



**Kiambo v Muriuki (Suing as the legal representative of the Estate of James Muriuki Kiambo)
(Environment & Land Case 31 of 2017) [2023] KEELC 20433 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20433 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 31 OF 2017**

JM MUTUNGI, J

OCTOBER 5, 2023

BETWEEN

BENSON NJIRU KIAMBO PLAINTIFF

AND

**ALICE WAMBUI MURIUKI (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF JAMES MURIUKI KIAMBO) DEFENDANT**

JUDGMENT

Introduction and Background

1. The Plaintiff filed plaint dated 1st February 2017 seeking for orders that:
 - a. A declaration that land parcel number Baragwe/Thumaita/1067 and 1068 (suit land) is registered in the name of the Defendant in trust for himself, the Plaintiff, Cyprian Njeru and Ruth Wanjiku.
 - b. An order determining the trust and land parcel numbers Baragwe/Thumaita/1067 and 1068 be subdivided into five equal portions amongst the defendant, the Plaintiff, Cyprian Njeru, Peter Njogu and Ruth Wanjiku.
 - c. Costs of this suit.
 - d. Any other relief the Honourable Court may deem fit and just to grant.
2. The plaint was predicated upon the grounds that the suit land was initially Baragwe/Thumaita/725 (initial suit land) and was registered in the name of Joseph Kiambo Karuingi, who was the father (now deceased) of the parties herein.
3. The plaintiff alleged that their late father transferred Baragwe/Thumaita/725 to his son, the Defendant to hold in trust for his brothers and sister of the first house and that the defendant subdivided the



land into land parcels Baragwe/Thumaita/1067 & 1068 and was holding the two portions in trust for himself and his siblings.

4. The Plaintiff further alleged that they had been utilizing the said suit land before they were chased away by the defendant and that the defendant in breach of the trust has refused, neglected, or failed to subdivide the suit land amongst the siblings.
5. The Plaintiff contended that he was living on the suit land and the defendant was contemplating on selling the said suit land which would be prejudicial to them.
6. He contended that his claim against the defendant was for a declaration of trust of the suit land in accordance with the Kikuyu Customary law. The Plaintiff produced copies of green cards, two for the suit land and one for Baragwe/Thumaita/725 as part of his evidence.
7. The Defendant filed his statement of defence on 6th April 2017 partially admitting and denying some of the contents of the plaint. In response to the allegation by the plaintiff that he was holding the suit land in trust for his siblings, the defendant contended that he purchased the land for consideration from a purchaser who had been sold the land by their father, who had no interest in keeping the land.
8. The Defendant further contended that none of his siblings stayed and utilized the suit land and that he did not intend to sell the suit land.
9. The Defendant further averred that there was a decree for adverse possession issued against him over the suit land in favour of one of his brothers and whose execution was untenable due to the Plaintiff's conduct which he termed as an abuse of the court process.
10. On his part, the Defendant produced the application for consent of Land Control Board, the copy of Green Card for Baragwe/Thumaita/725, his Identification Card, a Copy of Official Search of Kangani/Ndagani/4267 which showed that the proprietors of the said land were Richard Mugo Kiambo (his brother) and Rahab Warui Kiambo (his mother) and the Judgment of the Civil Appeal No. 13 of 2000 between James Muriuki Kiambo Versus Rahab Warui Kiambo and Joseph Kiambo Karuigi.
11. The suit was initially heard on 17/7/2019 before Cheron, J when both the Plaintiff and Defendant closed their cases. The Defendant died shortly afterwards and that necessitated substitution. Upon substitution of the Defendant being allowed, the Defendant applied to amend the defence and to plead a Counterclaim which was granted. In the Counterclaim the Defendant inter alia sought an order for the Plaintiff to remove the caution lodged against land title Baragwe/Thumaita/1067 and a declaration that the late James Muriuki Kiambo was the absolute registered owner of title Number Baragwe/Thumaita/1067 and 1068. The Plaintiff in his defence to the Counterclaim reiterated that the Defendant held the suit land in trust for himself and his siblings.

Evidence of the Parties

12. The suit was heard denovo before me on 31/10/2022 and 13/3/2023 when both parties testified and closed their respective cases. The Plaintiff testified as the sole witness in support of the Plaintiff's case while the Defendant (Administrator of deceased estate) and her mother testified in support of the defence case.
13. The Plaintiff, PW1 testified and as part of his evidence he adopted his statement dated 1st February 2017. He stated that his father was the registered owner of land parcel Baragwe/Thumaita/725 where they all lived in. He stated that they were six siblings, five brothers and one sister. It was his position that his father, Joseph Kiambo Karuingi, who was the registered owner of the original suit land was



- holding the land in trust for his children and wife. He stated that his brother, the deceased, somehow got himself registered as the owner of the original suit land which he later subdivided into land parcels Baragwe/Thumaita/1067 and 1068.
14. He stated that his father never sold the land to the Defendant or any other person. He stated the land was ancestral land as his father had been given the land by his grandfather. He averred that his brother took advantage of their absence to transfer the land to his name.
 15. He averred that their father was a career policeman and owing to the nature of the job, he was always away and that it was his mother who was taking care of the land.
 16. In Cross Examination, the Plaintiff reiterated that land parcel Baragwe/Thumaita/725 was owned by his father but the Defendant (deceased) somehow got it subdivided into parcels Baragwe/Thumaita/1067 and 1068 which he caused to be transferred to his name. The Plaintiff admitted the land was subdivided and transferred to his brother's name during their father's lifetime.
 17. The Plaintiff asserted that he brought the suit on behalf of his siblings though he had no written authority from them. He stated his mother had a house on the suit property where they all stayed when they visited. He explained their father had a second wife with whom he settled in Meru while his mother settled at the land in Kirinyaga. He admitted he was aware about the Tribunal case and the resultant appeal therefrom on the same land parcel. He stated his mother's house was on the suit land and that when she died she was buried on the land. He said his brother Richard Kiambo resides on the land. He concluded his evidence by stating that he lodged a caution over parcel Baragwe/Thumaita/1067 to protect the interest of his family.
 18. Alice Wambui Muriuki (DWI) testified that the Defendant herein was her late father and she was substituted in his place. She adopted her written statement dated 24.03.2021 and the bundle of documents (Defendant's exhibit 1-7) as part of her evidence. She stated that land parcel Baragwe/Thumaita/725 was transferred to her father by her grandfather who was the previous registered owner on 17.1.1981 for a consideration of Kenya Shilling thirty thousand (Kshs. 30,000) as evidenced in the green card. She stated that the money was a refund to one Mugambi who had purchased the land from her grandfather. She contended that her grandfather had intended to move to Meru but her father did not want to go with him so he opted to refund the purchase price for about 2 acres that had been paid by Mugambi to her grandfather.
 19. She testified that her grandmother and her Uncle Richard Kiambo resided on the suit land but the Plaintiff had not resided in the suit land though they stayed in her grandmother's house every time they visited her. She further stated that there was a tribunal case that was concluded and there was a Court of Appeal Judgment in Nyeri Appeal No.46 of 2013 which awarded her uncle, Richard Kiambo 1/4-acre land on the basis of adverse possession.
 20. DWI further stated that her father was the second born in the family and as such, her grandfather could not have transferred the land to him to hold in trust since he was not the first born. She contended that the plaintiff's case had no basis and should be dismissed with costs.
 21. In cross examination, the Defendant stated that she was born in 1981 and that the evidence she gave was from the records that had been availed. She stated that she had not availed any agreement to show that her father had bought the land or any evidence to show that Mugambi was refunded the Kshs. 30,000. She stated that her grandfather did not reside in the suit land, and that it was her grandmother who was residing in the suit land. She stated her grandmother had some tea bushes and coffee on the suit land. She testified further that David Muchiri, the first born of her grandfather did not own any



land around where the suit land is located and further stated she did not know whether her grandfather gave her Uncles land anywhere else.

22. Mary Waruguru Muriuki, the mother of DW1 testified as DW2 and she adopted her witness statement dated 24.03.2021 as her evidence. She stated that the Plaintiff was the brother to her deceased husband. She further testified that the original suit land parcel Baragwe/Thumaita/725 belonged to her father-in-law initially, who sold the same to David Mugambi. She explained that David Mugambi was not very interested with the land, and her husband decided to refund the money to him and buy the land back. She stated it was at this point that her father-in-law transferred the land to her deceased husband, which he later subdivided into portions 1067 and 1068.
23. DW2 affirmed that the land was registered in her deceased husband's name on 17.1.81 and that she has occupied the land since 1981 when it was transferred to her deceased husband. DW2 stated that the Plaintiff registered the caution over the land in the year 2017. She contended that her deceased husband was not holding the land in trust and that he purchased it from David Mugambi.
24. In cross examination, DW2 stated that she was married in 1979 and that her father-in-law had two wives. She said that the first wife Rahab Warui had five sons and a daughter and that her husband and the Plaintiff were her sons. She further stated that her husband's siblings were not residing in the suit land except for Richard, the youngest of the siblings who was staying in the suit land with his mother.
25. She stated that after selling the land in Kirinyaga, the father-in-law relocated to Meru where his second wife was living. She stated that she did not have an agreement to show that her deceased husband refunded the money to David Mugambi.

Submissions, Analysis and Determination.

26. The parties filed written submissions following the closure of the trial. The Plaintiff in his submissions asserted that having regard to all the evidence adduced and taking into account all the attendant circumstances it was evident that the deceased was registered to hold the land not as an absolute owner but a trustee on behalf of his siblings. The Plaintiff placed reliance on the Cases of *Twalib & Another –vs- Said Sagger Alimed Al Lieidy & Others* (2015) eKLR and *Samuel Gichina Muiruri –vs- Evanson Kimemia* (2002) eKLR. It was the Plaintiff's submission that a resulting trust arose in favour of the Plaintiff and the siblings as their father in effecting the transfer in favour of the Defendant (deceased son) did not intend to confer a beneficial interest over the suit land upon his son as transferee absolutely.
27. The Defendant in his written submissions maintained the transfer effected to the Defendant was absolute as the Defendant (deceased) refunded money paid as purchase price for the land by one David Mugambi. The Defendant argued the land was transferred to him for valuable consideration and there was never any intention that he was to hold the land as a trustee.
28. In his submissions the Defendant further argued the present suit was *res judicata* since the matter in dispute had been previously litigated in Gichugu Land Dispute Tribunal No. 5 of 2000 whose decision was appealed to the Provincial Land Disputes Tribunal Central Province whose decision precipitated the appeal in Embu HC Civil Appeal No. 13 of 2000 which set aside the Tribunal's award on the basis that the Tribunal lacked the jurisdiction to deal with the dispute.
29. The Defendant further argued the suit was *res judicata* by reason of the Court of Appeal decision in the case of *Richard Mugo Kiambo –vs- James Muriuki Kiambo* (2014) eKLR where the Court of Appeal decreed Richard Mugo Kiambo who is the younger brother of the Defendant entitled to a portion of the suit land measuring 0.30 Ha by reason of adverse possession. The Defendant contended the



Plaintiff was aware of the ongoing suit and should have applied to join the proceedings to ventilate his interest as he was an interested party.

30. In his opposition to the Plaintiff's submission that a resulting trust had been created the Defendant placed reliance on the Case of Peter Ndungu Njenga –vs- Sophia Watiri Ndungu (2000) eKLR where the Court held:-

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

31. This has been a convoluted matter which as per the record has generated previous actions. Before the Land Disputes Tribunal at Gichugu in 2000, the parents of the parties were the claimants against the Plaintiff. Apparently when the matter could not be resolved through the Tribunal as the award issued by the Tribunal was set aside, as the Tribunal did not have jurisdiction to deal with matters involving title to land, the parties brother Richard Mugo Kiambo sued the Defendant in Kerugoya ELC No. 31 of 2012 (OS) claiming adverse possession of Title No. Baragwe/Thumaita/1067. Though his claim was unsuccessful before the ELC Court, he was successful before the Court of Appeal and he was decreed to be entitled to a portion of 0.30 Ha of the suit land.
32. Both parties before this Court exhibited minutes of a family meeting held on 22/12/1996 at their mother's house on the suit property. In attendance at the meeting was their father, mother and their Uncle, P. Kiambo who chaired the meeting. It is evident from the content of the minutes that the father never intended to transfer the land to the Defendant absolutely. The deliberations at the meeting also indicate the Defendant paid some money to Mr. David Mugambi as refund for monies his father had received as purchase price of the land. The Defendant apparently prevailed on his mother to remove the caution she had registered against the title and have the land transferred to his name ostensibly so as to shield the land from being sold by his father. Because of all that the Defendant had done on behalf of the family, the brothers were agreeable to have One Acre (1) transferred to the Defendant absolutely to compensate him and the other Acre to be registered in their mother's name as trust land (the suit land they assumed was 2 acres though it was about 2 ½ Acres or 1.01 Ha).
33. The Defendant did not dispute that the land parcel Baragwe/Thumaita/725 constituted clan land that it was given to their father by their grandfather. There was no evidence adduced to show that the father of the parties had some other land in Kirinyaga and/or that he gave his sons including the Defendant any other land in Kirinyaga. As highlighted it is evident from the family meeting held in 1996, there was no clear intention from the father of the parties, who was the registered owner to sell the suit land outright to his son, the Defendant herein. Indeed, what comes out of the evidence is that while the father had sold the family land of 4 acres, the wife (mother of the parties) was apprehensive that her husband could as well sell the remaining 2 ½ Acres or thereabouts constituted in land parcel Baragwe/Thumaita/725 precipitating her decision to lodge a caution over the title claiming “beneficiary interest”. This is the caution the Defendant persuaded her to remove to facilitate the transfer to his name. In my view, it does not appear realistic that the father would have decided to sell all his ancestral land, more so to one of his son's and leave all the other four(4) sons without any land. The Defendant fortunately had the ability to redeem the land by making a refund to the person who had paid some money to his father towards purchase of the same. However there was no formal agreement between the Defendant and his late father to affirm that the refund was to be treated as purchase of the land. Considering that the Defendants mother and her children were residing on the suit land,



the intention could not have been that the Defendant was acquiring the land absolutely to exclude his other siblings.

34. On the issue of res judicata that the Defendant has submitted on, it is my considered view that the Land Disputes Tribunal Award that resulted in Embu HC Appeal No. 13 of 2000 would not render the present suit res judicata. The Land Disputes Tribunal had no jurisdiction to deal with the subject matter and hence its decision was held to be a nullity. Hence the Land Disputes Tribunal was not a Court or Tribunal that was competent to try the issue before it within the meaning of Section 7 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya and therefore the doctrine of res judicata would be inapplicable.
35. As regards Nyeri Court of Appeal Civil Appeal No. 46 of 2013 that arose from Kerugoya ELC No. 31 of 2012, I also hold the doctrine of res judicata would not apply for two reasons. Firstly, the Plaintiff was not a party in the proceedings, and, secondly the issue in that case was one of adverse possession whereas in the present suit the issue is whether the Defendant held the land under a customary trust in favour of the Plaintiff and his siblings. The issue of trust was not pleaded and did not arise in Nyeri Civil Appeal No. 46 of 2013.
36. As regards whether or not the Defendant was registered to hold the land in trust, I make an affirmative finding. The Defendant's father had relocated and was residing in Meru with his second wife, while the first wife and her children were residing at Kirinyaga land (suit property). The father had already sold a part of the land and the Defendant's mother was apprehensive he could sell the remaining land prompting her to register a caution. The Defendant apparently being the only child who was then able refunded the prospective purchaser some of the money he had paid to preserve the land within the family. The mother agreed to remove the caution for the Defendant to be registered. The Defendant as per the evidence was also assisting with the education of his younger siblings and in the circumstances it was only reasonable for him as the responsible child to be entrusted with the registration of the land to hold in trust for his mother and the other siblings. The land constituted ancestral land and each of the children had a beneficial interest over the same.
37. The Supreme Court of Kenya in the Case of Isack M'anga Kiebia –vs- Isaya Theuri M'linturi & Another (2018) eKLR exhaustively discussed the application of customary law in matters relating to land as follows:-

“[40] ... Given the fluidity and complexity of these rights, it is obvious that, such rights could not find expression in the Register in their totality. Such customary rights as could not be noted on the register would have to be recognized somehow, for they had already been recognized by [the Constitution](#).

(41) Thus, the obligations of a registered proprietor upon a first registration, as embodied in Section 28(b) (and the proviso thereto) and Section 30 (g) of the Registered [Land Act](#), could only logically, be traceable to the “rights, interests, or other benefits under African customary law”. How then, given this historical context, and the constitutional and statutory provisions, could it have been so easy to declare that rights under customary law become extinguished for all purposes upon the registration of a person and that none could survive whatsoever

...

(54) In the foregoing premises, it follows that we agree with the Court of Appeal's assertion that “to prove a trust in land; one need not be in actual physical



possession and occupation of the land.” A customary trust falls within the ambit of the proviso to Section 28 of the Registered *Land Act*, while the rights of a person in possession or actual occupation, are overriding interests and fall within the ambit of Section 30(g) of the Registered *Land Act*.”

38. In the present case, I am persuaded that James Muriuki Kiambo, being one of the eldest sons and one of the endowed sons of Joseph Kiambo Karuingi was registered as proprietor of the suit land in a fiduciary capacity for his mother and his siblings.
39. In his pleadings, the defendant contended that only his younger brother and his mother lived in the suit land, that the rest of his siblings did not live within and only used their mother’s house whenever they visited. As pointed out by the Supreme Court in *Isack M’nanga Kiebia Versus Isaaya Theuri M’lintari* (supra) their occupation of the land was immaterial as their interests were protected in the proviso to Section 28 of the Registered *Land Act* (repealed) which provided:

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –
- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

Section 30 (g) of the Act provided:

30. Unless the contrary is expressed in the register all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register.
- (g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where enquiry is made of such person and the rights are not disclosed.

Section 28 and 30 of the repealed Registered *Land Act* were reproduced under Section 25 and 28 of the *Land Registration Act*, 2012 albeit with minor alterations. While the previous Act did not expressly acknowledge customary trust unless it was supported by possession and/or occupation as an overriding interest that did not require noting in the register, the new *Land Registration Act*, 2012 did so under Section 28(b) which provides for “trusts including customary trusts” and are overriding interests that need not be noted in the register. In the circumstances, I find and hold that the plaintiff has proved his case on a balance of probabilities and is entitled to Judgment.

40. I take cognisance of the fact that the Court of Appeal awarded one of the Defendant’s brothers Richard Mugo Kiambo 0.3 Ha of the suit land. In making the final orders I have to have regard of this award.
41. Equally I take note that the Defendant’s action of making refund to David Mugambi possibly saved the land from being alienated. On account of this contribution, the Defendant (in this case his estate) needs to be compensated by getting a larger portion of the land. In my view the Defendant should be



compensated by getting one half of the original land parcel Title No. Baragwe/Thumaita/725 which measured 1.01 Ha. I accordingly make the following final orders:-

1. The Defendant shall retain land Title No. Baragwe/Thumaita/1068 measuring 0.25 Ha registered in his name.
2. That Land parcel Title No. Baragwe/Thumaita/1067 shall be shared as follows:-
 - i. Richard Mugo Kiambo – 0.30 Ha as per Court of Appeal C.A No. 46 of 2013, Judgment delivered on 6th May 2014.
 - ii. Benson Njiru Kiambo (Plaintiff herein) as trustee for himself, Cyprian Njeru, Peter Njogu and Ruth Wanjiku – 0.20 Ha (approx.)
 - iii. The Defendant's Estate - 0.25 Ha (approx.)
3. Each party to bear their own costs of the suit.

JUDGMENT DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 5TH DAY OF OCTOBER 2023.

J. M. MUTUNGI

ELC - JUDGE

