



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC SUIT NO. 19 OF 2019

SERAH WANGUI KIARIE.....1ST PLAINTIFF

JANE NDUTA KIARIE.....2ND PLAINTIFF

SAMUEL KARANJA KIARIE 3RD PLAINTIFF

ANTHONY MBUGUA KIARIE.....4TH PLAINTIFF

(suing as the Legal representatives of the Estate of KIARIE THUKU - deceased)

VERSUS

JAMES NJENGA THUKU.....DEFENDANT

JUDGEMENT

By a Plaint dated 25th January 2019, filed on 29th January 2019, the Plaintiffs herein have sought for Judgement against the Defendant for:-

I. An order of permanent injunction restraining the Defendant by himself, his agents, servants, employees, proxies and/or any person claiming under him from alienating, selling, transferring, trespassing, evicting and/or otherwise howsoever from interfering with the Plaintiffs' quiet possession and enjoyment of Land Parcel LR Kiambaa/Karuri/T.419 and LR Kiambaa/Thimbigua/927.

II. An order that Land Parcel LR Kiambaa/Karuri/T.419 and LR Kiambaa/Thimbigua/927, be distributed equally between the Plaintiffs and the Defendant in trust for himself and his late brother Kiarie Thuku.

III. In the alternative to(ii) above, a declaration that the plaintiffs' have acquired ownership of half the share of Land Parcel LR Kiambaa/Karuri/T.419 and LR Kiambaa/ Thimbigua/927, by way of adverse possession.

IV. An order directing the Defendant to transfer and cause the Plaintiffs' to be registered as proprietors of half portion of Land Parcel LR Kiambaa/Karuri/T.419 and LR Kiambaa/Thimbigua/927, and in default the Deputy Registrar of this Honorable Court to execute all the relevant documents to effect the transfer and registration of the Plaintiffs' as proprietors of half portion of Land Parcel LR Kiambaa/Karuri/T.419 and LR Kiambaa/Thimbigua/927.

V. General damages.

VI. Punitive damages.

VII. Costs of this suit and interests.

VIII. Such other reliefs as this Honorable Court may deem fit.

In their statement of claim, the Plaintiffs' stated that the Defendant is registered as the proprietor of Land Parcel LR No Kiambaa/Karuri/T.419, and LR Kiambaa/Thimbigua/927, and that the suit properties were originally owned by the late Thuku Kiarie, who had two biological sons namely Njenga Thuku, the Defendant herein and Kiarie Thuku (deceased), who was the father of the Plaintiffs. They averred that the Kiarie Thuku (deceased) died before land demarcation and registration in 1958, resulting in registration of the suit property in the name of the Defendant, to hold it in trust for himself and his brother Kiarie Thuku (deceased).

They further averred that Kiarie Thuku (deceased), and the Defendant settled on LR Kiambaa/Karuri/T.419, where they both raised their families and cultivated on LR Kiambaa/Thimbigua/927. They contended that despite the Defendant holding the suit properties in trust for himself and his late brother, he has refused to transfer and effect registration of the Plaintiffs' as proprietors of their father's share and on 29th October 2018, they were served with a Notice to Vacate, and in a bid to evict them, the Defendant attempted to demolish Plaintiffs' houses with a group of 40 rowdy men.

It was their further contention that, they obtained OB No.7 of 5th January 2019, and OB No.11 of 5th January 2019, from Karuri Police Station and as a result of the foregoing, the Defendant's conduct exhibits blatant breach of trust, is malicious, fraudulent and unlawful.

The suit is contested and the Defendant filed a Defence and Counterclaim dated 17TH April 2019, denying all the allegations raised in the Plaintiff and contended that the Plaintiffs' and their parents have never lived on LR Kiambaa/Thimbigua/927, and he only gave a graveyard to their brother Njenga Kiarie, in honor of his name. He further contended that he bought the parcels of land bits by bits and the same were amalgamated as LR Kiambaa/ Karuri/T.419, and has never held the land in trust.

In his counter-claim he contends that he is the legal owner of LR Kiambaa/Thimbigua/927, and LR Kiambaa/Karuri/T.419, which he acquired vide several Sale Agreements with different parties and he therefore prays for:-

I. The Court to visit LR Kiambaa/Thimbigua/927, to confirm that the Plaintiffs' do not live there and neither do they have their livelihoods dependent on it.

II. The Plaintiffs' agents, servants, purchasers and employees and anyone acting on their behalf be evicted from the parcel of land known to the parties as LR Kiambaa/Karuri/T.419.

III. A permanent injunction be issued against Plaintiffs' agents, servants, purchasers and employees from trespassing, subdividing, disposing, living on, erecting on buildings whatsoever, transacting any business and or interfere in any manner whatsoever with the parcel of land known to the parties as LR Kiambaa/ Karuri/ T.419.

IV. Costs of this suit.

V. Interest thereon

VI. Any other relief that this Honorable Court might deem fit to grant.

The Plaintiffs' further filed a Reply to Defence and Counter-claim dated 9th October 2019, and filed in Court on 22nd October 2019.

The matter proceeded via *viva voce* evidence on the 18th November 2020.

PLAINTIFFS' CASE

PW1 – Serah Wangui Kiarie, one of the Plaintiffs' herein testified and adopted her witness statement dated 25th July 2019, and her list of documents filed on 22nd October 2019. She testified that she came to Court upon being told that the Defendant was registered as the proprietor of LR Kiambaa/Karuri/T.419, and LR Kiambaa/Thimbigua/927, to hold in trust for the family. She further testified that she was born and lives on T.419 and that the Defendant has tried to evict them from the suit property. Further, that the Defendant did not purchase the suit property but it was allocated to the family of Thuku.

On cross-examination, she stated that the land was allocated by the Colonial Government and that their father told them that Njenga was a trustee for the family of Thuku, his father who died in 1976, while the Defendant was registered as the proprietor in 1970.

On Re-examination, she testified that the Plaintiffs were told that their father was a drunkard and could not be registered as the trustee, and that one of her brother who died in 1975, was buried on the suit land.

PW2- Fredrick Njenga Githaria-adopted his witness statement as part of his evidence. He testified that they were given the suit plots by the British Government, and that the land was registered in the name of one of the family members, who is the Defendant herein, and he was registered as the trustee for the family of Thuku. He further testified that the Defendant did not purchase the suit land.

On Cross Examination, he testified that the land was for **Thuku Kiarie**, and he died before the land was registered and that the land was registered in the name of the Defendant to hold in trust for the family.

On Re-examination, he stated that the father of Njenga Thuku, died in 1944, and he personally knew him.

PW3- Njuguna Waweru adopted his witness statement as part of his evidence.

On Cross-Examination, he testified that the land belonged to **Thuku Kiarie**, the father of the Defendant and that the Defendant was registered as proprietor to hold in trust for the family. He further testified that the Plaintiffs' are children of **Kiarie Thuku**, who is now deceased.

On Re-examination, he stated that the Plaintiffs' live on the suit land and that they should be given their father's share.

DEFENCE CASE

DW1- Njenga Thuku, filed his Defence and Counter-claim and he adopted his witness statement and list of documents as part of his evidence as Defence Exhibit 1.

On Cross Examination, he testified that he was born in **1936**, and bought the land in **1956**, when he was **20 years** old. He further testified that the suit properties were not given by the British Government and that the sale of land agreements were entered in the year **1958**, and the suit properties were sold to him by three people.

It was his testimony that the Plaintiffs' live on the suit property and were born there. That the Green Card is for **Njenga s/o Thuku**, who is **Njenga Son of Thuku**.

On Re-Examination, he testified that he had given his brother a place to stay and his brother died before he had bought his own parcel of land. He further testified that the Plaintiffs' declined to move out of suit properties.

At the close of *viva voce evidence*, the Court directed the parties to file written submissions. The Plaintiffs through the **Law Firm of J.M Waiganjo & Co. Advocates**, filed their written submissions on **21st June 2021**, while the Defendant filed his written Submissions on the even date through the **Law Firm of Nyambura Munyua & Co. Advocates**.

This Court has now carefully considered the pleadings herein, and the annexures thereto. The Court has also examined the available evidence and the exhibits thereto. The Court has also considered the written submissions, the cited authorities and the relevant provisions of law and finds the issues for determination are:-

- 1. Whether the Defendant holds the suit property in trust for the Plaintiffs.**
- 2. Whether the Defendant is entitled to the prayers sought in his Counter-claim**

1. Whether the Defendant holds the suit property in trust for the Plaintiffs.

There is no doubt that **Land Parcel LR Kiambaa/Karuri/T.419**, and **LR Kiambaa/Thimbigua/927**, are registered in the name of the **Defendant**. The Plaintiffs' had in their oral and written evidence stated that the suit land was initially owned by **Thuku Kiarie**. The Defendant contends that his late father **Thuku Kiarie**, died without owning any land.

The parcels of land **LR Kiambaa/Thimbigua/927**, and **LR Kiambaa/Karuri/T.419**, are indeed registered in the name of the Defendant herein, which was done in **1970**. The parcel of land is registered under the **Registered Land Act Cap 300 (repealed)** In the said Act, **Section 126** provides that:-

“A person acquiring land, a lease or a charge in a fiduciary capacity may be described by that capacity of acquisition and if so described shall be registered with the addition words as ‘trustee’ but the Registrar shall not enter particulars of any trust in the register”.

However, in this instant Certificates of title held by the Defendant, the word **trustee** was not added, and the Court assumes that the Plaintiffs' were referring to customary trust.

Black Law Dictionary Ninth Edition describes '**Trust**' as

“The right enforceable solely in equity to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one another (the trustee at the request of another for the benefit of a third party”.

This Court has considered the green card for **LR Kiambaa/Karuri /T.419**, and it is very clear that the parcel of land is registered in the name of **Njenga S/O Thuku**. Alternatively, **LR Kiambaa/Thimbigua/927**, is also registered in the name of **Njenga S/O Thuku**, without any indication that he was holding them **in trust** for the family. Therefore, the Court holds that **Njenga S/O Thuku** refers to the Defendant herein without any contrary evidence.

There is no evidence before the Court showing that **LR Kiambaa/Karuri/T.419** and **LR Kiambaa/Thimbigua/927**, were registered in the name of **Thuku Kiarie (deceased)**, neither have the Plaintiffs' tabled tangible evidence to show ownership by the said **Thuku Kiarie (deceased)**.

The Supreme Court held in **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR**, that the existence of a customary trust over land should be determined on a case by case basis, considering the nature of the land and the intention of the parties:

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust...”

Further, the case of *Alice Wairimu Macharia v Kirigo Philip Macharia* [2019] eKLR, it was held that:

“...it follows that evidence must be led that points to the root of the land. Pertinent question that must concern this Court are such as; how was the land first registered” Was it clan, communal or family land before registration” Was the land inherited or passed down from the family lineage of [the first registered owner]” How did [the first registered owner] acquire this land” Did he inherit or he acquired by way of purchase or a gift.”

The evidence and witness testimony adduced by PW1-PW3, in this case is not sufficient to establish the existence of a **customary trust** over the suit properties. The Plaintiffs’ had an obligation to establish flow of ownership from the British Government to one **Thuku Kiarie (deceased)**. The legal burden to prove of existence of a trust rests with the one who is asserting a right under customary trust.

It is this Court’s considered view that the Plaintiffs’ have not proved existence of a trust through evidence to prove the same and neither had the witnesses established the root of the titles herein.

2. Whether the Defendant is entitled to the prayers sought in his Counter-claim

In his counter-claim, the Defendant contends that he is the legal owner of LR Kiambaa/Thimbigua/927, and LR Kiambaa/Karuri/T.419, which he acquired vide several sale agreements with different parties. The said sale agreements have not been disputed and indeed the green cards for the suit land show that the suit properties are registered in the name of the Defendant. There was no evidence availed by the Plaintiffs’ to prove the contrary; - that is that this transfer and registration was not as a result of a trust by **Thuku Kiarie (deceased)**.

The suit properties being registered in the name of the Defendant under the **Registered Land Act Cap 300 (now repealed)**, then he is deemed to be the absolute owner, together with all rights and privileges appurtenant thereto, and this rights are not liable to be defeated except as provided by the Act. **Section 27 & 28 of Registered Land Act (repealed)** provides as follows;

“27. Subject to this Act - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register: Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee”.

This position has been repeated in Sections 24, 25 and 26 of the **Land Registration Act 2012**. **Section 26(1)** provides as follows:-

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-

a. On the ground of fraud or misrepresentation to which the person is proved to be a party: or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This Court finds and holds that the Plaintiffs’ herein were not able to prove any of the grounds provided for by **Section 26 (1)** of the **Land Registration Act 2012**, to allow for challenge of the Defendant’s title.

Consequently, this Court comes to a conclusion that the Defendant herein is the **absolute and indefeasible owner** of the suit properties, being **LR Kiambaa/Thimbigua/927 and LR Kiambaa/Karuri/T.419**, and therefore the rightful owner.

The upshot of the foregoing is that having carefully considered the available evidence, the written Submissions and the relevant provisions of law, the Court finds and holds that the Plaintiffs’ have not proved their case on the required standard of balance of probabilities against the Defendant herein. Consequently, the Plaintiffs’ claim against the Defendant is dismissed entirely.

However, with regard to the Defendant’s Counter-claim, the Court finds and hold that he has succeeded only in respect to prayers **No. (ii), (iii), (iv) and (v)** of the said Counter-claim dated **17th April, 2019**. Consequently, the Court enters Judgement for the Defendant herein as against the Plaintiffs in respect of prayers **No. (ii) (iii), (iv & (v)** of his **Counter claim**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 30TH DAY OF SEPTEMBER, 2021.

L. GACHERU

JUDGE

Court Assistant – Kuiyaki