



**Wacira (Substituted on Behalf of Veronicah Mukami Wachira (Deceased))  
& 3 others v Wanjohi (Environmental and Land Originating Summons  
29 of 2015) [2024] KEELC 6840 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6840 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 29 OF 2015  
JO OLOLA, J  
OCTOBER 17, 2024**

**BETWEEN**

**JOSEPH WANG'ONDU WACIRA (SUBSTITUTED ON BEHALF OF  
VERONICAH MUKAMI WACHIRA (DECEASED)) ..... 1<sup>ST</sup> PLAINTIFF  
CHARLES MWANGI WACHIRA ..... 2<sup>ND</sup> PLAINTIFF  
PAUL WANGAI ..... 3<sup>RD</sup> PLAINTIFF  
JOSEPH WANG'ONDU WACHIRA ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**PRISCILLA WAHITO WANJOHI ..... DEFENDANT**

**JUDGMENT**

**Background**

1. By an Originating Summons dated 30<sup>th</sup> January 2015, the four (4) Plaintiffs pray for a declaration:
  1. That Land Parcel No. Thegenge/Karia/447 was registered in the name of the late Wanjohi S/o Kihara (now deceased) in trust for himself and Peter Wachira Kihara in equal shares,
  2. That the respondent Priscilla Wahito Wanjohi and the 1<sup>st</sup> Applicant Veronicah Mukami Wachira were made administrators of the Estate of Wanjohi S/o Kihara alias Sisto Wanjohi Kihara to hold LR. No. Thegenge/Karia/447 in equal shares for the benefit of the Estate of Wachira Kihara and be registered in the names of the Applicants before distribution of the rest of the Estate of Wanjohi S/o Kihara alias Sisto Wanjohi Kihara (deceased),
  3. That the costs of this Originating Summons be provided for.



2. The Originating Summons is supported by an Affidavit sworn by Joseph Wang'onde Wachira (the fourth Plaintiff) on behalf of the other Plaintiffs. The 4<sup>th</sup> Plaintiff avers that together with the 1<sup>st</sup> Plaintiff, they filed a succession cause and cited the Defendant as the immediate family of the late Wanjohi S/o Kihara seemed reluctant to institute the cause.
3. The 4<sup>th</sup> Plaintiff avers that Wanjohi S/o Kihara was a bother to the 4<sup>th</sup> Plaintiff's father one Wachira Kihara being the only sons of Wangui Kihara. It is the Plaintiff's case that during the period of land consolidation and registration, the portion of land that was reserved for Wangui Kihara's household was registered in the name of Wanjohi Kihara as the eldest son.
4. Priscilla Wahito Wanjohi (the Defendant) is opposed to the grant of the orders sought. In her Replying Affidavit sworn on 13<sup>th</sup> May 2015, the Defendant avers that the Originating Summons is without merit and should be dismissed with costs as it has only been filed to defeat and circumvent the decision of the High Court in Nyeri High Court Succession Cause No. 442 of 2008.
5. The Defendant avers that this suit is ill advised as she is only but one of the administrators of the estate of Wanjohi S/o Kihara. It is the Defendant's case that the Plaintiffs were granted time in the succession cause to prosecute their case but failed to do so and the Defendant was eventually issued with a Grant of 29<sup>th</sup> May 2014.

#### **The Plaintiff's Case.**

6. The Plaintiffs called a total of three (3) witnesses at the trial which commenced way back in 2016.
7. PW1- Joseph Wang'onde Wachira is the 4<sup>th</sup> Plaintiff. He told the court that the Defendant is the wife to his paternal uncle and that the said paternal uncle was the registered proprietor of LR. No. Thegenge/Karia/447.
8. PW1 testified that his grandfather Kihara Nguini had two wives. During the land demarcation and registration, PW1's grandfather caused his parcels of land to be registered in the names of a son in each of the two hoses. PW1's grandmother named Wangui had two sons, Wachira Kihara who is PW1's father and Wanjohi Kihara. PW1 further testified that his uncle Wanjohi Kihara was then registered as proprietor of the suit property while his step uncle Kuria Kihara from Wambui's house was registered as the proprietor of LR. No. Thegenge/Karia 474.
9. PW1 told the court that before the suit property could be divided amongst the two brothers, PW1's father passed away in the year 1976 and his uncle Wanjohi Kihara also later on passed away in 2004.
10. PW1 further told the court his uncle's family were reluctant to start succession proceedings upon his death. Consequently, PW1 and his mother Veronica Mukami Wachira commenced the same and cited the Defendant as an Interested Party. A grant was thereafter issued in the joint names of PW1's mother and that of the Defendant. PW1 told the court that the Grant was issued in the joint names because Wanjohi Kihara had held the title for the suit property in trust for himself and PW1's father in equal shares.
11. PW1 testified that some time thereafter, the Defendant filed Nyeri High Court Succession Cause No. 442 of 2008. PW1 and his mother filed protests in thee cause before eventually filing this suit.
12. PW2- Paul Gitonga Wanjohi is a neighbour to the parties herein. He told the court that his grandfather and PW1's grandfather were brothers. He testified that PW1's grandfather had sub-divided his two parcels of land to his two wives and that the suit property was registered in the name of Sisto Wanjohi Kihara to enable him to take care of the same on behalf of his mother's family.



13. PW3- Peter Ndirangu Wanjohi is a member of the same clan with the parties herein. He told the court that the suit property was registered in the name of the Defendant's husband because PW1's father was working away in a Settlement. They were however to share the land equally.
14. PW3 testified that PW1's father returned to the village in 1976 but after three (3) months he got sick and died before they could share the land. He told the court that when PW1's mother asked Sisto Wanjohi for her portion of the land, Wanjohi told her there was no land. The parties then started having disputes which initially went to the Chief's Office and that of the District Officer before landing in court.

### **The Defence Case.**

15. On their part, the Defence called two witnesses in support of their case.
16. DW1- Priscilla Wahito Wanjohi is the Defendant herein. She told the court that the deceased 1<sup>st</sup> Plaintiff- Veronica Mukami Wachira's husband and her own husband were brothers. The other Plaintiffs are Veronica's children.
17. Adopting the contents of her Replying Affidavit to the Originating Summons as her evidence in-chief, DW1 told the court she did not know how her husband came to be registered as the proprietor of the suit property because when she got married in 1963, she found him thereon. DW1 told the court that the Plaintiffs have never lived on, cultivated or made any developments on the suit property and that they have always lived in Kieni.
18. DW2 – John Kihara Wanjohi is the first-born son of the late Sisto Wanjohi Kihara and a step-son of the Defendant. He told the court that his father had bought his own parcels of land and that during land demarcation and adjudication, all the parcels were consolidated in one piece and got registered in his name as LR. No. Thegenge/Karia/447 measuring about 4.86Ha.
19. DW2 testified that before land consolidation, Kihara Nguini had purchased a parcel of land measuring about 2.5 acres. The said parcel was registered in his name, the same being LR. No. Thegenge/Karia/474. He told the court; Kihara Nguini's son Kuria Kihara also bought some 2.5 acres which were consolidated and registered jointly in their names as the said Thegenge/Karia 474.
20. DW2 further testified that after Wachira Kihara left his home in his early years, he had never lived in Nyeri until his death in 1976. He told the court Wachira Kihara bought 4 acres of land in Gatarakwa where he lived with his wife Veronica Mukami.

### **Analysis and Determination.**

21. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties.
22. The suit herein was originally instituted by Veronica Mukami Wachira together with her three children. In the course of these proceedings, more particularly on 2<sup>nd</sup> April 2021, Veronica died and was substituted by her son Joseph Wang'ondu Wachira who is also the 4<sup>th</sup> Plaintiff herein.
23. By their Originating Summons instituted herein on 30<sup>th</sup> January 2015, the Plaintiffs pray for a declaration that the land parcel number Thegenge/Karia/447 was registered in the name of the late Wanjohi S/o Kihara in trust for himself and one Peter Wachira Kihara in equal shares. The Plaintiffs also urge the court to declare that the late Veronica Mukami Wachira and Priscilla Wahito Wanjohi (the Respondent herein) were made joint administrators of the Estate of Wanjohi S/o Kihara alias Sisto



Wanjohi Kihara to hold the suit property in equal shares for the benefit of the Estate of Wachira Kihara. In addition, the Plaintiffs pray that one half portion of the suit land be registered in their names before distribution of the rest of the Estate of Wanjohi S/o Kihara alias Sisto Wanjohi Kihara.

24. Essentially the grounds and the facts upon which the Originating Summons is based is the contention by the Plaintiffs that the registered proprietor of the suit property is a brother to Peter Wachira Kihara who was the husband of Veronica and father of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs. It is the Plaintiffs' case that the suit property was registered in the name of the said Wanjohi S/o Kihara as the eldest son of their grandmother Wangui Kihara to hold the same for the benefit of himself and the rest of Wangui Kihara's household. It is further the Plaintiffs' case that the Defendant's household has refused to grant them their share of the suit property and hence the institution of this suit.
25. On her part, the Defendant who is the widow of the said Wanjohi S/o Kihara denies that the suit property was registered in her husband's name to hold in trust for her brother Peter Wachira Kihara. The Defendant avers that this suit is without merit and that the same has been filed to defeat and circumvent the decision of the High Court in Nyeri High Court Succession Cause No. 442 of 2008. It is the Defendant's case that the Plaintiffs herein first raised the issue of trust in the said Succession Cause and asserts that the Plaintiffs were granted time to file the claim based on the issue of trust but failed to do so.
26. As it were, Section 28 of the *Land Registration Act* recognizes trusts including customary trusts as one of the overriding interests that runs with the land and which subsist and affect the same without necessarily being noted in the land register.
27. Addressing itself to the circumstances in which a customary trust can be presumed to exist in *Isack Kieba M'Inanga -vs- Isaaya Theuri M'Lintari & Another* [2018]eKLR, the Supreme Court of Kenya held as follows:

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie -vs- Kinuthia*, that what is essential is the nature of the holding of the land and intentions of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:-

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



28. In support of their claim for the existence of a customary trust over the suit property, the 4<sup>th</sup> Plaintiff who testified herein as PW1 avers as follows at Paragraph 3 to 8 of the Affidavit sworn on 30th January 2015 filed in support of the Originating Summons.

- “ 3. That Wanjohi Kihara alias Sisto Wanjohi Kihara is my paternal uncle being a brother to my father Wachira Kihara;
4. That the deceased Wanjohi S/o Kihara alias Sisto Wanjohi Kihara and my father were the only son (s) in the house of my grandmother Wangui Kihara wife of Kihara Nguini;
5. That during the time of land consolidation and registration, the portion of land that was to go to the house of Wangui Kihara from my grandfather Kihara Nguini were registered in the name of Wanjohi Kihara the eldest son of my grandfather in the house of Wangui Kihara. Annexed hereto the search certificate of land parcel Thegenge/Karia/447 marked “JW1”;
6. That my father died in 1976 and was buried on this land;
7. That the deceased Wanjohi Kihara alias Sisto Wanjohi Kihara held the land parcel Thegenge/Karia /447 in trust for himself and my late father in equal shares; and
8. That we as the family of Wachira Kihara would wish the court to declare that the said Wanjohi Kihara held the land in trust for himself and Wachira Kihara.”

29. That wish was however one that was rather difficult to grant. For a start, there was no evidence placed before the court to support the contention that the suit property either belonged to the Plaintiffs’ Asher clan, or that it was previously owned by the grandfather, the said Kihara Nguini. The Search Certificate produced by the Plaintiffs herein reveals that the Defendant’s husband Wanjohi S/o Kihara was the first registered proprietor of the suit land, the same having been registered in his name on 29<sup>th</sup> January 1958.

30. Secondly, other than the fact that they shared a family tree with the Defendant’s husband, there was nothing placed before the court to demonstrate that the Defendant’s husband held the land for the benefit of other members of the family save for his own.

31. In support of her case, the Defendant called her step son John Kihara Wanjohi (DW2) who was the first born son of the Defendant’s husband. DW2 was categorical that their grandfather left Nyeri with all his family and settled in the Rift Valley in the 1920s. It was his case that his father was the only one who returned to and settled in Nyeri in search for education in the 1930s and that the rest of the family were only repatriated back to Nyeri during the period of emergency.

32. DW2 was further categorical that his father single-handedly purchased the suit property during the period of land demarcation and consolidation. He told the court that the Plaintiffs had never ever occupied and/or utilized the suit property. That much was confirmed by the 4<sup>th</sup> Plaintiff (PW1) in his testimony during cross-examination. PW1 testified thus:-

“I am 67 years old.

My father died in 1976 by which time I was a grown up. When he died I was living in Nairobi. He died in Nyahururu where he used to work for one John Gitonga Kihara. I was born where my father used to work (Kieni). When I was very young, my father took me and



my mother on the suit land and built thereon but this was before land consolidation. After land consolidation, my family (immediate) never lived on the suit land.”

33. It was not clear to this court how young PW1 was during the alleged visit. It was even more unclear how he knew that the place his father took him to was the suit property when land demarcation and consolidation was yet to be done. What was clear was that after he was registered as the proprietor of the suit property, the Defendant’s husband had exercised full control thereon as the proprietor thereof.
34. While it was true that the Plaintiffs’ father was buried on the suit property, the circumstances leading thereto were explained by DW2 who told the court that his uncle was sort of abandoned and they made a decision to pick his body and bury the same on the suit land. This position was again somewhat indirectly confirmed by the 4<sup>th</sup> Plaintiff (PW1) during cross-examination. While conceding that their father had another parcel of land in Gatarakwa, he told the court that the only reason they were unable to bury him in Gatarakwa was because in 1976 when his father died, the co-operative Society through which they had purchased the land had not allotted parcels to its members and that the sub-divisions in Gatarakwa were only done in 1979.
35. It follows that there was no basis for the claim that the suit property was held by the Defendant in trust for the Plaintiffs. That must be the reason when in the year 2011 they raised a similar claim in Nyeri High Court Succession Cause No. 442 of 2008, they did not file any suit despite the court staying the cause and granting them six (6) months to file their claim.
36. As stated by the Defendant, this suit was clearly an afterthought and filed in abuse of the process of the court after the court proceeded in the Succession Cause to confirm the Grant in respect of the Estate of Wanjohi S/o Kihara in the name of the Defendant on 29<sup>th</sup> May 2014.
37. In the premises, I was not persuaded that there was any merit in the Plaintiffs’ case. The same is dismissed with costs to the Defendant.

**DATED, SIGNED AND DELIVERED AT NYERI THIS THURSDAY 17<sup>TH</sup> DAY OF OCTOBER, 2024.**

**J. O. OLOLA**

**JUDGE**

In the presence of:

No appearance for the Plaintiff

Ms. Wanjiru holding brief for Karweru for the Defendant.

Court Assistant: Kendi

