



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELC MISC NO. 40 OF 2020

SIMON NGURE MURATHI.....APPLICANT

VERSUS

PAULINE WANJUE MURATHI.....1ST RESPONDENT

LOISE NJOKI MURATHI.....2ND RESPONDENT

RULING

1. The Applicant filed the instant Application dated 16/11/2020 expressed under Art 162(2) (b) of the Constitution of Kenya, Section 3, 13, & 19 of the ELC Act Sections 65, 67 & 101 of the LRA, Rule 66 of the Land Registration Regulations 2017, Section 1A, 1B, 3A & 98 of the CPA & Order 51 of the CPR seeking orders that;

a. That the Honorable Court be pleased to order the 2nd Defendant to sign and or execute Form LRA 52 (transfer of the land by trustee and all other necessary instruments) for land parcel KIAMBAA/RUAKA/3657 & 3658 (suit lands) in favour of the Plaintiff/Applicant.

b. That the Honorable Court be pleased to order that the Deputy Registrar of this Court do execute Form LRA 52 (transfer of the land by trustee and all other necessary instruments) for land parcel KIAMBAA/RUAKA/3657 & 3658 (suit lands) in favour of the Plaintiff/Applicant.

2. The application is premised on the grounds set out as; that on the 22/1/2010 the late Stephen Murathi Muriuki, the 1st and 2nd Respondents were registered as Trustees of the suit lands for the Applicant who was then a minor; the Applicant is now of the age of majority; unlike the 1st Respondent who has executed the transfer, the 2nd Respondent has refused to do so contrary to statute.

3. In supporting the application, the Applicant in his replying affidavit sworn on the 16/11/2020 echoed the grounds relied on as set out in the preceding paragraph.

4. The 2nd Respondent joined the Applicant in support of the application. In her replying affidavit sworn on the 18/2/2021, she averred that she is the biological mother of the Applicant. That the suit lands were registered in the names of the three trustees in favour of the Applicant in 2010 as alluded by the Applicant. That on the 7/9/2018 one of the trustees namely Stephen Murathi Muiruri died leaving the Respondents as the joint trustees of the suit lands. That the Applicant is the beneficiary of the suit lands and having attained the age of majority, the trustees are now duty bound to execute the transfer in favour of the Applicant. That in pursuance of that duty, she has executed the necessary documentation to effect the transfer of the suit lands in the name of the Applicant.

5. The application is opposed by the 2nd Respondent via the replying affidavit sworn on the 3/3/2021. That she and her family have always believed that the suit lands were part of the estate of her late husband Stephen Murathi Muiruri and that explains why the same are included in the list of assets in the Succession Cause No CMCC 16 of 2020- Kiambu. That prior to the death of her husband, all the titles were in the custody of the 1st Respondent. That on enquiry of the whereabouts of the said title deeds, the 1st Respondent informed her that they were lost/misplaced prompting her to report the loss at Karuri Police station. In addition, that she lodged restrictions on the titles to protect the assets of the deceased's estate.

6. Further that in the ongoing succession cause aforesaid, the Applicant and the 1st Respondent did not disclose that the said suit lands belonged to the Applicant despite executing the affidavit consenting to the grant. That despite his involvement in the succession cause, the Applicant has not filed any cause to expunge the suit lands from the deceased estate. That she does not know when the titles to the suit lands were registered in the names of the trustees.

7. She further contested the birth certificate No 469928 on the ground that the names therein being SYMON NGURE do not belong to the Applicant who goes by the names SIMON NGURE MURATHI.
8. She denied having been approached by the Applicant to execute the transfers at any time or at all. She opined that this application be stayed pending the hearing and determination of the succession cause in Kiambu to pave way for the distribution of the assets.
9. In his supplementary affidavit sworn on the 23/8/2021, the Applicant stated that his ID No 29662627 reads Simon Ngure Murathi while his birth certificate reads Symon Ngure Murathi and that both names belong to him. He denied any allegations of fraud as alluded by the 2nd Respondent. That the suit lands are not free properties forming part of the estate of his father and therefore are not subject to succession. That the suit lands are resultant subdivisions emanating from parcel No Kiambaa/Ruaka/884 registered in the name of his late father on the 5/9/1990. That on the 22/5/1991 the ownership was changed to tenancy in common between the late Murathi and his wife, the 2nd Respondent in equal shares. That later the tenancy in common was dissolved and the property transferred to Ruaka Estate Limited on the 7/4/1993. On the 5/3/1998 the property was transferred to 3 trustees to hold in trust for the Applicant who was then a minor. That the mother title was closed upon subdivisions into the suit lands on the 22/1/2010
10. That the 2nd Respondent registered a restriction on the land on the 7/9/2018. That the 2nd Respondent has been aware of the ownership changes in the property including her trusteeship therein. That she is only feigning ignorance to further her scheme to prevent him from acquiring the suit lands by operation of law.
11. On the 28/6/2021 directions were taken and the parties elected to canvass the application by way of written submissions. Both parties have filed. I have read and considered the written submissions.
12. The Applicant submitted that he has attained the age of majority and pursuant to Section 65 of the LRA is now entitled to the suit lands by operation of law. That the remaining trustees being the Respondents are empowered in law to so transfer the suit lands to the Applicant. That the suit lands comprise the free properties of the estate and therefore do not form part of the estate of the deceased estate.
13. According to the Applicant, a free property of the estate means in relation to a deceased person property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interests have not been terminated by his death. That the properties having been registered under trust were not available to the deceased to freely dispose as it was subject to a trust. That following his death, the two remaining trustees survived him. That the allegations of fraud by the 2nd Respondent are not capable of being determined in the said application and as such nothing has been presented to challenge the titles herein or to rebut the presumption of propriety of titles as set out in Section 26 a and b of the RLA. That the Respondents are registered in their fiduciary capacity and should transfer the suit land to the right owner pursuant to Section 65 of the LRA
14. The Applicant relied on the case of **Gatimu Kinguru vs. Muya Gathangi (1976) KLR 253** to expound on the provisions of Section 66 of the LRA that trusts are not only inferred by the Court where there is an express reference on the instrument of acquisition but also where evidence supports a trust. That in the instant case there is an express trust and under Section 66 (1) of the LRA the trust is diminished upon the attainment of age of 18 years by the Applicant. That Section 52 of the said LRA empowers this Court to compel the execution of the transfer by the Deputy Registrar of the Court.
15. The 2nd Respondent failed to file written submissions despite the directions of the Court of the 28/6/2021 and 4/10/2021.
16. The key issue is whether the Applicant is entitled to the orders sought.
17. According to the titles on record the suit lands were registered in the names of Loise Njoki Murathi, Stephen Murathi Muiruri and Pauline Wanjue Murathi as Trustees for Simon Ngure Murathi. Both titles were registered on the 25/1/2010.
18. It is not in dispute that the parties are related. The Applicant is the son and step son of the 1st and 2nd Respondents. Stephen Murathi Muiruri was the father and husband of the Applicant and the Respondents respectively.
19. In this case, the Applicant avers that the subject parcels of land Nos. LR Kiambaa/Ruaka/3657 and Kiambaa/Ruaka/3658 were registered in his late father and both Respondents' names on 25/1/2010 to hold in trust for him. That the Applicant was a minor then and lacked requisite capacity to be registered as the proprietor. The 1st Respondent does not oppose the application and has further signed the relevant forms (Form LRA 52) as provided under **Rule 66** of LRA Regulations.
20. However, the 2nd Respondent opposed the application and averred that the said parcels of land solely belonged to her late husband alone. According to paragraph 6 of annexure LNM-1 annexed in her Replying Affidavit sworn on 3/3/2021 there is no mention of LR Kiambaa/Ruaka/3658 but parcel 3657 only. She further conceded placing restriction on all her deceased's properties including the subject parcels herein.
21. **Section 3** of the Law of Succession Act cap 160 states that "Free property", in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death. From that definition, it is not in doubt that where property is proven to be held in trust for another, it would not form part of the deceased's free estate available for distribution.
22. The Trustee Act defines a Trust as "trust" does not include the duties incident to an estate conveyed by way of mortgage, but, with this exception, the expressions "trust" and "trustee" extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative, and "trustee" where the context admits, includes a personal representative, and "new trustee" includes an additional trustee.

23. The Court of Appeal in the case of **Twalib Hatayan & another vs. Said Saggar Ahmed Al-Heidy & 5 others [2015] eKLR** adopted the Black's Law Dictionary, 9th Edition definition of trust as the right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary). The Court also observed that trusts are created either expressly (by the parties) or by operation of law. That an express trust arises where the trust property, its purpose and beneficiaries have been clearly identified.

24. **Section 28 (b)** of the Land Registration Act, 2012 (LRA) recognizes that trusts are overriding interest on land. That unless the contrary is expressed in the register, all registered land shall be subject to the overriding interests listed as may for the time being subsist and affect the same, **without** their being noted on the register.

25. **Section 65** of the LRA provides that if a person has become entitled to any land, a lease or charge under any law or by virtue of any order or certificate of sale made or issued under any law, the Registrar shall, on the application of an interested person supported by instruments of transfer or such evidence as the Registrar may require, register the person entitled, as the proprietor.

26. That provision is replicated under **Section 54 of the Land Act**.

27. **Section 27** of the Land Act provides that a child shall be capable of holding title to land through a trustee and such child shall be in the same position as an adult with regard to the child's liability and obligations to the land.

Section 66 of the Land Registration Act provides that a person acquiring land, a lease or a charge in a fiduciary capacity may be described in that capacity in the instrument of acquisition and be registered with the addition of the words "as trustee," but the Registrar shall not enter particulars of any trust in the register.

28. Rule 66 of the Land Registration General Regulations provides as follows

"a transfer by a trustee shall be in Form LRA 52 set out in the Sixth schedule."

29. **Section 67** of the LRA provides for survivor of trustees. That whenever two or more proprietors are registered jointly as trustees, and the survivor of such proprietors would not be entitled to exercise individually the powers that were vested in them, the Registrar shall enter a restriction to that effect.

30. The powers of Trustees under the Trustee Act are stipulated under Parts II and III thereof. Part II provides for the powers of trustees to invest and proposes how the investments are to be done, while Part III of the Act grants powers to the trustee to manage and administer the investments, guided by their absolute discretion.

31. The Court of Appeal has pronounced itself on the law of trusts. In the case of **Juletabi African Adventure Limited & another vs. Christopher Michael Lockley [2017] eKLR** the appellants challenged the trial Court judgment that allowed the Respondent's claim by declaring existence of a constructive trust. The Respondent had *inter alia* sought a declaration that the 1st appellant held the subject properties; a motor vehicle and parcel of land, in trust for him. The Court cited the case of **Twalib** supra in approval and in dismissing the appeal held that it is trite that the onus lies on a party relying on the existence of a trust to prove it through evidence which was done in the trial Court.

32. According to Section 26 of the Land Registration Act, the certificate of title issued by the Registrar upon registration or to a purchaser of the land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the limitations stated in the title. Under the same provision a title may be impugned through fraud or misrepresentation for which the person is proved to be a party or where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme.

33. The 2nd Respondent has alleged that the suit lands belong to the estate of the late Muiruri. The Applicant through affidavit evidence gave the root of the titles as set out in para 9 of this Ruling. The 2nd Respondent failed to place evidence before the Court to challenge or rebut the said evidence. My perusal of the titles therefore shows that the same are registered in the names of the Respondents as trustees for the Applicant.

34. According to the copy of the death certificate on record Muiruri died on the 7/9/2018 and survived by the Respondents as trustees of the titles. The titles having been registered in the names of 3 trustees way back in 1998 during the lifetime of Muiruri, in the absence of evidence to the contrary, it is evident that Muiruri had divested his interest in the land and which he held as a co-trustee with the Respondents. Given the history of the land it is doubtful that the 2nd Respondent had no knowledge that she held the title in trust for the Applicant.

35. With respect to the loss of titles, there was no evidence laid before the Court to support the same. Such evidence would have come in form of a police abstract. There was no evidence tabled by the 2nd Respondent to show that indeed a restriction was registered on the land and for what purpose.

36. I have perused the affidavit in support for letters of administration intestate dated the 15/1/2020 and I note that parcel No 3657 was listed as part of the assets of the deceased estate. I also note that the Applicant did not execute the same as it was between the two Respondents. In the absence of any instrument to show that the title is registered in the name of the deceased, it cannot be legally held that the suit land forms part of the free property of the estate on grounds that the said title was held in trust by the deceased and on his death the trusts became extinguished and held by the Respondents.

37. It is trite that existence of a trust is a question of fact that must be proven by way of evidence. The Applicant herein has on balance of probabilities, adduced evidence to support his application by producing copies of the title deeds of the respective parcels of land which demonstrate express trust.

38. From the above provisions it is evident that the law allows trustees to hold land under trust. In this case it is not in dispute that the suit land is registered in the names of the Respondents to hold in trust for the Applicant. The Applicant has averred that he has now come of age and would want the title to be transferred into his name. This is supported by the birth certificate which shows he was born in 1993 and therefore was aged 27 years at the time of filing the application. The trustees therefore are obligated to so transfer the suit land to the Applicant, noting that the trusts they held became extinguished on the attainment of the age of 18 years by the Applicant, which is long past.

39. In the upshot, I find that the application is merited I grant it as prayed. The 2nd Respondent to execute the necessary transfers within 14 days in default the Deputy Registrar of the Court be authorized to do so.

40. The Court notes that the Applicant did not show that he sent a demand in writing to the 2nd Respondent and for that reason, he is not deserving of costs of the application.

41. Each party to meet their costs.

42. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 4TH DAY OF NOVEMBER, 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Mr. Mwangi Ndegwa for the Plaintiff/Applicant

Ms Mwenda holding brief for Gichigo for 1st Respondent

Mr. Gacoya for the 2nd Respondent

Ms. Phyllis Mwangi – Court Assistant