



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 12B OF 2019

PRISCILLA WARUI NYAGA.....PLAINTIFF

VERSUS

JOSEPH NJOKA KAARA.....1ST DEFENDANT

OCTAVIAN KIURA KAARA.....2ND DEFENDANT

RULING

Summary of Facts

By a Plaint dated 13th December 2012 and amended on 10th January 2013, the Plaintiff approached the Court seeking the following orders as against the Defendants:

- a) A declaration that the proceedings and findings of the Gichugu Land Disputes Tribunal in respect of LR. No Baragwe/Guama/1279 and the subsequent confirmation as the judgement of the court in Land Tribunal Case No.13 of 1999- Kerugoya Senior Principal Magistrate's Court were null and void and cannot be effected;***
- b) A declaration that the Plaintiff does not hold LR No Baragwe/Guama/1279 as a trustee for the Defendants;***
- c) An order that the Defendants be permanently restrained from entering, utilizing, occupying or in any way interfering with the Plaintiff's peaceful user of LR. No Baragwe/Guama/1279;***
- d) Costs and interest at court rates;***
- e) Any other relief the Court may deem just to grant.***

The gravamen of the Plaintiff's case is that, notwithstanding the fact that she was registered as proprietor of land parcel LR Number Baragwe/Guama/1279 (hereinafter referred to as the Suit Land) on 1st July 1998, the Gichugu Land Dispute Tribunal on 16th February 1999 ordered for the Suit Land to be registered jointly in the names of Beatrice Wanja Kaara (the Plaintiff's mother), Joseph Njoka Kaara (the Plaintiff's brother and 1st Defendant herein), Octavian Kiura Kaara (the Plaintiff's brother and 2nd Defendant herein) and Angelus Muriithi Kaara (the Plaintiff's brother). The Land Tribunal award was adopted as the judgement of the Senior Magistrate's Court sitting at Kerugoya on 28th May 1999. It is the Plaintiff's case that the Suit Land was part of a larger parcel of land, being LR Number Baragwe/Guama/637 which originally belonged to her deceased father, one Francis KaaraMunyi. That upon her father's demise and in accordance with the certificate of confirmation of grant issued at the High Court in Nairobi on 28th February 1994, LR Number Baragwe/Guama/637 was distributed as follows: Beatrice Wanja Kaara, the deceased's spouse (0.80 Acres); Joseph Njoka Kaara, the deceased's son (1.0 Acre); Octavian Kiura Kaara, the deceased's son (1.0 Acre) and Angelus Muriithi Kaara, the deceased's son (1.0 Acre). That the distribution excluded the Plaintiff. That the Plaintiff's mother, observing that her daughter had not been allocated any land, transferred her portion of land, now subdivided and known as LR Number Baragwe/Guama/1279 (the Suit Land), by way of gift on 1st July 1998. That those were the circumstances under which the Plaintiff became registered as the proprietor of the Suit Land. That the decision by the Gichugu Land Dispute Tribunal on 16th February 1999 adopted as a judgement of court on 28th May 1999, to distribute her land amongst her family members to her exclusion was therefore null and void. It is her contention that flowing from the judgement, her brothers, the 1st and 2nd Defendant have turned violent and prevented her from utilizing her land.

In response to the Plaint, the Defendants filed their statement of defence and counterclaim on 14th December 2015. They contend that the matter is improperly before court as the Plaintiff's dissatisfaction with the decision by the Gichugu Land Dispute Tribunal on 16th February 1999 adopted as a judgement of court on 28th May 1999 ought to have been ventilated by way of appeal or in the alternative by an application for the revocation of the grant issued on 28th February 1994. They further argue that the suit is incompetent as the orders in the

Magistrate Court have been partially executed and that prayers (b) and (c) in the Plaintiff are *res judicata*. The Defendants admit that the Suit Land was part of LR Number Baragwe/Guama/637 belonging to their father. That their father passed away on 23rd January 1981 prior to the commencement of the Law of Succession Act, Cap 160. That his estate was therefore distributed in accordance with Kikuyu customs, which customs did not make provision for inheritance by married daughters of a deceased person. That the Plaintiff was therefore not allocated any land in keeping with this custom. That the portion of land allocated to their mother, Beatrice Wanja Kaara, which upon subdivision of the original land became known as LR Number Baragwe/Guama/1279, the Suit Land herein, was to be held in trust for all her children. That the transfer of the Suit Land to the sole proprietorship of the Plaintiff was illegal and that the land held by the Plaintiff is held in trust for her siblings. It is their case therefore that the suit ought to be dismissed.

In addition, the Defendants counterclaimed against the Plaintiff as follows:

- (i) *A declaration that the Plaintiff holds LR Number Baragwe/Guama/1279 in trust for:*
 - (a) *The estate of Beatrice Wanja Kaara, whose beneficiary is the Plaintiff;*
 - (b) *The Defendants;*
 - (c) *The Estate of Angelus Muriithi Kaara.*
- (ii) *An order for determination of the trust in LR Number Baragwe/Guama/1279*
- (iii) *Costs of the counterclaim.*

By consent, the parties agreed to file written submissions for consideration by the Court. The Plaintiff filed her submissions on 09th November 2020. She largely adopted the contents of her Plaintiff and Supporting Affidavit. It is her contention that the Suit Land was validly gifted to her *inter vivos* by her mother and the respective entry entered in the land register. That nothing in that entry indicates that she was meant to hold the property in trust for her siblings, being that they are adults and should have been so gifted had their mother intended them to benefit from the Suit Land. That the suit is properly before court as the Plaintiff seeks declaratory orders. She dismissed the Defendant's suggestion that she ought instead to have filed an application for revocation of grant. On the whole, she prays for the suit to be upheld and the Defendant's counterclaim dismissed.

The Defendants filed their submissions on 22nd October 2020. They submit that the Plaintiff's claim is fatally defective as it failed to enjoin the Senior Principal Magistrate. They rely on the decision in *Republic Vs Attorney General & Another Ex-Parte Derek Gyidei Mango [2016] e KLR*. It is their further submission that the Plaintiff ought to have challenged the Tribunal's decision by way of judicial review. Reliance is placed on the decision in *Daniel Maina Kariuki Vs Sammy Maina Mbugua [2019] e KLR*. The Defendants contend that the orders sought cannot be granted as the judgement of the court has already been effected, with the Land Control Board having permitted for the transfer of land. They cite the decision in *Timothy Kagondou Muriuki & 4 Others v Republic & 3 Others [2013] e KLR*. In conclusion, the Defendants point out that the present suit is *res judicata* in light of the valid order by the Magistrate's court which has in fact been partly executed.

Issues for Determination

- 1. Whether the Plaintiff's suit is properly before Court.**
- 2. Whether the Plaintiff holds the Suit Land in trust for the estate of Beatrice Wanja Kaara, the Defendants and the estate of Angelus Muriithi Kaara.**
- 3. Which party ought to bear costs.**

Legal analysis and Opinion

The Court has anxiously considered the Parties' rival pleadings, affidavits and submissions.

The first question for determination is whether the present suit is properly before the Court. In addressing this question, the Court takes into account the history precipitating the Plaintiff's suit. The genesis of the Plaintiff's dissatisfaction appears to be the decision reached by the Gichugu Land Dispute Tribunal on 16th February 1999 calling for the Suit Land to be

registered jointly in the names of Beatrice Wanja Kaara (the Plaintiff's mother), Joseph Njoka Kaara (the Plaintiff's brother and 1st Defendant herein), Octavian Kiura Kaara (the Plaintiff's brother and 2nd Defendant herein) and Angelus Muriithi Kaara (the Plaintiff's brother). This award was adopted as the judgement of the Senior Magistrate's Court sitting at Kerugoya on 28th May 1999. It appears that the Plaintiff's dissatisfaction with the judgement persisted until on 13th December 2012 when she decided to file a fresh Plaintiff before the present court, which Plaintiff was later amended on 10th January 2013. The law provides for various ways in which a litigant aggrieved by the decision of a court or tribunal can seek redress. Two avenues were immediately available to the Plaintiff in 1999. The first was to seek an order of judicial review to quash the decision of the Gichugu Land Dispute Tribunal. **Section 9(3) of the Law Reform Act, Cap 26** makes provision for the avenue of judicial review as follows:

“In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for

the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such

shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired”.

The wording in **Order 53 Rule 2 of the Civil Procedure Rules, 2010** mirrors the provisions of the Law Reform Act. Rule 2 provides as follows:

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired”.

The avenue to seek leave for an application of judicial review was therefore open to the Plaintiff for six months after the impugned decision of the Gichugu Land Dispute Tribunal.

Another avenue through which the Plaintiff would have ventilated her dissatisfaction was by way of appeal against the judgement of the Magistrate court. **Section 65 of the Civil Procedure Act, Cap 21** provides for this avenue as follows:

“65. Appeal from other courts -

(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court —

(a) Deleted by Act No. 10 of 1969, Sch.;

(b) From any original decree or part of a decree of a subordinate court, on a question of law or fact;

(c) From a decree or part of a decree of a Kadhi’s Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.” (Underline, mine)

It is unclear why the Plaintiff did not explore any of the above avenues provided in law and why she waited for 13 years to file the present suit. The present suit is not an appeal, neither a judicial review application. It is a suit parallel to the one determined by the Tribunal and adopted by the Magistrates Court. The only conclusion is that the Plaintiff’s suit is an abuse of court process and an attempt at forum shopping. The suit falls into the category of cases observed in **Satya Bhamu Gandhi Vs Director of Public Prosecutions & 3 others [2018] e KLR** to constitute an abuse of court process. In that case, an abuse of court process was explained as follows:

“The situation that may give rise to an abuse of court process are indeed in-exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

(a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.

(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.

(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.”(Underline, mine)

The Plaintiff's case is therefore dismissed with costs.

Now, turning onto the Defendants' counterclaim. The issue for determination is whether or not the Plaintiff holds the Suit Land in Trust. It is not in contention that the Suit Land was part of the larger land parcel LR No. Baragwe/Guama/637 belonging to both the Plaintiff and Defendant's father, one Francis Kaara Munyi. It is also not disputed that Francis Kaara Munyi passed away on 23rd January 1981. The Court agrees with the Defendants that by this time, the Law of Succession Act had not been commenced and only came into operation on 1st July 1981. **Section 2 of the Law of Succession Act, Cap 160** provides as follows in relation to the administration of estates of persons deceased prior to its commencement:

'2. Application of Act

(1) *Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.*

(2) *The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.'* (Underline, mine)

On the question of the inheritance by married women under Kikuyu custom, the Court of Appeal in **Mary Wanja Gichuru Vs Esther Watu Gachuhe Civil Appeal No. 76 of 1998** cited with approval the opinion expressed by the late **President Jomo Kenyatta** in his book **Facing Mount Kenya** at page 29 where it stated:

".....After sometime, the family began to increase. Let us imagine that each wife had three sons and perhaps some daughters. But as female children do not take part in the ownership of land, we will leave them out, because, having no system of spinsterhood in Kikuyu society women do not inherit land on their father's side they play their part in the family or clan in which they marry."

The explanation given by the Defendants for why the Plaintiff was not included in the distribution of her deceased's father's estate is therefore plausible and allowed by law.

It is the Plaintiff's case that her mother, observing that her daughter had not been allocated any land, transferred her portion of land, now subdivided and known as LR Number Baragwe/Guama/1279 (the Suit Land), by way of gift on 1st July 1998. She disagrees with the proposition that the portion of land allocated to her mother was to be held as a life interest, arguing that should that have been the case, the same would have been captured in the certificate of confirmation of grant.

Section 35 of the Law of Succession Act, Cap 160 provides for the distribution of the estate of an intestate who dies leaving behind a spouse and children.

'35. Where intestate has left one surviving spouse and child or children -

(1) *Subject to the provisions of Section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to —*

(a) *The personal and household effects of the deceased absolutely; and*

(b) *a life interest in the whole residue of the net intestate estate:*

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.' (Underline, mine)

The import of the above section is that the remaining spouse has exclusive and absolute ownership of the personal and household effects of the deceased and can deal with them as she deems fit. However, she only has a life interest in the remainder of the net intestate estate. In essence, the remainder of the net intestate estate is not held by the remaining spouse absolutely, but only for the period that she is alive and is to be distributed to her children after her death. The following decisions are instructive:

In **Tau Katungi Vs Margrethe Thorning Katungi & Another [2014] e KLR where Musyoka, J. at page 4** stated that:

".... "Life interest" is not defined in the Law of Succession Act. Black's Law Dictionary, ninth edition, West, 2009, defines it as "an interest in real or personal property measured by the duration of the holder's or another person's life." In the context of Section 35 it is an interest held by the surviving spouse during their life "in the whole of the residue of the net interest estate." Its effect is that the surviving spouse first enjoys rights over the property and at his or her death the property passes to other persons. In the context of Section 35, the widow is entitled to enjoy rights over the residue of the net intestate estate, that is after taking away the chattels and settlement of liabilities, during her life time with the property passing to the children upon her demise or remarriage of she be a widow. The effect of Section 35(1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children's right to the property crystallizes upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate. This means that if the net estate is generating income she would be the person entitled exclusively to the income so

generated. The device is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled of right to the property of their deceased parent. However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent on the departed spouse. She would be left without any means of sustenance. The other aspect is that life interest ties up with the concept of matrimonial property: the said property would in most part be property acquired during marriage and with the contribution of the surviving spouse. Direct devolution of such property to the children would deny the surviving spouse of enjoyment of their own property.”

In the **Matter of the Estate of Basen Chepkwony (deceased) Nairobi HCSC No. 842 of 1991, Koome, J.** (as she then was) held that where the property in issue is land, it cannot be registered in the name of the surviving spouse absolutely since she only enjoys a life interest and holds the same in trust for the children and other heirs.

The same principle was restated in **Re Estate of Rosemary Mukwanjeru Kiria (Deceased) 2016 e KLR** where it was observed that:

“Under the above provisions, the surviving spouse only gets the chattels absolutely, and is only entitled to a life interest on the rest. The ultimate destination of the property the subject of the life interest is to the children in the event of the demise of the surviving spouse as provided in Section 35(5) of the Law of Succession Act and also as was held in the **Matter of the Estate of Gathima Chege (deceased)**..Section 37 of the Act allows the surviving spouse during life interest, subject to the consent of all the co-trustees and all the adult children or the consent of the court, to sell any of the property the subject of the life interest for their own maintenance. Where the subject property is immovable, the consent of the court is mandatory. The surviving spouse holds the property during life interest as a trustee and stands in a fiduciary position with relation to the property. The property does not pass to the surviving spouse absolutely. Where the property in issue is land, it cannot be registered in the name of the surviving spouse absolutely since she/he only enjoys a life interest and holds the same in trust for the children and other heirs. This was the holding in the **Matter of the Estate of Basen Chepkwony (deceased)**.”

From the foregoing, the Suit Land distributed to the Plaintiff’s mother was never meant to be held by her absolutely and in essence then, could not be transferred to another party. The transfer of the Suit Land to the Plaintiff was therefore illegal since the property was to be held by the mother during her lifetime and distributed to her children following her death in 2006. It is the finding of the Court therefore that the Plaintiff’s holding of the Suit Land constitutes a constructive trust. A constructive trust was defined in the Court of Appeal case of **Juletabi African Adventure Limited & another Vs Christopher Michael Lockley [2017] e K.L.R** which cited with approval the decision in **Twalib Hatayan Twalib Hatayan & Anor Vs Said Saggah Ahmed Al-Heidy & Others [2015] e KLR**:

“A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury’s Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment...”

In my view, the upshot of the foregoing analysis is as follows:

- a. **That the Plaintiff’s suit is dismissed.**
- b. **A declaration that the Plaintiff holds LR Number Baragwe/Guama/1279 in trust for the Estate of Beatrice Wanja Kaara (deceased).**
- c. **Costs are awarded to the Defendants.**

Ruling READ, SIGNED and DELIVERED physically at Kerugoya this **23rd day of July, 2021.**

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E.C. CHERONO

ELC JUDGE

In the presence of :-

1. Ms Wangechi Munene holding brief for Wanjiru Wambugu
2. Mr. Asimwe holding brief for Magee
3. Kabuta – Court Assistant.