



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 53 OF 2017**

**ELIJAH GITHINJI GACHUKI .....1<sup>ST</sup> PLAINTIFF**

**WAMBUI MURAGE KARIUKI.....2<sup>ND</sup> PLAINTIFF**

**CICILIA WAIRIMU MURAGE (Suing as the Legal Representative of**

**CYPRIAN MURAGE GACHOKI) .....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**STANLEY MUGO MURIUKI (Sued as the legal representative**

**of MURIUKI GACHOKI).....1<sup>ST</sup> DEFENDANT**

**RAPHAEL KINYUA MUGO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background**

Pursuant to a plaint dated 10<sup>th</sup> April 2017, the Plaintiffs sued the Defendants and prayed for the following orders:

- 1. A permanent injunction against the defendants restraining them from selling, transferring, disposing, charging and/or in any other way interfering with the plaintiffs use, possession and enjoyment of land parcel No. Mwerua/Gitaku/154 and deregistration of the land from the names of the defendants.***
- 2. Determination of trust in land parcel No. Mwerua/Gitaku/154 such that the 1<sup>st</sup> plaintiff gets 14 acres, 2<sup>nd</sup> plaintiff gets 14 acres and defendants gets 1 acre respectively.***
- 3. Costs and interest of the suit at court rates.***

The 1<sup>st</sup> defendant filed a statement of defence and counterclaim dated 9<sup>th</sup>

May, 2017 where he sought the following orders:

- 1. A declaration that the 1<sup>st</sup> defendant is the sole proprietor of land parcel No. Mwerua/Gitaku/154 and the name of Raphael Kinyua Mugo be struck out by rectifying the register at the Land Office accordingly.***
- 2. Removal of all restrictions, cautions and inhibitions registered over land parcel No. Mwerua/Gitaku/154 by the plaintiffs.***
- 3. The plaintiffs by themselves, servants, agents or any one claiming over them be forcibly evicted from the suit land and an order of permanent injunction to issue against the plaintiffs, servants and agents from trespassing, constructing, cultivating, charging, leasing or in any way illegally interfering with the 1<sup>st</sup> defendants peaceful and quiet enjoyment of his proprietary rights over land parcel No. Mwerua/Gitaku/154***
- 4. Costs and interest of the suit at court rates.***

The matter was set down for hearing on 17/10/2019.

### **Plaintiffs summary of Facts**

The plaintiff called three witnesses.

#### **PW1 – JEMIMAH WANGITHI GITHINJI**

She testified on oath and stated that she lives in Kahawa Sukari in Nairobi. She is a retired teacher and now doing business. She said that Elijah Githinji Gachoki (deceased) was her husband. She produced letters of Administration Ad Litem in succession cause no 253/18 (Kerugoya) as plaintiff exhibit No.1. She stated the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs

are the wives of her late brother in law, Cyprian Murage Gachoki. She also produced letters of Administration obtained by the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs as P. Exhibit No. 2. She said that Stanley Mugo Muriuki is the nephew of her husband and the first born son of her late husband's brother one Muriuki Gachoki. She stated that the suit land belonged to her father-in-law which was given to him by the clan and caused it to be registered in the name of the first born son Muriuki Gachoki. She referred to a green card showing the suit land was registered in the name of Kariuki Njagua alias Gachoki Njuguna on 21/04/1960. Entry No. 3 shows that the land was given as a gift at a consideration of Kshs 1200 on 06/08/1964. She got married in 1980 and since then they have been living on the suit land she found.

When they got married, she found Cyprian Murage and his family had settled in the suit land. Her sisters-in-law Wambui Murage and Cicilia Wairimu Murage each live in separate homes with their children who are adults and have their own houses. She also has two sons Leonard Munene and Gideon Kinyua who have built on the suit property. The witness also stated that when she got married she did not find the wife of Muriuki Gachoki. She stated that Muriuki Gachoki was in prison when she got married and the 1<sup>st</sup> defendant was not living on the suit land but came later and she brought him up. They have been utilizing the suit property with each of the families having separate and distinct portions. The total acreage of the suit land is 3.8 acres.

The first defendant had sold a portion of the suit land to one Raphael Kinyua Mugo (2nd defendant) vide a sale agreement dated 10/04/97 but her family and that of the 2<sup>nd</sup> plaintiff paid Raphael Kinyua Mugo Kshs 200,000 as a refund of the purchase price on consideration that he was going to get a lesser portion. She produced the sale agreement as p exhibit No.3. The refund was received by Mugo's Advocate which was also produced as exhibit no.4. Mugo later filed a succession cause for the estate of Muriuki Gachoki secretly and when her husband discovered he filed a revocation of grant but the court declined to revoke the grant. However, the court ordered the 2<sup>nd</sup> defendant to be removed from the title.

#### **PW2 - JOHN MUGO NYAMU**

He testified and stated that he comes from "*hungari wa mbari ya njue*" clan where he is the chairman. It is the same clan where the parties in this suit belong. He stated that Muriuki Gachoki (deceased), Cyprian Murage Gachoki (deceased) and Elijah Githinji Gachoki (deceased) were brothers and were sons to the late Gachoki Njagua alias Kariuki Njogu.

Muriuki Gachoki was given land parcel No. Mwerua/ Mukure/346 by the clan comprising of 10.10 acres. His father had clan land L.R. No. *Mwerua/Gitaku/154* comprising of 3.8 acres. Muriuki Gachoki sold his and the father transferred this land to him. However, Gachoki Njuguna's family continued to live on the land being a clan and that the father only transferred to him because he was the first born and by then Cyprian Murage was at school while Elijah Gachoki was still a small boy.

He stated that Gachoki Njuguna's family has been utilizing the land together and Gachoki Njuguna, Cyprian Murage and Muriuki Gachoki were buried in the suit land and that the land was registered in the name of Muriuki Gachoki to hold in trust for the siblings where they have lived since 1964.

#### **PW3 - WAMBUI MURAGE**

She stated that Cicilia Wairimu Murage is her co-wife and Cyprian Murage Gachoki was their husband. She stated that Elijah Githinji Gachoki was her brother-in-law and also brother to her husband. She stated that Muriuki Gachoki is the father to Stanley Mugo who is the 1<sup>st</sup> defendant in this case. Before filing this suit they obtained letters of administration of their late husband which she confirmed as Plaintiff Exhibit No. 2.

### **Defendants summary of Facts**

The defence called two witnesses.

#### **DW1 - STANLEY MUGO MURIUKI**

He said that his father is Muriuki Gachoki and Elijah Githinji is his uncle and brother to his father as well as Cyprian Murage Gachoki and they are all deceased. His grandfather was Gachoki Njagua. His father died sometime in the year 1984. Immediately after the demise of his father, his brothers Elijah Githinji Gachoki and Cyprian Murage Gachoki started evicting him from the suit land parcel No. Mwerua/ Gitaku/ 154 and he went to rent a house at Gathambi village.

After suffering for a long time, he went and consulted with the clan elders who informed him that the suit property belonged to his late father one Muriuki Gachoki and that he should fight to get back the parcel of land. He then decided to file a succession cause No. 147 of 1997

(Embu) and after the case was heard the land was transferred to him on 13/06/1996. He was given 1.8 acres and the 2<sup>nd</sup> defendant was given 2 acres since he funded him to file the succession cause. After the court had given directions that the land be transferred to him and the transfer had been done, his late uncle Elijah Githinji put a restriction on the land on 22/08/1997 and cause him to be arrested on the grounds of obtaining money by false pretenses. He was charged, convicted and sentenced to 3 years 4 months imprisonment. Upon release, he came back home and found that his Uncle Elijah Githinji had subdivided his father's land on the ground and gave himself 1.4 acres, Cyprian Murage's two wives 1.4 acres and left him only one acre. He stated that the plaintiff occupied his land and continue to do so without his consent. He wants the caution placed on the land removed and the plaintiff evicted from the suit land.

## DW2 - PETER MURIUKI NGARI

He stated that Muriuki Gachoki who is now deceased was the father to Stanley Mugo Muriuki. He stated that Muriuki Gachoki was a farmer and had inherited 10 acres from the clan and his father Gachoki Njagua had also been given land by the clan measuring 3.8 acres.

The witness testified that Gachoki Njagua alias Kariuki Njogu realized that Muriuki Gachoki's 10.10 acre piece of land was not fertile and convinced his son Muriuki Gachoki to sell this land which he did and he transferred his 3.8 acres to him which he had been given by the clan in 1964. He said that sometime in 1984, Muriuki Gachoki died and that when Muriuki Gachoki was still alive his brothers Elijah Githinji and Cyprian Murage and their families were in occupation of the suit land. However, he stated that after Muriuki Gachoki died his brother Elijah Githinji Gachoki took control of the parcel of land and evicted Muriuki Gachoki's son Stanley Mugo Muriuki and the clan elders intervened and told him that the land belonged to his late father Muriuki Gachoki. From there, Stanley Mugo Muriuki took steps to fight for his father's land and filed for a succession cause.

### Plaintiff's Submissions

The plaintiff through the firm of Wangechi Munene & Co. Advocates cited the following authorities in support of the plaintiff's claim:

- (1) *Section 25 of the Land Registration Act No.3 of 2012*
- (2) *Mbui Mukangu Vs Garald Mutwiri Mbui C/A No. 281 of 2000*
- (3) *Gathiba Vs Gathiba HCCC No. 1647 of 1984(Ur)*
- (4) *Section 28(b) of the land Registration Act No.3 of 2012.*

### 1<sup>st</sup> Defendant's Submissions

The 1<sup>st</sup> defendant through the firm of Kiguru Kahigah & Co. Advocates submitted that although the plaintiffs were living on the subject parcel of land during their life time, the same was due to the fact the 1<sup>st</sup> defendant's father, Muriuki Gachoki (deceased) had allowed them to be in occupation of the land and that the same cannot be construed that they are automatically entitled to the land on basis of trust as the subject land was gifted to him by his father during his lifetime. He cited the case of *Estate of the late Githunge M'itwerandu Alias Githungu M'Ntiiri, Succession Cause No. 15 of 2020 (Meru) (Ur)*.

In conclusion, the 1<sup>st</sup> Respondent submitted that from the evidence adduced in Court it is clear that none of the plaintiffs challenged the transfer and the registration of the subject land to the 1<sup>st</sup> defendant and hence they are not entitled to claim for a share of it on grounds of trust.

### Legal Analysis and Decision

I have analyzed the evidence and document produced by the parties. I have also considered the applicable law. The plaintiffs claim is for determination of trust. Customary trust is an overriding interest over land that need not be noted in the register. It is a matter that must be pleaded and proved by evidence. **Section 25 of the Land Registration Act N.o 3 of 2012** recognizes Customary trust and the same provides as follows:

*“25(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order or court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all privilege and appurtenances belonging thereto, free from all other interest and claims whatsoever, but subject-:*

- (a) *To the leases, charges and other encumbrances and to the condition and restriction, 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.*

*(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 Supreme Court put into perspective the principles for determination of trust in the case of **Isack M'tentari & Isack Ntongal M'tentari SCOK Petition 10 of 2015** where the court held that:-

*“Each case has to be determined on its own merit and quality of evidence. It is not every claim of right to land that could qualify as a customary trust. In this regard, we agree with the High Court in **Kiarie Vs Kiarie**, 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 for the benefit of such other 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 before registration family, clan or family 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 him their 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 clan is directly against the registered proprietor who is a member of the family, clan or group.”*

The plaintiffs in this instant case have shown and the 1<sup>st</sup> defendant admitted that the suit property parcel No. Mwerua/Gitaka/154 is a family/clan land which was registered in the family patriarch Kariuki Njagua on 21/04/1960 and later transferred to the 1<sup>st</sup> defendant's father Muriuki Gachoki on 06/05/64. The plaintiffs called Jemimah Wangithi Githinji as a witness who stated that when she got married in 1980 to Elijah Githinji Gachoki who was brother to Cyprian Murage Gachoki and Muriuki Gachoki, she found her mother-in-law and all the family members living on the suit land. Ever since then, they have lived and done extensive development on the disputed land including building of permanent houses. They have also buried their grandfather and her husband as well as her brother-in-law Cyprian Murage Gachoki on the suit land. She produced photographs of a development project that have been undertaken including the construction of permanent houses, construction of walls, tanks, planting of bananas, mangoes and the presence of burial sites. These activities undertaken by the families of the three brothers on the suit land after it was left by their father Kariuki Njagua alias Kariuki Njogu are clear manifestation of the concept of notion of trust inherent in the Kikuyu Customary Law where the original registered owner held and was presumed to hold the same fiduciary trust for himself and the family generally.

The 1<sup>st</sup> defendant in his evidence stated that he got registered as proprietor of the land after he filed a succession cause No. 147/96 (Embu) and that the title is absolute and indefeasible. That argument in my view cannot relieve him of his duty and obligation as a trustee under Kikuyu Customary law and the suit land shall be sub-divided among the three siblings being the sons of Kariuki Njagua alias Kariuki Njogu or their legal representatives in the manner proposed by the plaintiffs taking into consideration that the 1<sup>st</sup> defendant had sold two (2) acres to Raphael Kinyua Mugo but the said Raphael Kinyua Mugo was refunded the purchase price by the plaintiff in the sum of Ksh. 200,000.

In the upshot, I enter Judgment as follows:

***(1) The 1<sup>st</sup> defendant, Stanley Mugo Muriuki is registered as proprietor of the land parcel Number Mwerua/Gitaku/154 to hold in trust for himself and the plaintiffs Wambui Murage Kariuki and Cicilia Wairimu Murage.***

***(2) The trust referred in order (1) above is determined as follows:***

***(a) Jemimah Wangechi Githinji to get 1.4 acres.***

***(b) Wambui Murage Kariuki & Cicilia Wairimu Murage to get 1.4 acres.***

***(c) Stanley Mugo Muriuki to get 1 acre.***

***(3) The land Registrar, Kirinyaga County to cancel the names of Stanley Mugo Muriuki and issue new titles in terms of the determination of trust above.***

***(4) Since the parties herein are close family relation, each party to bear her costs of this suit.***

**Judgment READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 23<sup>rd</sup> day of July, 2021.**

.....  
**E.C. CHERONO**

**ELC JUDGE**

**In the presence of:-**

1. Ms Wangechi for Plaintiffs
2. Defendants/ Advocate – absent
3. Kabuta – Court clerk.