



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 5 OF 2020

JANE WAMBUI NJUKI.....1<sup>ST</sup> APPLICANT

ALICE WATHITHA NGUNJIRI.....2<sup>ND</sup> APPLICANT

JOYCE WANJA NDERITU..... 3<sup>RD</sup> APPLICANT

SOPHIA MUTHONI GICHOMBI.....4<sup>TH</sup> APPLICANT

VERSUS

TARACIRA MICERE NJUKI.....RESPONDENT

JUDGMENT

### Summary of Facts

Vide Originating Summons filed on 06<sup>th</sup> February 2020 and supported by the affidavit of the 1<sup>st</sup> Applicant of even date, the Applicants herein moved to court claiming to be entitled to half a share of land parcel No. Baragwe/Kariru/2545 (hereinafter referred to as the suit land) by way of a trust. They sought the court's determination of the following questions:

- a. Whether land parcel No. Baragwe/Kariru/735 was registered in the names of Njuki Miano (deceased) on 13<sup>th</sup> January 1959;
- b. Whether Njuki Miano subdivided land parcel No. Baragwe/Kariru/735 into new numbers: 2542; 2543; 2544 and 2545 on 30<sup>th</sup> January 2012;
- c. Whether land parcel No. Baragwe/Kariru/2545 was registered jointly into the names of Njuki Miano (deceased) and the Respondent;
- d. Whether Njuki Miano (deceased) held his share of land parcel no. Baragwe/Kariru/2545 in trust for his daughters, the applicants herein;
- e. Whether the Respondent holds half a share (1 Acre) out of land parcel No. Baragwe/Kariru/2545 in trust for the Applicants;
- f. Whether the trust created should be determined and one (1) Acre out of land parcel No. Baragwe/Kariru/2545 be transferred to the Applicants;
- g. Who should bear the cost of the originating summons.

It is the Applicants' case that land parcel No. Baragwe/Kariru/735 was registered in the name of their deceased father, Njuki Miano in the year 1959. That the Applicants' mother, Esther Kariuko Njuki passed away on 16<sup>th</sup> December 2010. That in 2011, their deceased father married the Respondent herein. That their father passed away on 20<sup>th</sup> December 2014. That sometimes in the year 2012, prior to his death, the Applicants' father had subdivided the said land parcel No. Baragwe/Kariru/735 into four parts: 2542; 2543; 2544 and 2545. L.R No. Baragwe/Kariru/2542 was sold to one Jamleck Chomba, LR No. Baragwe/Kariru/2543 and 2544 were transferred to the Applicants' brothers: Anthony Gachoki Kamau and Peter Muchiri Njuki respectively and LR No. Baragwe/Kariru/2545 jointly registered in the names

of their deceased father and the Respondent. The Applicants contend that the subdivisions were done following a family meeting held on 6<sup>th</sup> December 2011. That during the said meeting, a copy of whose minutes are attached, it was agreed under minute 3, that the 2 acres held by the Applicant's deceased father would be so held in trust for them. Following the demise of the Applicant's father on 20<sup>th</sup> December 2014, the Respondent presented the certificate of death to the register and was registered as the sole proprietor of the suit land. It is their case that half of the suit land held by their father was held in trust for them and that the Respondent ought to transfer 1 acre to the Applicants.

The Respondent entered appearance on 10<sup>th</sup> March 2020 and filed her replying affidavit on 11<sup>th</sup> March 2020. She strenuously opposed the Applicants' claim. It is her case that the Applicants are her step daughters, being children of her deceased husband's first wife. That after the death of the Applicants' mother on 16<sup>th</sup> December 2010, she got married to the Applicants' father, one Njuki Miano on 21<sup>st</sup> May 2011. She has attached a marriage certificate to that effect. She avers that sometimes in 2012, the said Njuki Miano wanted to subdivide his land parcel Baragwe/Kariru/735, in order to give portions thereof to his sons. That upon visiting the lands registry, he discovered that the 1<sup>st</sup> Applicant herein had placed a caution on the said land, which caution was later lifted on 18<sup>th</sup> January 2012. That on 30<sup>th</sup> January 2012, Njuki Miano, her now deceased husband, subdivided land parcel Baragwe/Kariru/735 into 4 portions, with the resultant portions being land parcels Baragwe/Kariru/2542; 2543; 2544 and 2545. That LR No. Baragwe/Kariru/2542 was sold to one Jamleck Chomba, LR No. Baragwe/Kariru/2543 transferred to his son, Anthony Gachoki Kamau and 2544 transferred to his other son, Peter Muchiri Njuki. That LR No. Baragwe/Kariru/2545 was registered jointly in the name of the deceased Njuki Miano and herself. That after her husband's death and consequent to the court orders given on Kerugoya High Court ELC 45 of 2015, she notified the lands registrar of the death and was thus registered as the sole proprietor of the suit land. She denies that she has any intention of selling the suit land, arguing that it is now her matrimonial home. She strongly denies the Applicants' assertion that the portion of the suit land held by their deceased father was held in trust for them and further refutes the claim that the suit land constitutes ancestral land. She prays to the court to order the caution placed on the suit land by the 1<sup>st</sup> Applicant on 4<sup>th</sup> September 2019 lifted and the Applicants' suit dismissed.

Vide a further affidavit filed on 28<sup>th</sup> April 2020, the 1<sup>st</sup> Applicant on behalf of the other Applicants avers that the caution placed upon the suit land by her brothers during the lifetime of their father was to prevent their father and the Respondent from disposing off land parcel Baragwe/Kariru/735 seeing as it constituted ancestral land. It is her further averment that at the time their deceased father married the Respondent he was suffering from depression and was undergoing treatment. That further, at the time of registering the suit land in the joint proprietorship of himself and his wife, the Respondent, he was terminally ill and lacked the mental capacity to appreciate the import of the registration. She therefore reiterates that the Applicants have a beneficial interest in half a share of the suit land, being that the same was held in trust for them by their father prior to his death.

By consent, the parties agreed to file written submissions for consideration by the Court. The Applicants filed their submissions on 15<sup>th</sup> April 2021. They largely reiterated the contents of the originating summons, supporting affidavit and further affidavit. Relying on the decision in *Alice Wairimu Macharia Vs Kirigo Philip Macharia (2019) e KLR* and *Jason Gitimu Wangara Vs Martin Munene Wangara & Others (2013) e KLR*, the Applicants submit that they have met the conditions stipulated in law for the establishment of a trust in their favour. That the Respondent breached this trust by having the suit land registered under her name only and refusing to transfer half of the suit land to the Applicants. They rely on the decision in *Stephen & 6 Others Vs Stephen & Another [1987] e KLR*.

The Respondent filed her submissions on 15<sup>th</sup> April 2021. She dismissed the Applicant's claim that at the time of registration of the suit land under joint ownership, their father, and her husband was mentally ill and incapable of appreciating the effect of the registration. She contends that no psychiatric report has been adduced to support the claim and further questions why the Applicants have not challenged the allocation of the remaining three subdivisions and resultant transfers. In support of this argument she submits that the transfer of L.R. No. Baragwe/Kariru/2542, one of the four subdivisions, to Jamleck Chomba was registered barely a month before the demise of the Applicants' father, yet the Applicants do not contest that the transfer and registration was tainted by the alleged mental incapacity of the transferor, their father. She submits that there is no dispute as to the original ownership of L.R. No. Baragwe/Kariru/735 by the deceased Njuki Miano, nor is there contention on the fact that he later subdivided the land into four portions. It is also agreed that the suit land was registered jointly between the Respondent and her deceased husband and Applicants' father. Relying on the decision in *Isabel Chelangat Vs Samuel Tirop Rotich & 5 Others [2012] e KLR*, it is her submission that jointly owned property is not held in the individual shares of the constituents and that upon the demise of one of the joint owners, their interest is automatically vested in the surviving joint owner. It is her contention that the entire suit land is her matrimonial home and therefore she does not hold half of it in trust for the Applicants. On the issue of whether or not the Applicants have proved the existence of a trust, reliance is placed on the following decisions: *Alice Wairimu Macharia Vs Kirigo Philip Macharia (2019) e KLR*; *Julebati African Adventure Limited & Another Vs Christopher Micael Lockley [2017] e KLR* and *Isack Kieba Minanga Vs Isaaya Theuri M'lintan & Another SCOK No. 10 of 2015*. It is the Respondent's position that the Applicants have failed to meet the threshold required to prove the existence of a trust. It is her conclusion therefore that the Applicants' suit ought to be dismissed.

#### **Issues for Determination**

- a. Whether land parcel No. Baragwe/Kariru/735 was registered in the names of Njuki Miano (deceased) on 13<sup>th</sup> January 1959;**
- b. Whether Njuki Miano subdivided land parcel No. Baragwe/Kariru/735 into new numbers: 2542; 2543; 2544 and 2545 on 30<sup>th</sup> January 2012;**
- c. Whether land parcel No. Baragwe/Kariru/2545 was registered jointly into the names of Njuki Miano (deceased) and the Respondent;**
- d. Whether Njuki Miano (deceased) held his share of land parcel No. Baragwe/Kariru/2545 in trust for his daughters, the applicants herein;**
- e. Whether the Respondent holds half a share (1 Acre) out of land parcel no. Baragwe/Kariru/2545 in trust for the Applicants;**

f. Whether the trust created should be determined and one (1) Acre out of land parcel No. Baragwe/Kariru/2545 be transferred to the Applicants;

g. Who should bear the cost of the Originating Summons?

### **Legal analysis and opinion**

I have considered with anxious care the parties rival pleading, affidavit and submissions. I now analyze and evaluate the issues framed as follows:-

#### **1. Whether land parcel No. Baragwe/Kariru/735 was registered in the names of Njuki Miano (deceased) on 13<sup>th</sup> January 1959?**

There is no contention that land parcel No. Baragwe/Kariru/735 was originally registered in the names of Njuki Miano, the Applicant's father who is also the Respondent's husband on 13<sup>th</sup> January 1959. A green card for the said parcel of land was annexed to the affidavit of the 1<sup>st</sup> Applicant sworn on 30<sup>th</sup> December 2019 in support of this Originating Motion and marked as "P.1". It is therefore not in dispute that the land described as No. Baragwe/Kariru/735 was originally registered in favour of Njuki Miano on the said 13<sup>th</sup> January 1959.

#### **2. Whether Njuki Miano subdivided land parcel No. Baragwe/Kariru/735 into new numbers; Baragwe/Kariru/2542, 2543, 2544 and 2545 on 30<sup>th</sup> January 2012 and whether the land was registered jointly in the name of Njuki Miano and the Respondent herein**

It is not also in dispute that the registered proprietor, Njuki Miano caused the original land parcel No. Baragwe/Kariru/735 to be subdivided into four portions during his life time on 30<sup>th</sup> January 2012. As a result of the said sub-division, the following resultant parcels emerged; Baragwe/Kariru/2542, 2543, 2544 and 2545. Pursuant to the said sub-division, the said Njuki Miano sold land parcel No. Baragwe/Kariru/2542 to one Jamleck Chomba and caused land parcels No. Baragwe/Kariru/2543 to be transferred to his son Anthony Gachoki Kamau while he transferred parcel No. Baragwe/Kariru/2544 to his other son Peter Muchiri Njuki while the last resultant portion Number Baragwe/Kariru/2545 was registered jointly with his second wife Taracira Micere Njuki who is the Respondent herein.

**Joint tenancies** is a concept defined under **Section 2 of the Land Act No. 6 of 2012** as follows:-

"Joint tenancy" means a form of concurrent ownership of land where two or more persons each possess the land simultaneously and have undivided interest in the land under which upon the death of one owner it is transferred to the surviving owner or owners" (underline mine).

It is apparent from the reading of the above section of the law that land held under joint tenancy is held in undivided shares. This position is amplified by **Section 91(4) of the Land Registration Act, No. 3 of 2012** as follows:-

"(4) If land is occupied jointly, no tenant is entitled to any separate share in the land, and consequently,

- a. Disposition may be made only by all the joint tenants.
- b. On the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; and
- c. Each joint tenant may transfer their interest intervivos t all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void" (underline mine).

The position is further amplified under **Section 49 of the Land Act, No. 6 of 2012** which provides the position in the event of the death of a co-tenant under a joint tenancy as follows:-

#### **"49. Transmission on death of joint proprietor -**

"If one of two or more joint proprietors of any land, lease or charge dies, the Registrar shall, on proof of the death delete the name of the deceased from the Register by registration of the death certificate".

The foregoing provisions of law have been interpreted by the Courts in a number of case, one being the case of **Kivuitu Vs Kivuitu (1991) e K.L.R 248** where the Court observed as follows:-

".....The fact that the property is registered in the joint tenancies means that each party owns an undivided equal share therein – Because of the conveyance of the property to be held by them as joint tenants, there was a presumption at the time, that the interest of the parties was to hold the matrimonial home as joint tenants, provided that if one of them died, the other would take the whole ownership" (underline mine).

The interpretation of the law as shown in the above decision and numerous other precedents is categorical that in a property registered in the joint names, each party owns an undivided equal share therein and upon demise of any of the tenants, the others would take the whole

ownership.

Having held that the original land parcel No. Baragwe/Kariru/735 was acquired by Njuki Miano (deceased) during the land demarcation and adjudication period in 1960, this Court makes the irresistible conclusion that the land is a clan land liable for being passed from one generation to another, the Respondent as proprietor holds the same in trust for herself and the rest of the family members. It is not in dispute that the Applicants are members of the same family as the Respondent.

**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 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.

(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 late Njuki Miano who was joint owner with the Respondent and also a trustee in the suit property had sub-divided the original land parcel No. Baragwe/Kariru/735 into land parcel Numbers Baragwe/Kariru/2542, 2543, 2544 and 2545. However, he sold parcel No. Baragwe/Kariru/2542 and transferred parcels No. Baragwe/Kariru/2543 and 2544 to his two sons Anthony Gachoki Kamau and Peter Muchiri Njuki in the exercise of his obligation as a trustee. However, he failed to transfer any share of the land to the applicants who are also beneficiaries of the land the same way as Anthony Gachoki Kamau and Peter Muchiri Njuki. Article 27 (3) of the Constitution of Kenya, 2020 provides that – there is no discrimination between men and women and that both deserve equal entitlement of the ancestral land. Though Njuki Miano (deceased) who was the joint registered proprietor has since passed on, the obligation and responsibility as a trustee of the suit land passes on and the Respondent cannot be relieved of such obligation. In view of the matters aforesaid, I find and hold that the Respondent hold land parcel No. Baragwe/Kariru/2545 in trust for herself and the Applicants.

### **Decision**

In the upshot, I enter judgment for the Plaintiffs/Applicants against the Defendant/Respondent in the following terms:-

- 1. The Defendant/Respondent is holding the suit property land parcel No. Baragwe/Kariru/2545 in trust for herself and the Applicants/Plaintiffs.**
- 2. The Respondent holds half a share (1 Acre) out of land parcel No. Baragwe/Kariru/2545 in trust for the Applicants**
- 3. The Land Registrar Kirinyaga County to excise one (1) acre out of land parcel Number Baragwe/Kariru/2545 and register in the joint names of the Applicants.**
- 4. Each party to bear her own 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. Mr. Asimwe holding brief for Muthomi for Plaintiff
2. Ms Ndungu holding brief for Wanjiru Waweru for Respondent
3. Kabuta – Court clerk.

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

There is no contention that land parcel no. Baragwe/Kariru/735 was originally registered in the names of Njuki Miano, the Applicants’ father and Respondent’s husband, on 13<sup>th</sup> January 1959. Both Parties also agree that on 30<sup>th</sup> January 2012, the said Njuki Miano did cause land

parcel no. Baragwe/Kariru/735 to be subdivided into four portions, resulting in new title numbers: Land parcel Nos. Baragwe/Kariru/2542; 2543; 2544 and 2545. There is also no dispute as to the manner in which the four parcels were allocated: LR No. Baragwe/Kariru/2542 sold to one Jamleck Chomba; L.R No. Baragwe/Kariru/2543 transferred to Anthony Gachoki Kamau; LR No. Baragwe/Kariru/2544 transferred to Peter Muchiri Njuki and L.R No. Baragwe/Kariru/2545 registered in the joint names of Njuki Miano and the Respondent.

The point of departure is on the import of the joint registration of L.R No. Baragwe/Kariru/2545 registered in the joint names of Njuki Miano and the Respondent. It is the Applicants' view that their father, Njuki Miano held in trust for them his portion of LR No. Baragwe/Kariru/2545 under the joint proprietorship, so that, upon his demise on 20<sup>th</sup> December 2014, the Respondent ought to have transferred to them their father's portion in the jointly owned property. The Respondent on the other hand argues that jointly owned land is not held in shares and that upon the demise of her husband and the Applicants' father, the entire of the suit land automatically devolved to her.

**Section 2 of the Land Act, No. 6 of 2012** defines joint tenancies as follows:

“Joint tenancy” means a form of concurrent ownership of land where two or more persons each possess the land simultaneously and have undivided interest in the land under which upon the death of one owner it is transferred to the surviving owner or owners.’ (Underline, mine).

Immediately clear from this definition is that land held under joint tenancy is held in undivided shares. This position is amplified by **Section 91 (4) of the Land Registration Act, No. 3 of 2012**.

“4) If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently —

- (a) Dispositions may be made only by all the joint tenants;
- (b) On the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; and
- (c) Each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.’ (Underline, mine)

**Section 49 of the Land Act, No. 6 of 2012** provides the position in law on the death of a co-tenant under a joint tenancy:

**“49. Transmission on death of joint proprietor**

If one of two or more joint proprietors of any land, lease or charge dies, the Registrar shall, on proof of the death, delete the name of the deceased from the register by registration of the death certificate.’

The foregoing provisions of law have been interpreted in a number of cases, two of which are set out below:

In the case of ***Kivuitu Vs Kivuitu in 1991 e KLR 248***, the Court observed as follows with regard to joint tenancies:

“.....The fact that the property is registered in the joint names means that each party owns an undivided equal share therein. – Because of the conveyance of the property to be held by them as joint tenants, there was a presumption at the time, that the interest of the parties was to hold the matrimonial home as joint tenants, provided that if one of them died, the other would take the whole ownership.” (Underline, mine)

In the case of ***Isabel Chelangat Vs Samuel Tiro (2012) e KLR*** the Court on the principal of joint ownership relied on the following position:

“A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities.” The right of survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. The four unities that must be present in a joint tenancy are:-

- i) The unity of possession
- ii) The unity of interest
- iii) The unity of title
- iv) The unity of time.”

From the foregoing provisions it is clear that Njuki Miano (deceased) could not, under the joint tenancy hold separate shares from the Respondent. In fact, even in life, the said Njuki Miano could not have transferred his interest to the Applicants once the joint tenancy was registered. Also clear is the fact that upon the demise of Njuki Miano, the suit land automatically devolved to the surviving co-tenant, who is

the Respondent.

Having so established, the court disagrees with the Applicants that the Respondent holds half of the suit land in trust for them. In my opinion, the upshot of the foregoing analysis is that the Applicants' suit lacks merit and the same ought to be dismissed with costs.

**JUDGMENT READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 16<sup>TH</sup> DAY OF JULY, 2021**

.....

**E.C. CHERONO**

**ELC JUDGE**

In the presence of:-