acre parcel of land already transferred by the 1st defendant to the 2nd defendant. The plaintiffs thus pray that the suit property owned by Munene Kigundu be declared to be ancestral land and that a quarter ( $\frac{1}{4}$ ) acre parcel of the sub-division, to wit, MUTIRA/KAGUYU/5038 be transferred from the 3rd defendant to the 1st plaintiff and MUTIRA/KAGUYU/5034 registered in the name of the 2nd defendant be transferred to the 2nd plaintiff.

The defendants on the other hand entered appearance on 24th October 2014 and filed a joint defence and counter-claim on 11th November 2014 in which they contend that the 1st plaintiff's mother, Mary Wathoko who is also the 2nd plaintiff's aunt was never married to Munene Kigundu. They deny knowledge of the consent and subsequent order referred to by the 1st plaintiff and accuse her of forgery and of forging the 1st defendant's signature. They aver that the 1st and 2nd plaintiffs are merely licencees on the sub-divided suit property. They counter-claimed for the eviction of the 1st and 2nd plaintiffs from the suit property and for a permanent injunction restraining the plaintiffs from

entering, alienating or interfering with the suit property.

The plaintiffs by way of a rejoinder filed their reply to the defence and counter-claim on 21st November 2014, reiterating their averments in the plaint and noting that Mary Wathoko, the 1st plaintiff's mother (deceased) and the 2nd wife of Munene Kigundu is buried on the suit property as is the 2nd plaintiff's father one Dominic Gichangi Munene (deceased). They even noted that the burial permit for the 2nd plaintiff's father was issued to the 1st defendant on 10th June 2015. The plaintiffs filed a Notice of Motion application seeking for inhibition orders against land parcels No. MUTIRA/KAGUYU/5028, 5034 and 5038 pending the hearing of the suit. The orders sought were granted on 13th July 2015.

On 19th August 2015, the 1st plaintiff filed a Notice of withdrawal of her claim in SPMCC No. 23 of 2011. On 8th September 2015, the Court orders issued on 29th November 2011 were set aside and the said suit No. 23 of 2011 was withdrawn. On 15th January 2016, the remaining plaintiff, formerly 2nd plaintiff filed his issues for determination as follows:-

- a) *Whether Land Parcel No. MUTIRA/KAGUYU/702 is ancestral land given to the late Munene Kigundu during land consolidation and demarcation?*
- b) *Whether the 2<sup>nd</sup> Plaintiff's father, Dominic Gichangi Munene was a son of Munene Kigundu?*
- c) *Whether the 2<sup>nd</sup> Plaintiff has any rights and/or interests over Land Parcel No. MUTIRA/KAGUYU/702, now subdivided?*
- d) *Whether eviction and permanent injunction orders sought in the counterclaim ought to be issued?*
- e) *Costs of the suit and counterclaim.*

On 13<sup>th</sup> September 2017, the 3<sup>rd</sup> Defendant filed his witness statement in which he averred that his mother, the 1<sup>st</sup> Defendant had 9 children and was the only wife of Munene Kigundu and that Mary Wathoko was a sister to his mother but not a wife to his father. He further stated that the said Mary Wathoko lived with them when she was chased out of her second matrimonial home in Kandara, where she was married to one Ndung'u. She also stated that his family took in their aunt and her children and allowed her to be buried on the Suit Property.

On 24<sup>th</sup> July 2014, a consent order was entered into by the parties advocates to refer the matter to arbitration before the Assistant County Commissioner. The consent was adopted as a court order on 15<sup>th</sup> January 2019. On 21<sup>st</sup> January 2019, the Arbitration Report was filed with the consent, whose findings were to the effect that the Arbitrator had failed to come up with a determination and was therefore referring the matter back to court. The Plaintiff filed his written submissions on 22<sup>nd</sup> January 2020 and the Defendants filed theirs on 30<sup>th</sup> December 2020.

### **Legal Analysis and Decision**

The issues that emerge for determination can be identified as follows:-

- (1) Whether the Plaintiffs are legitimate beneficiaries of the Estate of Munene Kigundu who died intestate?**
- (2) Whether the Plaintiffs have established the existence of trust and therefore entitled to benefit in the suit land parcel No. MUTIRA/KAGUYU/702, now sub-divided?**
- (3) Whether the Defendants have proved their counter-claim?**
- (4) Whether eviction and permanent injunction orders sought ought to issue?**
- (5) Who will bear the costs of the suit?**

In an attempt to determine all the five issues combined, it is instructive to note that prove of customary trust can only be established through evidence. In the case of *George Mbiti Kiebia & Another Vs Isaya Theuri Milintari & Another [2014] e K.L.R* the Court of Appeal held as follows:-

*“The legal burden to prove the existence of the trust rests with the respondents..... It is our considered view that the appellants did not rebut and dislodge the testimony of the respondents who are not only in occupation and possession of Parcel No. 86 but also claim entitlement to Parcel No. 70 pursuant to their being members of the family that owned the ancestral clan land. We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and rebut the notion that the property is not free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the appellant did not go this extra mile that is required of him in relation to Land Parcel No. 70 and no evidence was led to rebut the respondents' testimony.”*

The counsel for the defendant in his submissions cited the Supreme Court case of *Isack M'inanga Kiebia Vs Isaya Theuri M'lintari & Another [2018] e K.L.R* where the Supreme Court considered the elements required to qualify a claimant under customary trust as follows:

“1. The land in question was before registration, family, clan or group land.

2. The claimant belongs to such family, clan, or group.

3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.

4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.

5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

The 1<sup>st</sup> Plaintiff in her evidence stated that her father, the late Munene Kigundu was given land by the clan, being parcel No. MUTIRA/KAGUYU/702 measuring approximately 1.62 Ha to hold in trust for himself and his family which includes them. However, they failed to produce any evidence or call witnesses who were present during the land demarcation to show that indeed the said Munene Kigundu was given land by the clan. The plaintiffs did not even disclose the family, clan or group which they claim to belong and who gave the original registered proprietor the suit property parcel No. MUTIRA/KAGUYU/702.

The 1st plaintiff stated in her testimony that her father Munene Kigundu had two wives. She said that the first wife was Eunice Wanjiku Munene who is also the 1st defendant herein while the second wife was Mary Wathoko who is also her mother (deceased). The 1st defendant also stated that her mother was blessed with two children being herself and her late brother Dominic Gichangi Munene. She stated that when her father died, her step-mother who is the 1st defendant got registered as the owner of the disputed land on behalf of the whole family. It is also the 1st plaintiff's evidence that when she realized that the 1st defendant was not willing to give a share of the suit land to her mother's household, she decided to file a suit before the Magistrate's Court in SPMCC No. 23 of 2011 (Kerugoya).

The 2nd plaintiff in his testimony stated that his father was one Dominic Gichangi Munene while his grandfather was Munene Kigundu. He further stated that his grandfather who was the original registered proprietor of the suit property was given land by the clan to hold in trust for himself and his family. He said that his grandfather had two wives. The first wife was Eunice Wanjiru Munene who is the first defendant herein while the second wife was his aunt, Mary Wathoko (deceased). When his father passed on, he was buried on the suit land and the 1st defendant promised to give his mother's household the portion where their father was buried. However, he learnt with shock that the 1st defendant gave her children the resultant portions of sub-divisions and left them with nothing.

The defendants denied the plaintiffs claim and filed their defence and counter-claim to the plaintiffs claim. In his evidence, the 3rd defendant stated that contrary to the allegations by the plaintiffs, Mary Wathoko who is his aunt, and particularly a sister to the 1st defendant was never married to her late father, Benard Munene Kigundu. He further stated that the aforesaid Mary Wathoko was married to one Kathuri Njiraini at Gatwe Village within Kirinyaga wherein they were blessed with two children namely Jane Wanjiru Ndungu and the late Dominic Gichangi who is the father to the plaintiff (Eric Munene). He stated that Mary Wathoko later re-married at Kandara in Muranga County to one Ndungu wherein they got another child namely Njeri. He explained that their family allowed the plaintiffs and Mary Wathoko to visit and stay at their home after Mary Wathoko was kicked out of her matrimonial home in Kandara, Muranga County. The 3rd defendant further stated that though they allowed Mary Wathoko and Dominic Gichangi to be buried on land title No. MUTIRA/KAGUYU/702, they did not have any proprietary rights over the same.

### **Undisputed facts**

The following facts are not disputed:-

(1) That Eunice Wanjiku Munene (1st defendant) and Mary Wathoko (deceased) are sisters.

(2) That Dominic Gichangi Munene (deceased) was the father to Erick Munene ((1st plaintiff).

(3) That Mary Wathoko (deceased) and Dominic Gichangi Munene (deceased) were buried in the suit land parcel No. MUTIRA/KAGUYU/702.

(4) The original registered proprietor of the suit land parcel No. MUTIRA/KAGUYU/702 was Munene Kigundu.

The question whether the suit property L.R. No. MUTIRA/KAGUYU/702 is an ancestral land is a matter of evidence. Other than the averments contained in the plaint, the plaintiffs did not lead any evidence to show that indeed the suit property is an ancestral land given to Munene Kigundu by the clan during the land demarcation to hold in trust for himself and his siblings. The plaintiffs did not call any family member who was present during the land demarcation or any other witness to shed light on how the said Munene Kigundu who was the original registered proprietor acquired the suit land. Prove of customary trust is a serious matter that must be proved by cogent evidence and not by assumption. In the case of *Mbothu & 8 others Vs Waititu and 11 others [1986] e K.L.R 171 at page 189, the Court of Appeal held:-*

*“The law never implies, the court never presumes, a trust but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”*

The plaintiffs did not prove that the suit land was encumbered with trust. They did not lead evidence to show that the suit land was clan land. From my analysis of the evidence by the plaintiffs, this Court cannot deduce any

intention of the parties to create a trust. The 3rd defendant in his testimony explained that Mary Wathoko who is her maternal aunt and sister to his mother Eunice Wanjiku Munene (1st defendant) was never married to his late father Benard Munene Kigundu. The 3rd defendant also explained that his aunt Mary Wathoko (deceased) was allowed to stay in their family after she was chased away by her husband one Kathuri Njiraini and was later buried together with her son Dominic Gichangi in the suit land. That explanation in my view appears more probable than not. It is common under African Customs and particularly Kikuyu Customary practice for a married lady to accommodate her siblings including those who are married whenever they have marital problems. I am persuaded that Mary Wathoko (deceased) was allowed to by her sister Eunice Wanjiku Munene (1st defendant) to stay with her family after she was chased by her husband and even allowed her body and that of her son Dominic Gichangi to be buried in the suit land.

If the evidence by the plaintiffs that Mary Wathoko (deceased) was married by Benard Munene Kigundu as his second wife, nothing could have been difficult for them to adduce evidence of marriage. The said Mary Wathoko are blood sisters with Eunice Wanjiku Munene who is the 1st defendant herein. I doubt if the said Mary Wathoko had capacity to marry the same husband with her sister under Kikuyu Customary Law. There is even no evidence that consent was given by their respective families. There is also no evidence that dowry was paid (Ruracio) or a ram was slaughtered (Ngurario) in accordance with the Kikuyu customs.

From my view point, if the evidence by the Plaintiffs that Mary Wathoko and Eunice Wanjiru Munene who were sisters were co-wives, then, their claim would have been adequately addressed through a succession cause. The framework for applications for grants of representation is set out in **Section 51 of the Law of Succession Act**. The most relevant portion is to be found in **sub-section 2(g)** which state as follows:

**“Application for Grant**

**51 (1)**

*(2) Every application shall include information as to:-*

*(a)*

*(b)*

*(c)*

*(d)*

*(e)*

*(f)*

*(g) In cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of any child of his or hers then deceased;*

*(h) .....*”

My understanding of **Section 51(2) (g)** is that a petitioner for grant of letters of the Estate of a person who died intestate must disclose all the surviving spouses and children of the deceased and any grandchild of the deceased whose own parent is dead. It is only through a succession cause that inquiries and investigations are undertaken to determine the true identity of the actual beneficiaries of the Estate of the deceased registered owner of the disputed land. The claim by the plaintiff in this case as blood relations with the deceased registered proprietor would be resolved with a higher degree of preponderance by a Succession Court than the Environment and Land Court. The evidence by the plaintiffs is that Mary Wathoko (deceased) was a wife to Munene Kigundu who was the registered owner of the suit land. It is the plaintiffs’ averments that Eunice Wanjiku Munene (1st defendant) and the late Mary Wathoko are sisters and the two are co-wives to Munene Kigundu (deceased). It is also the evidence of the plaintiffs that the late Mary Wathoko and Munene Kigundu (deceased) were blessed with two children namely Jane Wanjiru (1st plaintiff) and Dominic Gichangi (deceased) and also father to Eric Munene (2nd plaintiff). If the 1st plaintiff is indeed the daughter to Munene Kigundu (deceased) and Eric Munene (2nd plaintiff) is the grandson to the said Munene Kigundu who was the immediate registered owner of the suit property, then the plaintiffs’ remedy in my respective view would have been resolved in a succession cause and not in the Environment and Land Court. That becomes apparent where the defendants have vehemently denied that the late Mary Wathoko (deceased) who was the 1st defendant’s sister was not married to the late Munene Kigundu but was only accommodated by her sister (Eunice Wanjiku Munene (1st defendant) on humanitarian’s grounds after she was chased by her husband. The issues that arise from that dispute are questions that can only be resolved through a Succession Court. If the plaintiffs indeed wanted to pursue a claim from the Estate of Munene Kigundu (deceased) for being their father and grandfather respectively, then they should have sought to be made personal representative(s) of his Estate. Since the issues require determination as to the paternity of the plaintiffs to the late Munene Kigundu and whether there was a valid marriage between the late Mary Wathoko and the late Munene Kigundu, this Court is not competent to determine these issues which are reserved for the Succession Court. The upshot of my findings is that the plaintiffs have not proved their claim on the preponderance of probabilities. This suit therefore fails and the same is hereby dismissed with costs.

As regards the defendant’s defence, I am satisfied that their evidence is credible. It is more probable than not that Mary Wathoko who is the 1st defendant’s sister was welcomed to her house after she was chased by her husband. It is in keeping with African Customs for a married woman to accommodate her sister in her house when she has marital problems. It is also a taboo and indeed unlawful under African Customary Law for sisters to be married by one man. That practice is only permissible among the Muslim religion and not under Christianity.

In any event, I have stated elsewhere in this judgment that issues of determining paternity and whether there was celebration of marriage between the late Mary Wathoko and the late Munene Kigundu as his second wife are clearly issues outside the jurisdiction of this Honourable Court. In view of all the matters aforesaid, I find the plaintiffs suit has not been proved on the required standard and the same is hereby dismissed. However, I find the defendants have proved their counter-claim on a balance of probabilities and do hereby enter judgment in the following terms:-

*(1) The plaintiffs suit is hereby dismissed.*

*(2) The defendants counter-claim has been proved on the required standard.*

*(3) Eviction and permanent injunction orders are granted as prayed in the counter-claim.*

*(4) In view of the relations between the 1st defendant and the plaintiffs through their late mother Mary Wathoko who were sisters with the 1st defendant, I order each party to bear their own costs.*

**JUDGMENT READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 5<sup>TH</sup> DAY OF MARCH, 2021.**

**E.C. CHERONO**

**ELC JUDGE**

**In the presence of:-**

1. Mr. Kahigah holding brief for Ngigi Gichoya for the Defendants
2. Mr. Kariuki holding brief for Maina Kagio for the Plaintiffs
3. Kabuta - Court clerk.