



REPUBLIC OF KENYA

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IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 108 OF 2017

ANNE MUTHONI KANYEKI.....1ST PLAINTIFF

DANIEL MAINA KINYUA (Suing as the administrator of the Estate of

CECILIA GICHUI KINYUA (Deceased).....2ND PLAINTIFF

VERSUS

NYAGA GICHENGE.....1ST DEFENDANT

VIRGINIA NJOKI NJANJA.....2ND DEFENDANT

ANN MARGARET WAMAITHA.....3RD DEFENDANT

LAND REGISTRA, KIRINYAGA COUNTY.....4TH DEFENDANT

JUDGMENT

Introduction

Vide a plaint dated 10th June 2010, the plaintiff sought the following orders:

- a) A permanent Injunction do issue restraining the Defendants, their agents and/or servant from interfering, trespassing upon, encroaching upon, entering or interfering with the suit premises and in particular the part of suit premises that is the possession of the plaintiffs.*
- b) A declaration that the transfer by way of gift of the said suit premises by the 1st Defendant to the 2nd and 3rd Defendants was by way of fraud and the same is illegal, null and void in these circumstances and the same be cancelled.*
- c) An order to the 4th Defendant for cancellation of the transfer by way of gift of the said suit premises to the 2nd and 3rd Defendants and any other subsequent transactions that may have been effected, reinstates the suit premises in the status it was in before the alleged Court order of 22nd April 2010.*
- d) Any other order that the Court may deem fit and just to grant in the circumstances of this case.*
- e) Costs of the suit as well as interest at Court rates from the date of filing this suit until payment in full.*

The plaint was filed contemporary with a Chamber Summons dated the same date. The 1st, 2nd and 3rd Defendant filed their defence denying the plaintiffs claim on 8th February 2011.

On 24th May the same year, Virginia Njoki Nyaga and Ann Margaret Wamaitha who are the 2nd and 3rd defendants instituted another suit against Ann Muthoni Kanyeki and Cecilia Gachui Kinyua before the Magistrate at Kerugoya being PMCC No. 162 of 2010 seeking the following orders:

- a) A declaration that the defendants are illegally in occupation of the plaintiff's land Parcel No. INOI/KARIKO/930.*

b) Eviction of the defendants, their agents and/or family members from the above said parcel of land and the orders herein be served to the O.C.S Kerugoya Police station for compliance.

c) Costs of this suit.

On 12th August 2015, Ann Muthoni Kanyeki filed a statement of defence and counter claim to the plaintiffs claim in the lower court. There was also another suit being PMCC No. 50 of 1982 (Nyeri) whose orders were appealed and vacated vide Miscellaneous Civil Application No. 782 of 2001 (Nairobi) which was also consolidated to these proceedings.

Plaintiff summary of Facts

The 1st plaintiffs Ann Muthoni Kanyeki began as PW1 and stated that she is a resident of Kariko within Kirinyaga County. She testified that she is a farmer cultivating the suit land since the year 1965. The 2nd plaintiff, Cecilia Gakui Kinyua (deceased) was her sister-in law and her survivors have appointed Daniel Maina Kinyua (her son) as administrator to substitute his deceased mother. She said that the suit property L.R. NO. INOI/KARIKO/930 (formerly known as INOI/KARIKO/252) belonged to Kinyua Muhoro and Kanyeki Gichenge who are husband to the 1st plaintiff and father to the 2nd plaintiff respectively and also brothers to the 1st defendant herein. She testified that together with the 2nd plaintiff's family, they have been in occupation of the suit land for more than 30 years and that the defendants have never been in occupation of the suit property. The 1st plaintiff further testified that the Limited Grant of Letters of Administration and Colligenda bona in respect of the Estate of Kanyeki Gichenge and Kinyua Muhoro were issued to Cecilia Gakui Kinyua (now deceased) and herself on 10th March 2004 and 2nd March 2004 respectively. She stated that the 1st, 2nd and 3rd defendants acquired title to the suit property fraudulently in the following circumstances.

- a) That the 2nd plaintiff is the wife of the 1st defendant who was the registered proprietor of the suit property before fraudulently transferring the same to his wife the 2nd defendant and the 3rd defendant.
- b) That the 1st defendant had in July 2001 vide Originating Summons moved the High Court at Nairobi vide Miscellaneous Application Number 782 of 2001 seeking orders that he be registered as the sole proprietor of the suit land to the exclusion of the plaintiffs' husband (who were both his brothers) arguing that INOI/KARIKO/252 (now known as INOI/ KARIKO/930 and being the suit property) had been allocated to him during a Land Adjudication Process in the locality.
- c) That the said Nyaga Gichenge (1st defendant) stated in the said Originating Summons that the plaintiffs husband Antony Muhoro and Kanyeki Gichenge Nyaga (both now deceased) had vide SRMCC Number 50 of 1983 (Nyeri) obtained orders for the subdivision of the suit property into INOI/KARIKO/1091, 1092 and 1093 and caused to be registered in the name of the said Nyaga Gichenge, the 2nd Plaintiff and Kanyeki Gichenge respectively).
- d) The said Nyaga Gichenge successfully moved the court vide the said Originating Summons and he was given ex-parte orders that the titles created vide the SRMCC Number 50 of 1983 namely INOI/KARIKO/1091, 1092 and 1093 be cancelled and the original title Number INOI/KARIKO/930 be reinstated and registered in his name.
- e) Upon learning of these developments and being aggrieved by them, the 1st plaintiff together with the 2nd plaintiff entered appearance in that matter and applied for setting aside of the orders of the High Court on the grounds that the Originating Summons had been heard ex-parte when both the respondent therein had died and no substitution had been undertaken.
- f) On 12th March 2004, being satisfied that the orders of the court in the originating summons had been obtained illegally, the court ordered a stay of execution of the orders and directed that the parties file a consent to vacate the orders in that matter.
- g) That immediately upon being granted these orders, they filed a caution in the register of the title for land title Number INOI/KARIKO/930 prohibiting all transactions and dealings on the land.
- h) Notwithstanding all the above the said Nyaga Gichenge, on 3rd may 2010 fraudulently and illegally purported to transfer to the 2nd and 3rd defendants herein the suit property despite there being a caution registered against the title which transfer he accomplished by using a forged Court order to lift the caution registered against the title.
- i) The Court order upon scrutiny and investigations being undertaken was discovered to be a forgery as it was alleged to have been executed by the Honourable **Mr. Justice Aganyanya, J.A** while presiding over the Court in the Originating Summons application which fact was untrue as at that time his Honourable **Lordship Aganyanya J.A** was an Appellate Judge sitting in the Court of Appeal and would have thus been unable to preside over a High Court matter
- j) Owing to the fraud, the 1st, 2nd and 3rd defendants herein were arraigned and charged before the Senior Principal Resident Magistrates Court at Kerugoya in Criminal Case Number 594 of 2010 with conspiracy to defraud contrary to *Section 317 of the Penal Code* and forgery contrary to *Section 349 of the Penal Code* where the 2nd and 3rd defendants herein were acquitted but the 1st defendant convicted and sentenced to serve one year under probation.
- k) The 4th defendant acted illegally and fraudulently by causing the change of and alteration of the register to the detriment of the plaintiffs and by purporting to lift the prohibitory order, caution and restriction lodged by the plaintiffs based on Court order which he knew or ought to have known that it could not have been issued by the cited Court. The 4th defendants further failed to satisfy

himself that indeed whether the said Court order had genuinely been issued by Court.

l) The 1st, 2nd 3rd and 4th defendants acted fraudulently and in conspiracy by transferring and registering the transfer of the suit land at a record speed of one day with a view to defeat the plaintiffs' interest in the suit.

m) That after all this, they filed this suit in the Environment and Land Court at Nairobi vide Cause Number 287 of 2010 filed on 14th June 2010 seeking for the determination of these issues.

The 1st plaintiff contends that due to the chronology of events outlined above and the circumstances surrounding this suit, it is clear that the defendants are guilty of material non-disclosure and if the matter is left as it is, then she will suffer as she will be evicted from her home together with her entire family and be rendered destitute.

She stated that if this Honourable Court does not grant the prayers sought, this suit and/or their counter-claim in CMCC 162/2010 (Kerugoya) now consolidated herein, there shall be a grievous miscarriage of justice and that the defendants will evict them from their only known home.

Defendants summary of Facts

The defence called Nyaga Gichenge as DW1 who testified on oath and stated that he was the registered owner of Land Parcel Number INOI/KARIKO/930 measuring six (6) acres. He was given the land by the clan in 1958. His brother Kinyua Muhoro and Kanyeki Gichenge had been given land in Mwea which they allegedly sold and bought land in Nanyuki. The 1st defendant further stated that their father had land adjacent to land parcel Nos KARIKO/746 measuring 6 acres and that the plaintiff should claim the same.

He also testified that there was a time his land was sub-divided irregularly but the High Court at Nairobi Civil Case No. 782 of 2000 reinstated the land to his name and cancelled the sub-divisions. He stated that his land has never been encumbered and denied any knowledge of encumbrance shown in Entry No. 9 of the green card or any court orders issued and/or served upon him regarding the alleged encumbrances. He stated that he transferred a portion of his land measuring 1 ½ acres to Margaret Wamaitha Muriithi and 4 ½ acres to Virginia Njoki Nyaga. He said that he was sued in a Criminal Case No. 594/2010 (Kerugoya) with conspiracy to defraud and was convicted and sentenced to one year probation. He was charged with Ann Margaret Wamaitha and Virginia Njoki but the two were acquitted. He stated that he transferred 1½ acres to Ann Margaret Wamaitha because he had a sick leg and he required money for treatment and medicine. Ann Margaret Wamaitha gave him money which he used to buy drugs. He said that he gave Virginia 4½ acres because he was too sick and he was apprehensive that he would not recover and wanted his wife to transfer to their children. He stated that he has lived in the suit land since 1958 when he was given by the clan. He said that the defendants came to the land in 1960s because his father lived there and the lands were adjacent. He said that his father later moved to his land but the plaintiffs and their husbands refused. He stated that he was aware the 2nd and 3rd defendants wanted to evict the plaintiffs from the suit land.

DW2 was Virginia Njoki Nyaga who testified on oath and stated that she is the registered owner of land parcel No. INOI/KARIKO/930 measuring approximately 4½ acres. She is jointly registered with Ann Margaret Wamaitha holding 1½ acres. She said that Ann Margaret Wamaitha gave her husband Nyaga Gichenge money when he was sick. She was registered proprietor of the 4½ acres so that she can give her children. She said that she attended the Land Control Board where she obtained the consent to transfer. The 2nd defendant also stated that they filed a case with Ann Margaret Wamaitha being CMCC No. 162 of 2010 seeking orders for eviction of the plaintiffs. She lives with her family in the suit land. She admitted that the plaintiff also live in the suit land with their families. She admitted she was charged alongside her husband and Ann Margaret Wamaitha in Criminal Case No. 594/2010 but she was acquitted with Ann Margaret Wamaitha.

DW3 was Ann Margaret Wamaitha. She was sworn and stated that she is jointly registered with Virginia Njoki Nyaga in land parcel No. INOI/KARIKO/930 having a share of 1½ acres. She stated that they were transferred the suit land by the 1st defendant Nyaga Gichenge. She was given 1 ½ acres because she gave him money when he was sick. They entered into a sale agreement. The first sale agreement is dated 9/3/2007. The second sale agreement is dated 29/1/2007 and the third agreement is an acknowledgment dated 30/4/2010. She admitted that despite purchasing the land, she has not taken possession.

Legal Analysis and Decision

I have considered the pleadings forming part of this consolidated suit and the viva voce evidence by the parties. I have also considered the submissions by counsels for both the plaintiffs and the defendants. From the submissions and the pronouncements by various Courts in the consolidated suits, the following come out as undisputed facts:-

- (1) The plaintiffs are sisters-in-law to the 1st defendant.
- (2) The plaintiffs have been in occupation of the suit property land parcel Number INOI/KARIKO/252 now known as INOI/KARIKO/930 cultivating the same with their families since 1965.
- (3) The 1st defendant is the first born son in the family of Gichenge Nyaga and that he was given land by the clan being the suit land parcel No. INOI/KARIKO/252 now known as INOI/KARIKO/930.
- (4) The 1st defendant was charged, convicted and sentenced to one year probation for fraudulently transferring the suit property and parcel No. INOI/KARIKO/252 now known as parcel No. INOI/KARIKO/930.
- (5) There was no criminal conduct associated with the creation of the following land titles; INOI/KARIKO/1091, 1021 and 1093.

(6) The order cancelling the land titles referred in paragraph (5) above being parcels No. INOI/KARIKO/1091, 1092 and 1093 and reverting back to the original title Number INOI/KARIKO/930 was done at an interlocutory stage.

(7) The conviction and sentence of the 1st defendant Nyaga Gichenge in Criminal Case No. 594 of 2010 has not been appealed against or set aside.

Issues for Determination

From the pleadings and decisions in the consolidated cases, the following are probable issues for determination:-

(1) Whether the 1st defendant held the suit property L.R. No. INOI/KARIKO/930 in trust for himself and the plaintiffs?

(2) Whether the sub-division undertaken in the suit property Number INOI/KARIKO/930 to give rise to the new titles Number INOI/KARIKO/1091, 1092 and 1093 were done legally?

(3) Whether the order cancelling title Number INOI/KARIKO/1091, 1092 and 1093 and issued at interlocutory stage should be vacated after the full hearing of the case?

(4) Who should bear the costs of this suit and all the consolidated cases?

It can be noted from the proposed issues for determination by counsel for the plaintiff and the response by the counsel for the defendants that customary trust is being contested as an issue for determination. The reasons are that the issue is not raised and pleaded in the consolidated suits. It is my view that though the issue of trust was not pleaded, the issue came out during the examination in-chief of the witness and cross-examination. The issue was also mentioned extensively by **Justice J.B. Ojwang** (As he then was) in his ruling in **Misc. Application No. 782 of 2001 (Nairobi)** delivered on 6th February 2004 where at page 7, the learned Judge observed as follows:-

“(6) When the Applicant had been allocated the plot which later became INOI/KARIKO/930, he had not held it in trust; and so he is aggrieved that this land should be divided out to the Respondents.

(7) Even if it had been right to share out INOI/KARIKO/930 among all the brothers, the Applicant states that as the muramati, he should have been given the largest piece; and therefore the allocation was irregular.

It can be gleaned from the decision above that the interlocutory order is the main issue in controversy in the primary suit which was referred to the Land Disputes Tribunal for determination and which has given rise to the subsequent suits which form part of this consolidation suit is customary trust. The issue in my view can be taken as proper for determination in resolving the controversy between the parties. It is trite law that trust is an overriding interest on land. **Section 25 of the Land Registration Act No. 3 of 2012** provides as follows:-

“25 (1) The rights of a proprietor, whether acquired on first registration 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)

(b)

(2) 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”.

The 1st defendant in his evidence admitted that he was given the suit land by the clan under Kikuyu customary law and that he was the first born son of Mzee Gichenge Nyaga and his other brothers were Kinyua Muhoro and Kanyeki Gichenge who lived in the suit land parcel No. INOI/KARIKO/252 (now known as INOI/KARIKO/930) where the 1st defendant and his siblings were borne, bred and brought up. It is also the suit land where the 1st defendant and his two brothers Kinyua Muhoro and Kanyeki Gichenge (Both deceased) got married and lived with their families to-date. The ruling in **Misc. Application No. 782 of 2001 (Nairobi)** delivered by **J.B. Ojwang, Ag. Judge** (as he then was) on 6th February 2004 gives the chronology of events and actual claim by the brothers of the 1st defendant namely Kinyua Muhoro and Kanyeki Gichenge (now deceased) and now succeeded by the plaintiff in this case. At **page 14 and 15** of the said ruling, the learned Judge observed as follows:-

“From the facts emerging in this application, the following points are clear:-

(1) The original plot L.R. No. INOI/KARIKO/525 had been allocated to the Applicant.

(2) A number of land reference numbering changes then took place, and the Applicant ended up with INOI/KARIKO/930.

(3) At the time the Applicant had been allocated INOI/KARIKO/252, the father to him and to the two Respondents had been allocated INOI/KARIKO/251.

(4) By a series of events which the Applicant cannot comprehend, L.R. INOI/KARIKO/930 was further subdivided into; INOI/KARIKO/1091 (0.57 Ha) in his name; INOI/KARIKO/1092 (0.81 Ha) in the name of one Cecilia Gacui Kinyua (his own sister in law); and INOI/KARIKO/1093 (0.81 Ha) in the name of the Applicant's brother, Kanyeki Gichenge.

(5) In this allocation, the two persons each allocated 0.81 Ha did not claim from the Appellant's father's title, the original INOI/KARIKO/251 as should have been the case.

(6) When the Applicant had been allocated the plot which later became INOI/KARIKO/930, he had not held it in trust; and so he is aggrieved that this land should be divided out to the Respondents.

(7) Even if it had been right to share out INOI/KARIKO/930 among all the brothers, the Applicant states that, as the **muramati**, he should have been given the largest piece; and therefore the allocation was irregular”.

From my reading of the summary of facts in the previous suits between the 1st defendant and his two brothers succeeded by the plaintiffs who are their wives, the main issue in controversy in the suit property is the determination of trust. This Court takes Judicial Notice that under Kikuyu Customary Law during land demarcation consolidation and adjudication period, the first born son in the family was given land by the clan to hold in trust for himself and in trust for the family. It was not an individual property but a family property. Land was not viewed as a private or individual but a family owned property. In the case of **Isack M'Inanga Kieba Vs Isaya Theuri M'Lintari & Isack Ntongai M'Lintari SCOK Petition 10 of 2015**, the Supreme Court held thus:-

*“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 other members, whether or not they are in possession 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 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, the claim is directed against the registered proprietor who is a member of the family; clan or group”.*

The plaintiffs in the instant case have testified that the 1st defendant is the first son in the family and that he was given the suit land by the clan during the land demarcation consolidation and Adjudication period to hold in trust for himself and the family. The plaintiff further stated that since the 1st defendant was given the land which was registered in his name, the family including their father Mzee Gichenge Nyaga and the siblings have lived there to-date. From the evidence adduced by the plaintiffs on the nature of land used by the family, there is irresistible presumption by this Court that the said holding by the 1st defendant were for the benefit of himself and other members of the family.

In his defence, the 1st defendant denied holding the suit land in trust. He stated that their father Gichenge Nyaga (deceased) held land parcel No. INOI/KARIKO/746 measuring six (6) acres and that the plaintiffs should make their claim in that land. However, the 1st defendant did not produce a certificate of official search or any other evidence. It is to be noted that the 1st defendant in previous proceedings as observed by **Justice J.B. Ojwang** in his ruling in **Misc. Application No. 782 of 2001 (Nairobi)** had alleged that his father who is also father to his siblings Kinyua Muhoro and Kanyeki Gichenge had been allocated land parcel No. INOI/KARIKO/251 which is different from what he is now alleging as land parcel No. INOI/KARIKO/746. A copy of title or certificate of official search was not also produced. If the 1st defendant denies that the suit land parcel No. INOI/KARIKO/525 now registered as INOI/KARIKO/930 was given to him by the clan absolutely and not to hold in trust for the rest of the family, then the burden lies upon him to go beyond mere allegations that their father Gichenge Nyaga was given land for the family. He should produce a certificate of title or a certificate of search showing that the alleged parcels of land were indeed given to their father and the land he is holding is indeed personal. To my mind, the 1st defendant has failed to show that the clan gave him the suit land parcel No. INOI/KARIKO/252 now known as INOI/KARIKO/930 to hold absolutely and not in trust for the family. As such, I find and hold that sufficient evidence has been given showing that the 1st defendant was indeed given the suit land to hold in trust for himself and the rest of the family of Gichenge Nyaga.

As regards costs, I am alive to the fact that the parties have incurred substantial sums of money engaging advocates in this dispute. However, as a Court, I am also alive to the need to promote co-existence of the warring parties who are close family relations. As such, I order each party to bear their own costs.

Disposition

The upshot of my finding is that the plaintiffs have proved their case against the defendants and do hereby enter judgment as follows:-

(1) A declaration that the 1st defendant herein, Nyaga Gichenge holds land parcel Number INOI/KARIKO/252 now known as INOI/KARIKO/930 in trust for himself and the plaintiffs herein.

(2) A declaration that the transfer by way of gift of the said suit premises by the 1st defendant to the 2nd and 3rd defendants was fraudulent, illegal, null and void and the same to be cancelled forthwith.

(3) The suit land parcel No. INOI/KARIKO/252 now known as land parcel Number INOI/KARIKO/930 to be shared in terms of the previous sub-divisions which was cancelled being Numbers INOI/KARIKO/1091, INOI/KARIKO/1092 and INOI/KARIKO/1093.

(4) *Since the orders cancelling the three sub-divisions named herein above were made at an interlocutory stage pending investigations by the Director, Criminal Investigations Department where the 1st defendant was charged, convicted and sentenced to one year probation for the offence that he conspired and transferred land parcel No. INOI/KARIKO/930 to the names of Virginia Njoki Nyaga and Ann Margaret Wamaitha Murithi (2nd and 3rd defendants) , I now reinstate the titles in respect of the three sub-divisions being land parcel No. INOI/KARIKO/1091 (0.57 Ha) in the name of the 1st defendant, INOI/KARIKO/1092 (0.81 Ha) in the name of Cecilia Gakui Kinyua and INOI/KARIKO1093 (0.81 Ha) in the name of Ann Muthoni Kanyeki.*

(5) *Each party to bear her own costs of this suit.*

JUDGMENT DATED, DELIVERED PHYSICALLY AND SIGNED AT KERUGOYA THIS 23RD DAY OF JULY, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Gachoki holding brief for Ann Thungu for Defendant
2. Plaintiff/Advocate – absent
3. Kabuta – Court clerk.