



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 709 OF 2013**

**STANLEY MURIITHI KABUBA.....PLAINTIFF**

**VERSUS**

**JOSEPH KITHANGA.....DEFENDANT**

**JUDGMENT**

**Background**

The plaintiff vide an amended plaint dated 23<sup>rd</sup> day of March 2017 prayed for the following orders:-

***(a) A declaration that the defendant holds one acre out of Land Parcel No. Mwerua/Kithumbu/128 which was sub divided to Mwerua/Kithumbu/2825 and 2826 in trust for himself and the plaintiff.***

***(aa) In the alternative he plaintiff be awarded 1 acre of Mwerua/Kithumbu/2835 and 2820 by way of adverse possession.***

***(b) Costs and interest at court rates.***

The Defendant filed an amended defence on 26<sup>th</sup> April 2017 denying the plaintiffs claim. After filing their respective compliance documents under *Order 3, 7 & II CPR*, the matter was set down for hearing.

**Summary of Facts**

The plaintiff testified as PW1 and stated that the defendant is his elder brother and the registered owner of Land Parcel Number Mwerua/Kithumbu/148. He further stated that they were borne five siblings, four boys and one girl. The plaintiff stated that during land demarcation their eldest brother who is the defendant herein was given Land Parcel No. Mwerua/Kithumbu/148 to hold in trust for the family of Kabuba Kigoto. The plaintiff also stated that their father Kabuba Kigoto was not present at the time and their eldest brother was given the land under Kikuyu Customary Law to hold in trust for himself and the rest of the family. He stated that though their mother Agnes Wanjiru Kabuba was present, women were not registered as owner of land.

The plaintiff further contends that he had been in occupation of a portion of the suit land where he has been utilizing a portion of one (1) acre and has even constructed a permanent house where they live with his family. He stated that his elder brother had lodged a complaint against him at the village elders and later moved to the area Assistant Chief where he was asked to vacate the suit land.

His mother filed a complaint before the Land Disputes Tribunal at Baricho where the tribunal awarded him 3 acres. His brother was dissatisfied with the findings and lodged an appeal to the Provincial Land Disputes Committee based at Nyeri where the decision by the Baricho District Land Disputes Tribunal was overturned. He then filed the instant suit.

The defendant also testified as DW1. According to his evidence, he confirmed that the plaintiff is his younger brother. He said that they are four siblings, three boys and one girl. The other two brothers are Elvis Njogu and Joseph Kariuki while their sister is Margaret Wanjiku. Their father is Kabuba Gichimu (deceased) while their mother is Agnes Wanjiru (also deceased). Their father had two wives, their mother and their step-mother one Susana Wanjru. The defendant further stated that their father had a parcel of land at Kiamiciri being L.R. No. 180 measuring 7 acres. Their step-mother was living in that land but she passed on. The said land is now being occupied by his step brothers and sisters.

The defendant stated that the suit Land Parcel Number Mwerua/Kithumbu/148 belongs to him measuring approximately 4 acres. He said that he sub-divided the land into two portions namely Mwerua/Kithumbu/2525 and Mwerua/Kithumbu/2526 and thereafter sold one portion to

Josephine Waithera Njine. The defendant confirmed that his brother who is the plaintiff herein has been occupying the suit land from 1997 to date and that he has given him notice to vacate. The defendant further stated that the plaintiff has two acres given by his brother Elvis and that he should move out of his land. He stated that he was given the land to hold in trust.

### **Undisputed Facts**

- (1) The defendant is the registered proprietor of land parcel No. Mwerua/Kithumbu/148 which has since been subdivided into L.R No. Mwerua/Kithumbu/2825 and 2826.
- (2) The plaintiff and the defendant are siblings.
- (3) The defendant was given the suit land by the clan in 1961.
- (4) Both the plaintiff and the defendant together with their families live on the suit Land Parcel No. Mwerua/Kithumbu/148 (now sub-divided).

### **Legal Analysis**

I have considered with anxious care the evidence adduced by both the plaintiff and the defendant. I have equally considered the documentary evidence produced as exhibits in the case. The one and only issue for determination in this case is whether the plaintiff has established a trust for determination in the suit property L.R No. Mwerua/Kithumbu/148 (now sub-divided).

The applicable law guiding the claim for trust is the **Land Registration Act, No. 3 of 2012. Section 25 (1)** of the said Act provides as follows: -

*“The rights of a proprietor, whether acquired on first registration or 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. To such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.*
- c. Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”*

**Section 28 of the said Act** provides as follows: -

*“Unless the contrary is expressed in the register, registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without being noted on the register: -*

- a. ....*
- b. Trust including customary trust*
- c.*
- d.*
- e.*
- f.*
- g. ....*
- h.*
- i. ....*
- j. ....”*

The law recognizes customary trust as an overriding interest on land that need not be noted in the register. It therefore goes without saying that a prospective purchaser of land has an obligation in the exercise of due diligence to go beyond the certificate of title and inquire of how the subject property was acquired by the original owner. In the instant case, there is no dispute the defendant who is the eldest son in the

family of Kabuba Kigoto was given the suit land by the clan during the said demarcation and consolidation in the year 1961.

There is also no dispute that the plaintiff is occupying a portion of the suit land with his family where he has constructed a house. The plaintiff in his evidence stated that their father Kabuba Kigoto (deceased) was given the suit land by the clan but since he was living in Mombasa, the land was registered in the name of the defendant who was the eldest son in the family to hold the same in trust for himself and the rest of the family of Kabuba Kigoto. The plaintiff's evidence given on oath has not been controverted or challenged. The arguments by the defendant that the plaintiff has two acres in Land Parcel No. Mwerua/Kithumbu/72 cannot hold water.

The suit Land Parcel Number Mwerua/Kithumbu/148 (now sub-divided) is a clan land which was given to the defendant and not the rest of his siblings. It is also a clan land and the plaintiff stated that though the land was given to their father by the clan, the land was only registered in the name of the defendant as a trustee since the plaintiff and his family are occupying the suit property where they have constructed their house.

I hold the view that from the evidence given by the plaintiff, there is clear implication that the defendant was registered as proprietor of the suit land parcel number Mwerua/Kithumbu/148(now sub-divided) to hold in trust for himself and also the plaintiff.

The Supreme Court of Kenya set out the principles and ingredients for determination of customary trust ***In the case of Isack M' Inanga Kebia Vs IsaayaTheuri M' Lintari & Isack Ntongai M' Lintari SOK Petition10 of 2015*** where it was held:

*“Each case has to be determined on its own merits and quality of evidence. It is not every claim of right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie Vs Kinuthia, that what is essential is the nature of the land intention of the parties. If the said holding were for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such 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: the land in question was before registration family, clan or group land; the claimant belongs to such a 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*

*t could have been entitled to be registered as an owner of other beneficiary of the land but for some intervening circumstances, the claim is directed against the registered proprietor who is a member of the family, clan or group”.* (emphasis mine)

I find and hold that the plaintiff has clearly brought himself within the principles set out in the *Locus Classicus* case by the superior Court and is therefore entitled to a portion of the clan land held by the defendant. No amount of arguments can relieve the defendant of his obligation to which he is subject to as a trustee.

For all the above reasons given I find that the plaintiff has proved his claim against the defendant on a balance of probabilities and enter judgment against the defendant as follows: -

- 1. A declaration that the defendant holds Land Parcel No. MWERUA/KITHUMBU/148 (now sub-divided) in trust for himself and the plaintiff.**
- 2. The subdivision of land parcels No. MWERUA/KITHUMBU/2825 and 2826 were unlawful and illegal and the same are hereby cancelled.**
- 3. The Land Registrar Kirinyaga is directed to rectify the register reverting back to the original title number MWERUA/KITHUMBU/148.**
- 4. Thereafter the said parcel of land No. MWERUA/KITHUMBU/148 to be subdivided into two portions, one portion measuring one (1) acre to be registered in favour of the plaintiff and the other portion in the name of the defendant herein.**
- 5. The District Land Surveyor Kirinyaga County to prepare the mutation forms and conduct the survey for the subdivision in paragraph (4) above.**
- 6. In view of the close family relations between the plaintiff and the defendant, I order each party to bear his own costs.**
- 7. The O.C.S Kerugoya Police Station to supervise the enforcement of this order.**

**JUDGMENT READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 15<sup>TH</sup> DAY OF JUNE, 2021.**

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**E.C. CHERONO**

**ELC JUDGE**

**In the presence of:-**

1. Mr. Beaco holding brief for Munene Muriuki for Plaintiff
2. Ms Ndungu holding brief for Chomba for Defendant
3. Kabuta – Court clerk.