



**Kinyua & 3 others (Suing as the legal representative of the estate of Francis Karandi Mwirichia – Deceased) v Kaigongi (Sued as the legal administratrix of the Estate of Sabelio Kinoti – Deceased) (Environment & Land Case 301 of 2017) [2022] KEELC 2419 (KLR) (4 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2419 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 301 OF 2017**

**CK NZILI, J  
MAY 4, 2022**

**BETWEEN**

**ISAAC KINYUA ..... 1<sup>ST</sup> PLAINTIFF  
GEOFFREY MUNENE KARANDI ..... 2<sup>ND</sup> PLAINTIFF  
SOLOMON KITHINJI KARANDI ..... 3<sup>RD</sup> PLAINTIFF  
DANIEL MUTEMBEI KARANDI ..... 4<sup>TH</sup> PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF FRANCIS  
KARANDI MWIRICHIA – DECEASED**

**AND**

**HELLEN KAIGONGI ..... DEFENDANT  
SUED AS THE LEGAL ADMINISTRATRIX OF THE ESTATE OF SABELIO  
KINOTI – DECEASED**

**JUDGMENT**

**A. Pleadings**

1. By a plaint dated October 4, 2017, the plaintiffs suing as legal representative of Francis Karandi Mwirichia herein after the deceased, brought a case against the defendant sued as the legal representative of the estate of Sabelio Kinoti deceased, claiming that Land Registration No. Abothuguchi/L-Kaongo/424 forming part of the estate of the defendants had been acquired as family land by one Colleta Kabugi, the mother to the deceased, Sabelio Kinoti and Francis Karandi Mwirichia and registered in the name of Sabelio Kinoti to hold in trust for the mother and Francis Karandi Mwirichia and other family members.



2. It was averred as a consequent and in recognition of that trust that, the late Sabelio Kinoti allowed the deceased Francis Karandi Mwirichia, Colleta Kabugi and their families to occupy and utilize more than half of the suit land up to and including at the time of his death in 1974, whereof there have been extensive developments including homes, farming activities and animal husbandry.
3. In breach of the aforesaid existing trust, possession, ownership, occupation and use of the land, it was averred that the defendants' children filed Githongo SRMC Succession Cause No. 22 of 2016 and have further been threatening to evict the plaintiffs from the said land as well as to disinherit them of the suit land.
4. The plaintiffs sought for a stay of the Githongo law courts succession cause, declaration of a customary trust of half share of the suit land and a permanent injunction.
5. Through a defence dated November 13, 2017, the defendant averred the suit was a delaying tactic to frustrate the finalization of the succession cause; denied that the plaintiffs had any legal capacity to sue since they had no relationship with the late Francis Mwirichia; insisted the alleged customary trust did not meet the Ameru customary law; averred that the plaintiffs were occupying LR Abothuguchi/L-Kaongo/648 and not 424; took the view the deceased Francis Mwirichia, Colleta Kabugi and their families used to occupy and utilize LR Abothuguchi/Gaitu/12-12-1214 till the plaintiffs recently moved into LR No. 648 and settled thereon.
6. Further, the defendant denied that the suit land was ever ancestral land and had this been the case nothing had stopped the said Colleta Kabugi from registering the same under her name if at all it belonged to her like she had done to other parcels of land such as L.R No. Abothuguchi/Gaitu/1464.
7. Additionally, the defendant averred the long occupation could not lead to creation of a trust or any other entitlement over adjacent land and that the land the plaintiffs were occupying did not form part of the succession proceedings in which the defendant was an administrator, since the plaintiffs had other parcels of land which they had developed and were only instituting the suit in bad faith to actuate their threats to take over her deceased father's estate on account of her gender.
8. Lastly, the defendant averred the allegations were baseless since the plaintiffs were already parties in the succession cause.

## **B. Evidence**

9. PW 1 Isaac Kinyua his witness statement dated October 4, 2017 and produced the list of documents namely; a search certificate for Land Registration No. Abothuguchi/L-Kaongo/651, L.R Abothuguchi/L. Kaongo/420 and a limited grant ad litem as P. E.xhs 1-3 respectively. He told the court the deceased Sabelio Kinoti was a brother to his late father Francis Karandi Mwirichia while Colleta Kabugi was his grandmother who had two sons, the defendant's father Sabelio Kinoti and his father Francis Karandi Mwirichia now deceased.
10. He stated her grandmother had two parcels of land namely, LR No's 424 and 651 both registered under the defendant's deceased father's name in trust for the family of Colleta Kabugi.
11. He stated his late uncle passed on leaving behind a wife of the who left and got re-married.
12. He testified the defendant who is her cousin got married in Kiambu but when she came back after the break down of her marriage, she showed where to live, built but recently without consultation filed a succession cause to inherit the two parcels of land. He told the court her late grandmother had bought the two parcels of land at the time when women could not be registered as land owners in accordance with Ameru customary law, hence the reason the two parcels were registered in the name of her elder



- son the defendant's late father, in trust for all her children who had built, occupied, developed and cultivated on the suit land as ancestral land. He stated he objected to the succession cause after he was notified about it. He requested that the land be equitably and fairly shared or distributed among them.
13. PW 2 Angelo Riungu adopted his witness statement dated December 13, 2019; confirmed that the parties were family members all living on Parcel No. 424 since childhood and that their parents were all buried in the suit land. He confirmed the land was registered under the elder son's name in accordance with the Meru customs in trust for the rest of the six family members.
  14. He testified that the defendant was occupying LR No. 651 after her divorce and return to the family land after he showed her where to settle.
  15. In his view, the land was initially bought by Colleta Kabugi deceased, but registered in the defendant's deceased father's name. He stated as the uncle to the parties, he had been overseeing their welfare and affairs. He told the court the land was not ancestral inheritance by Colleta Kabugi since she had bought it from one M'Witia. He insisted he gave evidence in the succession cause and set the record straight that Colleta Kabugi and his late father M'Mwirichia was the caretaker of his elder brother's family.
  16. DW 1 adopted her witness statement dated January 23, 2020, confirmed that the succession cause at Githongo Law Courts had not been finalized. According to her, Colleta Kabugi had told her, her late father was the one who had bought the suit land. She confirmed it was the plaintiff's late father who had brought her up together with others as her uncle. She told the court she had no agreement confirming the alleged purchase. She insisted her late father was also the owner of LR No. 651 but could not confirm that as per Ameru customs land would only be registered in the name of an elder male son and not in the name of a female member.
  17. As to where she was born, DW 1 confirmed she was brought up on LR No. 1212 – 12 14, belonging to her grandparents currently occupied by Muthomi Kithure.
  18. Further, DW 1 confirmed her late mother left the ancestral home in 1977 together with her after the death of her father but in 1978, Colleta Kabugi came for her and lived with her until she got married in 1997 in Kikuyu land.
  19. In her view, she stated even after her marriage she used to rent out the suit land which was vacant at the time. To her, the two parcels of land were separated by a path and she lived on Parcel. No. 651 though Parcel. No. 424 was her late father's land. She testified that the issue of whether the suit property was held in trust had not been indicated in the title, though in the succession cause her claim was over the inheritance of the two parcels of land. She produced the proceedings in the succession cause as D. Exh 1. She denied that PW 2 had allegedly showed her where to live after she divorced her husband and came back to the suit land.
  20. DW 2 adopted her witness statement dated January 23, 2020 confirming that the late Francis Karandi was her brother-in-law who had bought the two parcels of land from M'Mwitari Kirira before he got married though at the time people were not writing sale agreements. She confirmed that the plaintiffs were the children of the late Francis Karandi but could not confirm their residence.

### **C. Written Submissions.**

21. The plaintiffs submitted the issues for determination are: -
  - i. Whether the land was gathered during adjudication.
  - ii. Whether it was bought by Sabelio Kinoti.



- iii. Whether Sabelio Kinoti was the elder brother to Francis Karandi and lastly whether trust elements had been established.
22. The plaintiffs submitted the suit land was acquired by their late grandmother but registered in the name of her elder son in line with Ameru customary norms hence the reasons despite his death in 1974, the land was registered under his name in 1977 which land they have been occupying and utilizing till their father died in 2008. He insisted the suit land was intergenerational in nature held in trust for the plaintiffs.
23. It was submitted that the customary trust had been established through evidence, and the long occupation as held in *Kiebia v Isaaya Theuri* (2018) eKLR, *Mbui Mukangu v Gerald Mutwiri Mbui* (2004) eKLR, *Justus Maina Muruku v Jane Waitihira Mwangi* (2018) eKLR.
24. The defendant submitted the issue of being relatives was not in dispute; however, in her view her late father's registration in 1977 over the two parcels did not indicate any customary trust as alleged or at all. Further, the defendant submitted that for 34 years since the demise of her father, the deceased plaintiff's father laid no such claim until his demise in 2008.
25. The defendant also submitted, the plaintiffs were unable to explain why Colleta Kabugi did not register the land under her name if at all she was the purchaser as alleged or in the alternative why the plaintiff's father failed to register and or claim it during his lifetime.
26. In addition, the defendant submitted that the test in *Kiebia case (supra)* had not been met and that a customary trust could not be implied unless there was an intention to create it. Reliance was placed on *Peter Ndung'u Njenga vs Sophia Watiri Ndung'u* (2000) eKLR.
27. Further, the defendant submitted the plaintiffs would not claim customary trust without possession or utilization of the two parcels of land hence urged the court to find the same not proved. Reliance was placed on *Alice Wairimu Macharia v Kirigo Philip Macharia* (2019) eKLR and *Juletabi African Adventure Ltd & another v Christopher Michael Lockley* (2017) eKLR.

#### **D. Issues for determination**

28. The issues commending themselves for my determination are:
- i. If the plaintiffs have pleaded and proved customary trust.
  - ii. If the plaintiff is entitled to the prayers sought.
29. It is trite law that issues flow from pleadings and parties are bound by their pleadings. In this matter the plaintiffs by as administrators of the estate of Francis Karandi Mwirichia sued the defendant as the legal administrator of the estate of Sabellio Kinoti claiming the deceased defendant held L.R No. Abothuguchi/L-Kaongo 424 in trust for them since it was ancestral or family land acquired by their grandmother Colleta Kabugi mother from the two sons and their children.
30. The defendant denied any family relationship, or that there was any customary trust as alleged or at all. Further the defendant insisted the plaintiffs were occupying Parcel No. L.R Abothuguchi/1212-1214 until recently but moved into L.R No. Abothuguchi/L-Kaongo/648 where they have now settled in.
31. In order to found a customary trust the court in *Isaack Kiebia M'Inanga (supra)* held, the elements to be established as;- the land in question was before registration for the family, clan or group; the claimant belongs to the family clan or group the relationship of the claimant to such family, group or clan was not remote; the claimant could have been registered as an owner or beneficiary save for some



intervening circumstances and lastly, that the claim was directed against the registered proprietor who is a member of the clan, family or group.

32. In this matter, the plaintiffs have testified that the late Colleta Kabugi bought the suit land alongside LR No. 651 from one M'Mwithia. PW 1 and PW 2 confirmed that the suit land prior to this was not ancestral land but family land bought by the grandmother to the plaintiffs and the defendant's parents as her only two sons. According to the plaintiffs, the suit land could not be registered in the name of Colleta Kabugi since she was a female and the traditions then under Meru customs, a female could not be registered to land under her name and had to do it in the name of the elder son. PW 1 and PW 2 testified that though Sabelio Kinoti died in 1974, at the time the title deed came out in 1977 under his name.
33. Further the plaintiffs testified that the deceased Colleta Kabugi settled all his two sons on the suit parcels of land since it was family land wherein the plaintiffs averred, they have extensively made developments thereon without any objection or notice to vacate by the defendant.
34. PW 2 told the court that even after DW 1 came back after walking out of her marriage, he showed her where to settle down on Parcel No. 651. PW 2 gave evidence that the intention of the late Colleta Kabugi was that the two parcels of land though registered under the name of her son Sabellio Kinoti who pre-deceased her was to be held in trust for her and the rest of the family.
35. In order to execute the intention of the deceased Colleta Kabugi PW2 was of the firm view that the two parcels of land and more particularly Parcel No. 424 belonged to the plaintiffs since the defendant had already settled on Parcel No. 651 and hence it was only fair and equitable that the court confirms the customary trust in favour of the plaintiffs.
36. On their part DW1 and DW2 told the court there was no intention to create a customary trust when the suit land was initially registered in the name of the late Sabellio Kinoti in 1977 and that there was no justification why the plaintiffs' late father or grandmother did not raise the issue of trust during their lifetime and it was only the plaintiffs who were now raising it.
37. Further DW 1 and 2 insisted the suitland formed part of the estate of the deceased Silas Kinoti and was not subject to any customary trust and that the long occupation could not be a ground for a creation of a trust.
38. Looking at the evidence by the plaintiff's vis a vis that of the defendant as regard how the suit property was acquired, I am unable to find merits of the defendant's assertion that her late father bought the land. She was hardly three years old when her father passed on and her mother left the suit land to be remarried. It is her grandmother who later on went to look for her and brought her back to the suit land. The defendant has not brought the alleged seller to the suit land to her late father to testify. There is evidence that the late Francis Karandi Mwirichia and his deceased mother Colleta Kabugi were interred in the suit premises and left their families occupying the suit land. I have no reason therefore to doubt the plaintiff's evidence that the suit land was initially bought or acquired by Colleta Kabugi for and on behalf of his two sons and their families. Even though the defendant states her late uncle, the father to the plaintiffs and their grandmother should have asserted the alleged customary trust during their lifetime and not wait to do so 34 years afterwards, Musyoka J In Re. Estate of Charles Ngotho Gachunga (deceased) (2015) eKLR held, there was no limitation of action where the institution of trust or fiduciary relationship was involved in line with section 20 (1) of the *Limitation of Action Act*.
39. There is evidence that the defendant was married in Kikuyu land but after coming back, she was shown where to live by PW 2. It is common practice among Africans that a woman who returns to her parents upon divorce or otherwise remains unmarried is entitled to the land she actually lives on and depends



upon during lifetime, and that as a child of the deceased, is also entitled to distribution of the land. See *Eunice Karimi Kibunja v Mwirigi M'Ringera Kibunja* (2013) eKLR.

40. In this scenario, PW and PW 2 relies on Meru customary law as regards the trend to register land in the name of an elder son since females had no identity card at the time to register names under their names. See *Stanley Iriga M'Mwitari v Mercy Kanyiri Gatekia & 2 others* (2022) eKLR.
41. The defendant did not contest that such a custom was in existence. In cross examination, D.W1 said she was not aware of such a custom, DW2 was also unaware of such a custom. DW2 was also unable to confirm where the plaintiffs were living at the time.
42. In my view, the evidence of the plaintiffs appears consistent and believable as regards use, the occupation and possession of the suit premises. The said occupation appears, consistent with the intention of the deceased father of defendant and their late grandmother that the land belonged to their families and successors in title. This is perhaps the reason also why the defendant and her late father have never sought to evict and or give notice to her relatives to vacate the suit land. My finding therefore is that the suit land belonged to the family and would have been registered in the name of the plaintiffs deceased father save that at the time, he was younger than his late brother and that it was the intention of their late mother that the registered owner would eventually share out the suit land to his brother.
43. In the premises, I find that the plaintiffs have proved their claim to the required standards. I proceed to allow prayers 1 and 2 of the plaint dated October 4, 2017. Costs to the plaintiffs.
- 44 Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT**

**THIS 4<sup>TH</sup> DAY OF MAY, 2022**

**In presence of:**

Karanja for plaintiff

Muchomba (Karia) for defendant

**HON. C.K. NZILI**

**ELC JUDGE**

