



**Mugera & 7 others v Njeru (Environment & Land Case
609 of 2013) [2022] KEELC 15684 (KLR) (1 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 15684 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 609 OF 2013**

EC CHERONO, J

JULY 1, 2022

BETWEEN

MARGARET MUTHONI MUGERA 1ST PLAINTIFF
CATHERINE WANJIRU 2ND PLAINTIFF
ANNE WANGARI 3RD PLAINTIFF
ESTHER NJERI 4TH PLAINTIFF
PETER NJERU 5TH PLAINTIFF
THOMAS MURIUKI 6TH PLAINTIFF
BENSON KARIMI 7TH PLAINTIFF
MARY WAINOI 8TH PLAINTIFF

AND

JOHN MUGERA NJERU DEFENDANT

JUDGMENT

1. The plaintiff vide an amended plaint filed on 26/5/2015 seek the following orders;
 1. A declaration that the Defendant is registered as owner of land parcels No. Inoi/Kerugoya/871 & Inoi/Kariko1327 & 1328 in trust for the 1st Plaintiff and for determination of the trust and the Defendants to be ordered to sign documents so the Plaintiff gets half share of the land.
 2. The Defendant to be ordered to sign documents so the Plaintiff get half share of the Land Parcels No. Inoi/Kerugoya/871 as per the consent of the Kirinyaga Central Land Control Board of 17/2/1998 within 7 days and in default and for the Executive officer of this Court/



Deputy Registrar to sign documents to facilitate the Plaintiff getting half share of the suit land No. Inoi/Kerugoya/871.

3. Costs and interest.
2. The defendant filed a statement of defence on 25/7/2013 denying the plaintiffs claim and seeks to have the suit dismissed with costs.
3. After the close of pleadings, the parties filed their witness statements and list of documents in compliance with Order 11 of the *Civil Procedure Act*. Thereafter, this Court certified the case as ripe for hearing and the matter was set down for hearing.

Plaintiffs Summary of Facts

4. The 1st plaintiff testified on oath and stated that the 2nd to 8th plaintiffs are her children while the defendant is her brother. She was referred her witness statement recorded on 7/6/2013 which she asked the Court to adopt in her evidence. She said that the land in dispute L.R No. Inoi/Kerugoya/871 is registered in the name of the defendant and her step mother Mary Wambui. The 1st plaintiff stated that their late father Mugerwa wa Njeru had 10 wives and that their mother was known as Esther Mabuti. She said that their mother was blessed with three children namely Leonard Njeru, Samuel Ndege (deceased) and herself. She stated that their clan is Umbui and that her brother Leonard Njeru was given land in Kangaita measuring 3 acres where he lives with his family and where their parents lived. She said that Land Parcel No. Inoi/Kerugoya/871 measuring one (1) acre is a subdivision of land parcel No. Inoi/Kerugoya/244 which was measuring 5 acres before it was subdivided and distributed to each household and that the portion given to the house of her mother Esther Mabuti was registered in the names of Leonard Njeru and Mary Wambui.
5. The plaintiff further testified that she lived with her brother's family in L.R No. Inoi/Kariko/809 which later became L.R No Inoi/Kariko/1327 & 1328 after the road that connects Gatwe and Kangaita was created and thereafter she was sent away in 1978.
6. She said that she became a tenant and later sued her brother before the land disputes Tribunal in Kerugoya where she was awarded half acre which she took possession and started utilizing but her brother appealed to the High Court at Embu and the award was reversed and all titles issued after subdivision were cancelled. She was also referred to her list of documents dated 7/6/2013 containing 14 items which she produced in her evidence as P-Exhibit No. 1 to 14 respectively.
7. PW2 was Catherine Wanjiru, the 2nd plaintiff who associated with the evidence of her mother, the 1st plaintiff herein. The 3rd, 4th, 5th, 6th, & 7th plaintiffs also adopted the evidence of the 1st plaintiff and closed their case.

Defendants Summary of Facts

8. The defendant, Leonard Njeru Mugerwa testified on oath and stated that the 1st defendant is his step-sister while the 2nd, 3rd, 4th, 5th, 6th, & 7th, defendants are her children. He said that he is the absolute registered owner of the suit land parcel Number Inoi/Kerugoya/871, Inoi/Kariko/1327 and Inoi/Kariko/1328. He said that he does not hold the suit properties in trust for the plaintiffs or any other person whatsoever. He stated that if the plaintiffs were aggrieved by the orders issued in the succession matter, she ought to challenge the same and not file a separate suit.
9. He said that the proceedings before the Tribunal were null and void as the Tribunal lacked jurisdiction and the same were quashed by the Embu High Court vide Civil Appel No. 41 of 2002 and that the plaintiff cannot therefore rely on an award that was quashed.



10. The defendant further averred that he does not know nor is he privy to any dealings between the plaintiff and one Peter Kamau Muchira and neither does he know anything about Kerugoya PMCC No 340 of 2010.

Legal Analysis and Decision

11. I have considered the viva-voce evidence adduced by the plaintiffs and the defendant. I have also considered the documents produced by both the plaintiffs and the defendant as well as the rival submissions and the applicable law. The plaintiffs' claim is for a declaration that the defendant was registered as proprietor of the suit land parcel No. Inoi/Kerugoya/871, Inoi/Kariko/1327 & Onoi/Kariko/1328 in trust for the 1st plaintiff. The plaintiffs are also seeking an order for determination of the trust.
12. Trusts, including Customary trust is recognized under Section 28 of the Land Registration Act No. 3 of 2012 as an overriding interest on land which need not be noted in the register. The superior Courts have rendered themselves in the guiding principles for determining customary trust in Kenya. In the case of *Isack M' Inanga Kiebia vs Isaaya Theuri M'lintari & Another* (2018) eKLR, the Supreme Court of Kenya (SCOK) set out the following five ingredients as paramount in determining the existence of a trust; -
- That the land in question was before registration, family, clan or group land;
 - The claimant belongs to such family, clan or group;
 - 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;
 - The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and
 - The claim is directed against the registered proprietor who is a member of the family, clan or group.
13. The burden of proof in a claim for customary trust lies on that person who wishes the Court to believe in its existence. The law never presumes or implies the existence of trust. That position was aptly discussed in the case of *Mbothu & Others vs Waitimu & 11 Others*, (1980) KLR 171 cited in the *Estate of the late Jonathan Kinyua Waititu (deceased)* (2017) eKLR, (Succession Cause No. 488 of 2010) where the Court of Appeal held;
- “The law never implies; the court never presumes a trust but in case of absolute necessity. 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 will be implied.
- Since the plaintiff's claim was based on trust, the law places the onus on her to prove the existence of such trust----- It is however clear from the evidence herein that the plaintiff has neither pleaded nor proved any of the particulars as to how the trust subject matter of this claim arose with respect to the suit land. There is really no evidence upon which this court can make a finding that the defendant holds the suit land in trust for him.”
14. I entirely agree with the reasoning by the Court of Appeal which decision is binding on me. Turning to this case, the plaintiffs have not laid any foundation to the existence of trust. The green card for Land Parcel No. Inoi/Kerugoya/871 produced by the plaintiffs as P-Exhibit No. 1 indicates that the



defendant herein together with Mary Wambui Mugeru were registered as joint owners on 19/2/1986 and a certificate of title issued on 21/2/1986 respectively. The plaintiffs at paragraph 7 of their Amended plaint averred as follows;

“7. The 1st plaintiff avers that after the death of her father, a succession cause was done behind her back and the land parcel Inoi/Kerugoya/244 was distributed to the deceased 10 houses and the defendant was registered as owner of Inoi/Kerugoya/871 jointly with Mary Wambui Mugeru (stepmother of the plaintiff)”

15. From the reading of that paragraph, the suit land parcel NO. Inoi/Kerugoya/871 is one of the resultant subdivisions of the original land parcel No. Inoi/Kerugoya/244. It is clear from the averments that before subdivision, the said Land Parcel No. Inoi/Kerugoya/244 was registered in the name of Mugeru Wa Njeru (deceased), who is father to the 1st plaintiff and the defendant herein. The 1st plaintiff in her pleading averred that after the death of her father, a succession cause was done without her knowledge where the suit land which formed part of his estate was distributed and the defendant registered as proprietor behind her back.
16. In her own evidence, the 1st plaintiffs admitted that the original Land Parcel No. Inoi/Kerugoya/244 which was registered in the name of her father Mugeru Wa Njeru (deceased) was subdivided and distributed through a Succession Cause without her knowledge. It is my respective view that if indeed there was any trust in existence in the original title, then the same was duly determined the moment the grant was confirmed and the administrator caused the land to be sub-divided and distributed to the beneficiaries.
17. If the plaintiffs were aggrieved by the orders issued in the succession cause, then they ought to have challenged the same in the same cause and not to file a separate suit. The plaintiffs’ remedy in my respective view lies elsewhere.
18. I have also looked at the award by the Central Land Disputes Tribunal which was adopted by the Principal Magistrate Court at Kerugoya in LDT No. 1 of 2002. That award was appealed against and subsequently quashed and set aside. The award therefore became a nullity and of no legal effect.

Final Order

19. For all the aforesaid reasons, I find that the plaintiffs’ claim has not been proved on a balance of probabilities and the same is hereby dismissed with costs. It is so ordered.

RULING READ AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 1ST JULY, 2022.

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HON. E. C. CHERONO

ELC JUDGE

In the presence of;

M/s Hamba holding brief for Magee for the Defendant

M/s Ndungu holding brief for Anne Thungu for the Plaintiff

Kabuta, Court Assistant – present.

