



REPUBLIC OF KENYA



KENYA LAW

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Mugera & 5 others v Evan (Sued on his own behalf and as the personal representative of the Estate of Evan Kaara Mugera - Deceased) & another (Environment & Land Case 26 of 2018) [2022] KEELC 15698 (KLR) (3 June 2022) (Judgment)

Neutral citation: [2022] KEELC 15698 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 26 OF 2018**

EC CHERONO, J

JUNE 3, 2022

BETWEEN

**EVA HELLEN MICERE MUGERA 1ST PLAINTIFF
ROSE WAKATHAIYA GACANJA 2ND PLAINTIFF
JANE NDUNGURU NJERU 3RD PLAINTIFF
PATRICK NJAGI MUGERA 4TH PLAINTIFF
ROBINSON MBURIA MUGERA 5TH PLAINTIFF
CATHERINE MUTHONI MUGERA 6TH PLAINTIFF**

AND

**LIVINGSTONE KAARA EVAN (SUED ON HIS OWN BEHALF AND AS THE
PERSONAL REPRESENTATIVE OF THE ESTATE OF EVAN KAARA MUGERA
- DECEASED) 1ST DEFENDANT
MARGARET KANINI KAARA 2ND DEFENDANT**

JUDGMENT

1. The plaintiffs vide a plaint dated April 23, 2018 moved this honourable court seeking the following Orders-;
 - A. Declaration that Eva Kaara Mugera was registered as the proprietor of land parcel number Baragwe/Kariru/562 to hold in trust for himself and the plaintiffs
 - B. An order for cancellation of title deed of land parcel number Baragwe/Kariru/562 issued to the defendant.



- C. Costs of the suit
2. The defendants on November 9, 2020 filed an Amended statement of defence and counterclaim dated September 22, 2020 in which they seek the following orders-;
- a. A declaration that the defendants are the absolute owners of LR No Baragwe/Kariru/562
 - b. An order that the 4th & 5th plaintiffs do vacate from Land parcel number Baragwe/Kariru/562 forthwith or they be forcefully evicted
 - c. A permanent/perpetual injunction do issue restraining the plaintiffs by themselves, their servants, agents, relatives and/or anybody else claiming through them from entering, cultivating, working on or in any other way interfering with land parcel No Baragwe/Kariru/562
 - d. Cost of the counterclaim.
3. After pre-trial directions were taken, the matter was certified as ripe for hearing and the parties fixed the same for hearing on February 3, 2021.

Plaintiffs' Summary of Facts

4. The plaintiffs called Gikunju Njagi (PW1) as their first witness. He stated that he was born in 1932 or thereabouts and is father, Njagi Ngari was by then the chairman of Ungui clan and that he was actively involved in the affairs of the clan. He recalled that during land Adjudication in 1958, he was tasked with organising meetings of the clan. He said that he knew Mugera Kaara as the treasurer of the clan and that he had two wives namely, Gladys Kanini and Flora Wanjira
5. The witness also stated that during the demarcation process, Mugera Kaara was allocated Land parcel No Baragwe/Kariru/562. The said Mugera Kaara directed that his eldest son of the 1st wife, Kaara Muger be registered as the proprietor of the said land in trust for himself and other family members.
6. He stated that at that time, it was custom and practice that the eldest son be registered as proprietor of land as the common belief was that women could not own properties
7. The second witness was Patrick Njagi Mugera(PW2) who stated that his father is Mugera Kaara and his mother is Gladys Kanini. He said that Evan Kaara is his brother and that the suit land parcel number Baragwe/Kariru/562 is a clan land registered in the name of his paternal uncle, Evan Kaara Mugera. He said that they were brought up in the suit land where he lives with his family to date. He also stated that land parcel No Kirinyaga/Gathigiriri/411 was given to him by the County Council of Kirinyaga. He produced a green card as P-Exhibit No 1.
8. The third witness was Catherine Muthoni Mwangi (PW3) who stated that her father is Mugera Kaara and her mother is Gladys Kanini Kaara. She said that they are seven siblings in total namely, Kaara Mugera, Rose Rasaja, Jane Nduguru Njeru, Patrick Njagi, Robinson Mburia, Eva Micere Mugera and herself. She said that when they were growing up, they were living in the suit land parcel No Baragwe/Kariru/562 and that her parents have passed on and were buried in the suit land. She stated that their father had two wives namely Gladys Kanini and Flora Wanjira. She further stated that during land demarcation, the clan give their father land which was registered in the name of their first born brother to hold in trust for himself and on behalf of the rest of the family. She said that there was no other land given to any other member of the family. She said that their ancestral home is on the suit land and some of her siblings still cultivate on the same land



9. The 4th witness called by the plaintiffs was Robinson Mburia Mugera who adopted his witness statement dated December 7, 2018. He stated that his father is Mugera Kaara and his mother is Gladys Kanini. She said that the suit land parcel Number Baragwe/Kariru/562 is registered in the name of their first born brother Evan Kaara Mugera to hold in trust for himself and all the children of the 1st wife as it was the custom. He further stated that some time back, one Mbuko Mbanya wanted to sell his land parcel Number No Baragwe/Kariru/892. His mother informed him and since he did not have money, his father told him that he would buy the land and in future, he would transfer to him if he refunded him the purchase price. He said that in the year 1998, his father called a family meeting where he refunded him the sum of Kshs 27,000/ and he transferred him 3 acres out of land parcel No Baragwe/Kariru/892.
10. He stated that land parcel No Baragwe/Kariru/562 is an ancestral land where they were born and raised and that he is in possession of one and a half acres out of the said land.
11. The 5th and final witness was Francis Mbugua Mwaniki who was referred his statement recorded on July 28, 2021 and adopted in his testimony. He stated that Land parcel number Baragwe/kariru/562 is an ancestral land given to his father Mugera Kaara and who directed that the same be registered in the name of his eldest son Evan Kaara to hold in trust for himself and the other family members.

Defendants Summary of Facts

12. The 1st defendant, Livingstone Kaara Evan was referred his witness statement dated September 22, 2020, which he adopted in his testimony. He stated that his father is Evan Kaara Mugera and the plaintiffs are his paternal uncles and Aunts. He said that his Father was given land parcel number No Baragwe/Karira/562 by his clan absolutely and not to hold in trust. He stated that in the year 1962, their father(deceased) left the country and settled in the Democratic Republic of Congo. He said that their father left the suit land under the care and custody of his parents and the plaintiffs herein as mere licensees who only cultivated the land. He said that the 1st, 4th and 5th defendants cultivate and reside on the suit property with their father's approval and none of them has made meaningful developments
13. The 1st defendant further said that since his father was given the suit land by the clan absolutely, their grandfather purchased LR No Baragwe/kariru/892 which he later subdivided giving rise to LR Baragwe/Kariru/1641 and Baragwe/Kariru/1642. He said that he gave LR No Baragwe/Kariru/1641 to one of his sons Robinson Mburia Mugera while LR No Baragwe/Kariru/1642 remained in his own name to be shared among his daughters including the 1st, 2nd, 3rd, and 6th plaintiffs

Analysis And Decision

14. I have considered the pleading, viva voce evidence by the parties and their witnesses as well as their rival submissions and the applicable law. The main issue for determination in this suit is whether Evan Mugera Kaara was registered to hold the suit property LR No Baragwe/Kariru/562 in trust for himself and on behalf of the family. The Supreme Court of Kenya in the case of *Isack M'inanga Kiebia V Isaaya Theuri M' Lintari & another*(2018) Eklr pages 47-52 set out the guiding principles for determining the existence of customary trust as follows-;

“Each case has to be determined on its own merits and quality of evidence. It is no 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 v kinuthia*, that what is essential is the nature of the holding of the land and intention 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.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group”

15. The first witness called by the plaintiffs was Francis Mbugua Mwaniki who is a clan member born in 1935. He recalled that during land demarcation in 1958 , he used to attend clan meetings and in one of those meetings, Mugeru Kaara who was his friend and village mate was allocated land by the clan parcel No Baragwe/Kariru/562. He said that the said Mugeru Kaara(deceased) directed the clan to register the land in the name of his first born son Mugeru Kaara to hold in trust for himself and all the family members. Those averments given under oath were not challenged. I find his evidence reliable and credible. The other four witnesses who are also plaintiffs explained that they were born and brought up in the suit land where some are currently in possession and occupation. They also stated that they have made substantial developments in the suit property where their dead, including their mother and father were buried. I also find their evidence consistent, credible and unchallenged on cross examination
16. The totality of my analysis of the evidence and the applicable law is that the plaintiffs have proved their case on the required standard.
17. Regarding the counterclaim, the defendant alone testified. He did not call a clan member or any other person who was present when Evan Mugeru Kaara was being given the suit or even minutes of such meeting when the allocation was done. The defendant is the son of Evan Mugeru Kaara who is the registered owner of the suit property. He was definitely not present when the suit land was given to his late father. His evidence that his father was given the suit land absolutely is what he was told or heard from third parties which in my respective view is not admissible in evidence. Consequently, I find his testimony of no evidentiary value. For the reasons stated herein above, I find the counterclaim by the defendant lacking merit and the same is out for dismissal.
18. In view of all the reasons and explanation in my analysis, I hereby enter final judgment in the following terms-;
 1. A declaration that Evan Kaara Mugeru is registered as proprietor of LR No Baragwe/ Kariru/562 in trust for himself and the plaintiffs
 2. It is declared that the trust be and is hereby determined in favour of all the plaintiffs and defendants in equal shares
 3. an order for cancellation of title deed of land parcel No Baragwe/Kariru/562 issued to the defendants and the same to be registered in the joint names of the plaintiffs and the defendants as tenants in common in equal shares



4. Since the plaintiffs and the defendants are close relatives, I order each party to bear their own costs.

READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 3RD JUNE, 2022.

HON. E.C. CHERONO

ELC JUDGE

In the presence of-;

- 1. Mwangi Maina for plaintiff**
- 2. Mr Mugo H/B for Maina Kagio for defendant**
- 3. Kabuta C/A**

