



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 31 OF 2019**

**JOSPHAT MUTHII KIMUNYI.....PLAINTIFF**

**VERSUS**

**MARGARET MUTHONI MWAI (Sued as the legal**

**Administrator of the estate of:-**

**JULIUS MWAI KIMUNYI.....1<sup>ST</sup> DEFENDANT**

**MUREITHI KIMUNYI GAKUYA.....2<sup>ND</sup> DEFENDANT**

**LUKE GACOKI KIMUNYI.....3<sup>RD</sup> DEFENDANT**

**FRANCIS WATHOME KIMUNYI.....4<sup>TH</sup> DEFENDANT**

**SUSAN KARIMA MBUTITI.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Background**

By a plaint 10<sup>th</sup> July, 2019 the plaintiff sought the following orders:

- 1. A declaration that JULIUS MWAI KIMUNYI the substituted 1<sup>st</sup> Defendant was registered owner of land parcel No. MWEA/NGUCWI/1220, Land Parcel No. MWEA/NGUCWI/1567, Land Parcel No. MWEA/NGUCWI/1569, Land Parcel No. MWEA/NGUCWI/1570 in trust all the three houses of KIMUYU GAKUYA and an order for cancellation of the resultant titles so that the land reverts back to the original title and all the three houses to get a share of the said land.***
- 2. Costs of the suit and interest.***

The defendant filed a joint statement of defence dated 10<sup>th</sup> September, 2019 denying the plaintiff's claim.

**Plaintiff's summary of Facts**

The plaintiff above testified and stated that the 1<sup>st</sup> defendant is his sister-in-law being the wife of his late brother Julius Mwai Kimunyi. The 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> defendants are the children of the 1<sup>st</sup> defendant herein. He stated that his father was known as Kimunyi Gakuya who had three wives and that his brother Julius Mwai Gakuya's mother was Cecily Muthoni while his mother is Grace Micere who is the third wife. According to the plaintiff, his brother Julius Mwai Kamunyi got registered as the owner of the suit Land Parcel number MWEA/NGUCWI/219 in the year 1974.

After he passed away, a Succession Cause was done and they shared the land amongst his children in total disregard to the other two houses. He stated that the suit land is a clan land given to his father and registered in the name of his late brother to hold in trust for himself and the rest of the family members. He stated that the late Julius Mwai Kimunyi was the first born son in the household of Cecily and that the defendants are the ones cultivating the suit land and that they have never cultivated the suit land.

**Defendants summary of Facts**

The 1<sup>st</sup> Defendant Margaret Muthoni Mwai testified on behalf of all of the defendants and stated that she is the wife of one Julius Mwai Kimunyi (deceased) who was the registered proprietor of the suit property land parcel number MWEA/NGUCWI/219 given to him by a councilor known as Mutugi in the year 1974. She stated that her father-in-law had three wives. The mother to her husband was known as Cecily Muthoni and the mother to the plaintiff was Grace Micere while the third wife to her father-in-law was known as Janet Wanjiku. She stated that after the demise of her husband, she filed a succession cause and acquired land parcel number MWEA/NGUCWI/219. She further stated that the plaintiff did not object to the grant being confirmed in her favor.

### **Plaintiff's Submissions**

The Plaintiff through the firm of Anne Thungu & Co. Advocates submitted that the plaintiff was able to prove the existence of a customary trust in relation to the suit land. She submitted that customary trust is a consent through which land may be acquired in Kenya and is anchored on the Constitution and statute. She submitted that trust is an overriding interest in land which need not be registered and is enshrined in *Article 60 (1) (a) of the Constitution*. She cited *Sections 24, 25, 26 and 28 of the Land Registration Act of 2012* where customary rights are interest on land which need not be registered on the title. It is an overriding interest that subsists on the land and is binding on the land. She cited the following cases:

1. *Kiarie Vs Kinuthia (unreported)*

2. *Gladys Njeri Muhura Vs Lisper Muthiguro*

*ELC Case No. 188/2017 (Ur)*

3. *Isaac M'inanga Vs Isaaya Theuri (S.O.K) Petition No. 10 of 2015 (Ur).*

4. *Mukangu Vs Mbui C.A No. 281 of 2000 (Ur).*

### **Defendants summary of Facts**

The defendants called Margaret Muthoni (1<sup>st</sup> defendant) who testified on oath and adopted her witness statement dated 10<sup>th</sup> September, 2019.

The 1<sup>st</sup> defendant stated that she is the widow to the late Julius Mwai Kimunyi (deceased) who was brother to plaintiff herein. She contends that upon demise of her husband, she filed succession proceedings in Kerugoya being succession cause No. 188 of 1995 (CM) and a grant was confirmed and the manner in which the proprietor of the estate were to be distributed among the beneficiaries. She stated that the plaintiff was not a beneficiary to the estate of her late husband and therefore he was not entitled to a share of his estate. The witness further testified that land Parcel No. MWEA/NGUCWI/219 belonged to her late husband absolutely and that he never held the same in trust for the plaintiff or anyone else. She referred to a list of documents dated 10<sup>th</sup> September, 2019 and filed the same date. She also produced in her evidence as D. Exhibit No. 1, 2, 3, 4, 5, 6 and 7 respectively. She stated that she got married to the deceased in the year 1970 and passed away in 1994. She stated that the suit land Parcel No. MWEA/NGUCWI/219 was given to her husband by a councilor known as Mutugi in the year 1974 when they were married. After taking out Succession proceedings, the land was confirmed in her favor and that the plaintiff did not raise any objection.

### **Defendant's Submissions**

The defendants through the firm of G.O. Ombachi & Co. Advocates submitted that no evidence was adduced by the plaintiff on trust if any. He argued that nobody from the entire household was called to testify to confirm any trust on the subject matter.

The learned counsel further submitted that there is no dispute that the 1<sup>st</sup> defendant pursued a succession cause and had the estate of Julius Mwai Kamunyi (deceased) determined and distributed way back on 17<sup>th</sup> February 1998 vide succession cause no. 188 of 1995 (Kerugoya CM) and the 1<sup>st</sup> defendant was confirmed as the sole beneficiary of the suit property Land Parcel No. MWEA/NGUCWI/219.

He argued that the plaintiff has never challenged the confirmation of the grant in favour of the 1<sup>st</sup> defendant by way of revocation of the grant 25 years after the confirmation of the grant.

He cited the following authorities in support of the defendant case:

1. *Isack M'inanga Kiebia*

Vs

*Isaaya Theuri M'lintari*

*Isack Ntongai M'lintari*

*Petition No. 10 of 2015 SOK (Nairobi)*

2. Alice Wairimu Macharia

Vs

Kirigo Philip Macharia

ELC Case No. 467 of 2017 (O.S) (Murang'a).

In conclusion the defendant urged this court to dismiss this suit with costs.

### **Legal Analysis and Decision**

I have considered the evidence adduced by the plaintiff and the first defendant. I have also considered the documents produced in evidence and the Applicable Law. The plaintiff's claim is hinged on the doctrine of customary trust.

It is trite law that customary trust is recognized as an overriding interest on land which need not be registered or noted. However, a party who wishes to rely on customary trust must of necessity prove the existence of such interest by calling witnesses as was stated in the case of **Karanja Wanjihia Vs Duncan Wanjihia & 4 others (2004) e KLR** where the court held:

*"Trust is an issue both of fact and law. It is a serious issue and needs to be demonstrated through proper evidence and verification of evidence"*

The court of Appeal also rendered itself on the threshold required to prove the existence of customary trust in *the case of Mbothu & Others Vs Wairimu & 11 others, (1980) KLR 17*, cited in the Estate of the late **Jonathan Kinuya Waititu (deceased) (2017) e KLR** - Succession Cause No. 488 of 2010 where they 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 plaintiffs 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."*

In the instant suit, the plaintiff pleaded at paragraph 6 of the plaint as follows:-

*"The plaintiff avers that his father was given land parcel No. MWEA/NGUCWI/219 measuring 10 acres by the clan but since he had a rice holding within Mwea Irrigation Settlement Scheme being rice holding No. 2160, he registered the said land in the name of JULIUS MWAI KIMUNYI his son and the substituted 1<sup>st</sup> defendant.*

*The said JULIUS MWAI KIMUNYI was registered as a trustee for the three houses of his father."*

The plaintiff testified alone and did not call any witness from his clan who was present when the plaintiff was allegedly given the land. He could not even remember the name of his clan in his evidence. The plaintiff admitted that he was given 2 acres of rice holding in Mwea Number 2160. The plaintiff also admitted that his father had rice holding No. 2160 in Mwea and would not therefore be given another land and he decided to register the suit land in the name of Julius Mwai Kimunyi (deceased). He had not been born at the time of land demarcation and adjudication and his evidence to that effect cannot be verified. In my view such evidence is tantamount to hearsay which is not admissible in evidence.

Another issue that emerged from the evidence and submissions by the parties is whether the plaintiff's claim for declaration of trust can lie where succession proceedings has been completed and a certificate of grant issued. My answer to that can be found in **Section 26 of the Land Registration Act No. 3 of 2012** which is similar to **28 of the Repealed Registered Land Act**.

That was the holding in the case of **Felista Muthoni Nyaga Vs Peter Kayo Mugo, (2016) e KLR** where it was observed:

*"It is how well settled that the registration of a party as owner of land does not relieve him of his duty or obligation to which he is subject as trustee. That is clear from Section 25 of the now Repealed Registered Land Act under which the provisions in Section 25 of the new Land Registration Act No. 3 of 2012 ....."*

I agree with the above decision. The upshot of my finding is that the plaintiff has not proved his claim against the defendants to the required standard. Consequently, this suit is hereby dismissed and since the parties are relatives, I order each party to bear their own costs.

**Judgment READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 4<sup>th</sup> day of June, 2021.**

.....

**E.C. CHERONO**

**ELC JUDGE**

*In the presence of:-*

1. *Ms Kimata for Defendants*
2. *Ms Wambui holding brief for Ann Thungu for Plaintiff*
3. *Plaintiff – present*
4. *Defendants – absent*
5. *Kabuta – Court clerk.*