



REPUBLIC OF KENYA



KENYA LAW

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Njoroge & 3 others v Wanjuki (Substituted as the legal representative of the estate of Samuel Wanjuki Njoroge) (Environment & Land Case 4 of 2022) [2023] KEELC 17296 (KLR) (4 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17296 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 4 OF 2022

YM ANGIMA, J

MAY 4, 2023

BETWEEN

MICHAEL MURIITHI NJOROGE 1ST PLAINTIFF

MONICA NJOKI NJUKI 2ND PLAINTIFF

MIRIAM WANJIKU NDOME 3RD PLAINTIFF

MARGARET WAMBUI NJOROGE 4TH PLAINTIFF

AND

MOSES NDIRITU WANJUKI DEFENDANT

SUBSTITUTED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SAMUEL WANJUKI NJOROGE

JUDGMENT

A. The Plaintiff's Claim

1. Vide an originating summons dated December 15, 2009 and amended on July 12, 2022 brought under the provisions of sections 45(f) and 57 of the *Trustee Act*; rules 2 and 4 of the *Trustees Rules*; order xxxvi of the *Civil Procedure Rules*; sections 3 and 3A of the *Civil Procedure Act*; and all other enabling provisions of the law, the plaintiffs sought determination of the following questions:
 - a. Was Samuel Wanjuki Njoroge registered as proprietor of LR Nos Nyandarua/Wanjohi/3264, 3265, 3266, 3267 and 3268 formerly LR No Nyandarua/Wanjohi/7 formerly LR No Nyandarua/Wanjohi/1934. (The suit property) in trust for himself and the plaintiffs?
 - b. Are the plaintiffs entitled to shares in the property?



- c. Should an order issue vesting shares of the suit properties in the plaintiffs or in such other just manner?
 - d. Who shall bear the costs of the suit.
2. The originating summons was based upon the grounds set out on the face thereof and the contents of the supporting affidavit of the 1st plaintiff, Michael Muriithi Njoroge sworn on July 12, 2022 together with the exhibits thereto. The gist of the plaintiffs' claim was that they contributed financially to the acquisition of the suit property and that the same was registered in the name of the late Samuel Wanjuki Njoroge (Njoroge) in trust for the entire family members of the late Ndome Karoki (Karoki) by virtue of being the eldest son of Karoki.
3. The plaintiffs contended that they contributed towards acquisition of parcel 7 in at least 3 ways. Firstly, the late Njoroge had received the salaries of the 2 – 4 plaintiffs while they were employed by colonial settlers between 1960 and 1963. Secondly, the rest of the family members of Karoki had cultivated crops and reared livestock on parcel 7 which contributed towards payment of the Settlement Fund Trustees (SFT) loan. Third, that the 1st plaintiff had loaned Njoroge Kshs 15,000/= to enable him to redeem a farming loan he had taken from CPCS in 1982 in order to save the suit property from being auctioned.
4. The plaintiffs further stated that they and their parents had resided on parcel 7 for a long time and that when Karoki eventually died he was buried on the said land without any objection by Njoroge. As a consequence, they prayed for the questions in the originating summons to be resolved in their favour.

B. The Defendant's Response

5. The defendant filed a replying affidavit sworn by Moses Ndiritu Wanjuki on a date which is not indicated in the jurat. Nevertheless, the defendant denied the plaintiffs' claim in its entirety. It was denied that the late Njoroge was registered as proprietor of parcel 7 in trust for the plaintiffs as alleged or at all. It was denied that the said land was acquired through the financial efforts or contributions of all the family members of Karoki. It was denied that the late Njoroge was paid the salaries or wages earned by the 2 – 4 plaintiffs for the purpose of purchasing parcel 7.
6. The defendant denied that the plaintiffs had contributed in any manner towards acquisition of parcel 7 or towards repayment of the SFT loan and stated that any loan repayments by the plaintiffs were purely on account of loans taken by them for personal development. It was contended that Njoroge was allocated parcel 7 directly by SFT and that he solely repaid the loan on his own in consequence whereof he was issued with a title deed as absolute proprietor.
7. The defendant further stated that only the 1st plaintiff was resident on a portion of parcel 7 whereas 4th plaintiff was deceased and the 2nd and 3rd plaintiffs were residing elsewhere. The defendant further stated that the parties' ancestral or family land was title No Nyeri/Kiriti/317 which was owned by Karoki and the same was the subject of Nakuru High Court succession cause No 537 of 2004 whereby the 1st plaintiff was the petitioner and the rest of the parties were listed as beneficiaries.
8. The defendant further contended that the instant suit was res judicata on account of previous proceedings before the defunct Land Disputes Tribunal (the tribunal) and the Central Province Land Disputes Appeals Committee (the appeal's committee) whose award was adopted by the magistrate's court in Nyahururu SRM Misc Land Dispute Case No 30 of 2007 as a decree. It was contended that the said decree was never challenged on appeal.



9. Finally, the defendant stated that the instant suit was *res judicata* as the plaintiffs had failed to lodge a counter-claim when similar issues were litigated in Nyahururu CM ELC No 34 of 2018 – Samuel Wanjuki Njoroge v Michael Njoroge & 2 others between the same parties which suit was heard and determined earlier.

C. Summary of Evidence at the Trial

a. The plaintiffs' evidence

10. At the trial hereof, the 1st plaintiff testified as the sole witness on behalf of the plaintiffs except the 4th plaintiff who had died in April, 2022. He adopted the contents of his supporting affidavit sworn on July 12, 2022 as his evidence in-chief. The 1st plaintiff testified that the late Njoroge was sent to Nyandarua County in the 1960s to look for employment for the benefit of all the family members of Karoki. He stated the 2nd – 4th plaintiffs were enlisted and employed as Njoroge's wives in a white settler's farm and that Njoroge would receive their wages which were then channeled towards acquisition of parcel 7 in 1963. It was also his evidence that the rest of the family members contributed by cultivating crops and keeping livestock which boosted repayment of the SFT loan for the said land. The plaintiffs, therefore, considered Njoroge to have been registered as proprietor in trust for the rest of the family members.

b. The defendant's evidence

11. The defendant stated that he was the son and legal representative of the estate of the late Njoroge. He adopted the contents of his replying affidavit as his evidence in chief and produced the annexures thereto as exhibits. He testified that the late Njoroge was the absolute owner of parcel 7 according to the documents available and that there was no evidence that the plaintiffs contributed towards its acquisition. He, therefore, prayed for dismissal of the plaintiffs' suit.

D. Directions on Submissions

12. Upon conclusion of the trial, the parties were given timelines within which to file and exchange their respective submissions. The record shows that the plaintiffs' submissions were filed on February 3, 2023 but the defendant's submissions were not on record by the time of preparation of the judgment.

E. The Issues for Determination

13. The court has noted that the parties did not file an agreed statement of issues but they filed separate issues. Accordingly, the court shall frame the issues for determination as stipulated under order 15 rule 2 of the *Civil Procedure Rules*. The court has perused the pleadings, affidavits and evidence on record and is of the opinion that the following are the issues for determination in this suit:
 - a. Whether the instant suit is *res judicata* in view of previous proceedings involving the parties.
 - b. Whether the late Njoroge was registered as proprietor of parcel 7 in trust for the rest of his family members.
 - c. Whether the plaintiffs are entitled to the reliefs sought in the suit.
 - d. Who shall bear costs of the suit.



F. Analysis and Determination

a. Whether the instant suit is *res judicata* in view of previous proceedings involving the parties

14. The court has considered the material and submissions on record. The defendant contended that the suit was *res judicata* because the issues raised herein were determined before the tribunal and the Appeals Committee. It was further contended that the plaintiffs lost before the Appeals Committee and that they never challenged the decision before the High Court by way of appeal. It was further contended that it was *res judicata* because similar issues were considered in Nyahururu CM ELC No 64 of 2018 but the plaintiffs did not raise any counterclaim on the alleged trust hence they were barred from raising it in the instant suit.
15. The doctrine of *res judicata* is based upon section 7 of the [Civil Procedure Act](#) (cap 21) which stipulates, *inter alia*, that:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
16. The court is of the opinion that neither the tribunal nor the Appeals Committee was competent to entertain the matters before them within the meaning of section 3 of the [Land Disputes Tribunals Act, 1990](#). Section 3(1) thereof circumscribed the jurisdiction of the tribunal as follows:
- “
- “(1) Subject to this Act, all cases of a civil nature involving a dispute as to:
- a. the division of, or the determination of boundaries to land, including land held in common;
 - b. A claim to occupy or work land; and
 - c. Trespass to land.
- shall be heard and determined by a tribunal established under section 4.”
17. There is no doubt from the material on record that the plaintiffs’ claim before the tribunal was not a claim for division of or determination of boundaries; a claim to work or occupy land; or a claim for trespass to land. It was a claim for a declaration of trust since the plaintiffs claimed to have contributed towards the acquisition of parcel 7 and they claimed that the late Njoroge was merely registered as a trustee on behalf of the entire family of Karoki. Moreover, it was already registered land under the Registered Land Act which was in force hence outside the jurisdiction of both the tribunal and the Appeals Committee. See [M’Marete v Republic & 3 others](#) [2004] eKLR.
18. The defendant also relied upon explanation (4) of section 7 of the [Civil Procedure Act](#) which stipulates as follows:
- “Explanation (4) any matter which ought to have been made ground of defence or attack in such former suit shall be deemed to have been directly and substantially in issue in such suit.”



19. The defendant was of the view that the plaintiff ought to have raised a counterclaim in Nyahururu CM ELC No. 64 of 2018 (the previous suit) and seek a declaration of trust in that suit since the late Njoroge was seeking their eviction on the basis of being the absolute owner of the parcel 7 since he considered the plaintiffs to be mere licencees on the land. The court has perused the pleadings and judgment in the said case. It is evident from the material on record that the plaintiffs actually pleaded the issue of trust in the previous suit in the same manner in which it has pleaded in the amended originating summons. They pleaded in their joint statement of defence that all the family members of Karoki had contributed towards acquisition of parcel 7 and that the late Njoroge was registered merely as a trustee for the entire family.
20. The court is satisfied on the basis of the material on record that the plaintiffs actually made the issue of trust a “ground of defence” within the meaning of section 7 explanation (4) of the [Civil Procedure Act](#). There is no specific requirement that a litigant must lodge a counterclaim at the time of raising his ground of defence. By analogy, a defendant who has been sued for eviction on account of alleged trespass can plead the defence of limitation under section 7 of the [Limitation of Actions Act](#) (cap 22). There is, however, no mandatory requirement that he must raise a counterclaim for adverse possession in the same suit. He may well opt to initiate a separate originating summons for adverse possession. Accordingly, the court is not satisfied that the plaintiffs’ claim is res judicata under the law.

b. Whether the late Njoroge was registered as proprietor of Parcel 7 in trust for the rest of his family members

21. The court has considered the evidence and submissions on record on this issue. The plaintiffs submitted that they had demonstrated their contribution towards the acquisition of parcel 7 and their contributions towards repayment of the SFT loan. They submitted that a constructive trust in their favour was consequently established. They cited the cases of [Dominic Otieno Ogonyo & 2 others v Helida Akoth Walori](#) [2022] eKLR and [Godfrey Kagia Githire v George Ndichu Kagia & 4 others](#) [2008] eKLR in support of their submissions.
22. The court has perused the proceedings, evidence and judgment in the previous suit. It is evident that the 1st – 3rd plaintiffs in the instant suit were sued as the 1st – 3rd defendants in that suit. They all testified in the proceedings and the trial court believed their evidence to the effect that they actually contributed towards the acquisition of parcel 7 by making contributions through Wanjohi Farmers’ Co-operative Society (the society). It is also evident from those proceedings that an official from the said society testified as DW4 in the previous suit. His evidence, which the court believed, was that there were 2 payment cards which were opened for parcel 7 (which was initially plot No 1934) being 1934A and 1934B. Card No 1934A was for payments made by the late Njoroge whereas No 1934B was in the name of Monicah Njoki (the 2nd plaintiff in this suit).
23. Upon considering the entire evidence in the previous suit, the trial court concluded as follows:

“My view is that the defendants have interest in the suit land that cannot just be ignored by the court. The fact that the plaintiff is the registered proprietor does not automatically defeat the interests of the defendants in this land. In the case cited by the defendant’s counsel being [Gladys Njeri Muthura v Lispa Muthiguro](#) [2019] eKLR, it was held that registration of land in the name of the proprietor did not extinguish the rights under Kikuyu Customary Law. Also in the case of [Shelmith Nyambura Kariuki v Muturi Wambugu & another](#) [2009] eKLR the court dismissed a claim for eviction where the plaintiff had claimed that the



respondents were mere licensees on the land registered in her names because they had also contributed towards acquisition of the land.”

24. The court is of the opinion that the court in the previous suit found as a fact that plaintiffs had demonstrated their contribution towards acquisition of parcel 7 and consequently had acquired a proprietary interest therein under the law of trust. The trial court further held that the registration of a person as a proprietor of land does not automatically extinguish any obligation to which he may be subject as a trustee. There is no indication on record that the late Njoroge ever challenged that judgment by way of appeal. Accordingly, the court is of the opinion that issue estoppel applies to prevent the defendant from contending otherwise.
25. Additionally, this court is satisfied on the totality of the evidence on record that the 1st – 3rd plaintiffs have demonstrated that they contributed towards acquisition of parcel 7 through the society’s card No 1934 B. As was found in the previous suit, the plaintiffs’ contribution could not count for nothing. It would also appear from the course of dealings amongst the parties that they were living together peacefully whilst the SFT loan was being repaid and trouble arose only after the late Njoroge had obtained a title deed in his name. No good reason appears from the record as to why Njoroge would gratuitously host his entire family on parcel 7 whereas Karoki had some ancestral land in Nyeri. In fact, the material on record shows that Karoki’s body was buried on Parcel 7 upon his demise without any objection by Njoroge. The court is thus of the opinion that Njoroge was registered as proprietor on his own behalf and on behalf of the plaintiffs as well.

c. Whether the plaintiffs are entitled to the reliefs sought in the suit

26. The court has already found and held that the late Njoroge was registered as proprietor of parcel 7 on his own behalf and on behalf of his family members. Although the initial plaintiffs were four, the 4th plaintiff passed on during the pendency of the suit and she was not substituted. The court is of the opinion that in the absence of a justification for unequal sharing of the suit property the plaintiffs and the defendant should take equal shares meaning that each of them shall be entitled to ¼ share. The court shall consequently order cancellation of the 5 sub-divisions undertaken by the late njoroge to revert the suit property into title No Nyandarua/Wanjohi/7 before sub-division into 4 equal portions.

d. Who shall bear costs of the suit

27. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287. It is evident from the material on record that all the parties in this suit are family members. The court is thus of the opinion that each party should bear his own costs of the suit.

G. Conclusion and Disposal Orders

28. The upshot of the foregoing is that the court finds and holds that the 1st – 3rd plaintiffs have proved their claim of trust to the required standard. Accordingly, the court makes the following orders for disposal of the originating summons dated October 15, 2009 and amended on July 12, 2022:
 - a. A declaration be and is hereby made that the late Samuel Wanjuki Njoroge was registered as proprietor of title No Nyandarua/Wanjohi/7 (now subdivided into Nyandarua/Wanjohi/3264 – 3268) on his own behalf and in trust for the 1st – 3rd plaintiffs.



- b. An order be and is hereby made for the cancellation of the sub-divisions and any titles issued for Nyandarua/Wanjohi/3264 – 3268 and consequent restoration of title No Nyandarua/Wanjohi/7.
- c. That the said trust is hereby determined and 1st – 3rd defendants are entitled each to ¼ share of approximately 3.055 ha out of the said properties to be registered in their individual names. For the avoidance of doubt the defendant’s estate shall also be entitled to ¼ share of the suit property.
- d. Title No Nyandarua/Wanjohi/7 shall be subdivided into 4 equal portions of approximately 3.055 ha to be shared amongst the parties as indicated herein.
- e. Each party shall bear his own costs of sub-division and transfer of his respective share to himself.
- f. Each party shall bear his own costs of the suit.

29 It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 4TH DAY OF MAY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Wanjiru Muriithi for the Plaintiffs

Ms. Ndegwa for the Defendant

C/A - Carol

Y. M. ANGIMA

JUDGE

