



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC CASE NO. 8 OF 2019**

**BRIDGET RIARA EUSTUS.....1<sup>ST</sup> PLAINTIFF**

**EDWIN MARANGU.....2<sup>ND</sup> PLAINTIFF**

**WASHINGTON KIMATHI.....3<sup>RD</sup> PLAINTIFF**

**ROSEMARY IGOKI.....4<sup>TH</sup> PLAINTIFF**

**ENID NCHABIRA.....5<sup>TH</sup> PLAINTIFF**

**LINET NGEETA.....6<sup>TH</sup> PLAINTIFF**

**VERSUS**

**EUSTUS KIRIMI M'ABURI.....DEFENDANT**

**JUDGMENT**

1. The first plaintiff is wife to defendant while the rest of the plaintiffs are their children. Vide a plaint filed in court on 2.3.2010, it is pleaded that the land no. Abogeta/Lower Kiungone/220 was ancestral land and it was registered in name of defendant in trust for them. In 1990, the land was subdivided into four parcels no. 757 – 760 with the help of the plaintiffs. Defendant then alienated parcel 758 to someone else. He also left the matrimonial home and has been threatening to alienate the remaining parcels.

2. The plaintiffs therefore pray for a permanent injunction restraining the defendant from selling, charging, leasing or howsoever interfering with the plaintiffs' peaceful, quiet and undisturbed actual possession, user, enjoyment of L.R No's Abogeta/Lower Kiungone/757, 759 and 760.

3. I did not see the pleadings of defendant in the file even though a memorandum of appearance was filed dated 9.3.2010. PW 1, the 1<sup>st</sup> plaintiff adopted her statement dated 20.10.2019 as her evidence. She contends that their ancestral land Abogeta/lower Kiungone/220 which was sub-divided into parcels 757-760 has been unlawfully subdivided. That defendant who is her husband inherited the land from his father one M'Aburi Marita. The defendant in recognition of the customary trust settled his family on the suit land as follows: Abogeta Lower Kiungone/757 – he settled his son Washington Kimathi who has extensively developed the same. For Abogete/L. Kiungone/758, he transferred the same to the 2<sup>nd</sup> plaintiff, for Abogetha/L. Kiungone/759 this is where the family homestead is, while Abogeta/L. Kiungone/760 is utilized by the 1<sup>st</sup> plaintiff for subsistence farming.

4. PW 1 states that in the year 2000, creditors started visiting their homes and so she reported matter to the D.O and D.C where she was advised to have restrictions on the land. This was done, but defendant is at it again, attempting to alienate the family land. She prays that the land be shared out as follows:

***(a) "L.R No. Abogeta/L. Kiungone/757 to be transferred to Washington Kimathi to hold in trust for himself and that of the minor Baraka Mawira Kimathi.***

***(b) L.R No. Abogeta/L. Kiungone/758 to be maintained in the registered name of Edwin Marangu.***

***(c) L.R No. Abogeta/L. Kiungone/759 together with all the developments be registered jointly in the names of Bridget Riaru Eustus, Rosemary Igoki, Enid Nchabira, Linet Ngeta and Nanis Kaari to hold in trust for themselves and for their benefit and hold in trust for the children of Geldine Rima (deceased) and Emily Kagure (deceased).***

***(d) L.R No. Abogeta/L. Kiungone/760 Eustus Kirimi M'Aburi 1/2 acre, Bridget Riara Eustus ½ acre, The 1 1/2 acre together with all the developments be registered jointly in the names of Bridget Riara Eustus, Rosemary Igoki, Enid Nchabira, Linet Ngeta and Nanis Kaari to hold in trust for themselves and for their benefit and hold in trust for the children of Geraldine Rima (deceased) and Emily Kagure (deceased). I (read pw1) retains the control of L.R Abogeta/L. Kiungone/760 and all the developments therein be retained”.***

5. In support of their case Pw1 produced the documents in their list of 20.12.2019 as their exhibits 1-7.

6. In cross examination, PW 1 stated that 2<sup>nd</sup> plaintiff (Marangu) and 3<sup>rd</sup> plaintiff (Washington) have been registered as the owners of some parcels. She stays on parcel 759 and that defendant is registered as owner of parcel 760.

7. In re-exam, pw 1 stated that Washington has parcel no. 757 while Edwin has 758 and they have titles.

8. PW 2 is one Washington Kimathi, 3<sup>rd</sup> plaintiff. He adopted his statement recorded on 20.12.2019 as his evidence. His evidence is more or less similar to that of his mother (PW 1). He added that he wants the court to follow the sharing of the land as per their proposal.

9. PW 3, Joyce Njiru also adopted her statement dated 20.12.2019 as her evidence. She contends that she was married to defendant's brother one Francis Rutere (late). She confirms that plaintiffs are defendant's wife and children who stay on parcel 220 which borders their land 306.

10. On 16.1.2020 when the case was progressing for trial and plaintiff had closed case, the court brought it to the attention of the parties that the statement of defence dated 29.3.2020 allegedly filed on 31.3.2010 was not in the court file. The case was adjourned for defendant to avail the said documents. He was also directed to file the statements of witnesses and documents he wished to rely on and he was granted 30 days to comply. However, there was no compliance on the part of defendant by the time he took to the dock on 15.10.2020.

11. DW 1 stated that the plaintiffs are his children who chased him away. He has apparently given them 4 acres along with their mother. He has two wives and the other wife has 3 children but plaintiffs want to take away everything. He says his eldest child who stays with their mother has parcel 757 and that is where their homestead is, 758 is for Edwin Marangu while he retained parcel 760 for himself and his younger wife. He contends that parcel 760 is 2 ½ acres.

12. DW 1 contended that he bought the suit land and he did not get it from his father.

13. In their submissions the plaintiffs averred that the suit land was bequeathed to defendant by his father to hold it in trust for the family. The land 220 was subdivided into four parcels 757-760 in 1990 with consent of and financial aid of plaintiffs. Defendant was then registered as the owner of the resulting parcels. However, he went against their agreement and only transferred parcel 758 to 2<sup>nd</sup> plaintiff but refused to transfer the others as agreed.

14. Plaintiff's aver that they have proved a claim of customary trust in line with the holding in **Isaack M'Inanga Kiebia vs Isaaya Theuri M'Lintari and another (2018) eKLR**.

15. They further state that the prayers of permanent injunction have been met in line with the cases of **Giella vs Cassman Brown (1973) E.A 358, Kenya Breweries Ltd & another vs Washington O. Okenyo (2002) eKLR** and **Showind industries vs Guardian Bank Limited and another (2002) 1 EA**.

16. For the defendant, it was submitted that no evidence was adduced to prove that defendant was given the land by his father, hence the claim of customary Trust has not been established. He further states that no law requires parents to sub-divide the land and share it with their children. Thus plaintiffs have failed in their case. The defendant relied on the cases of **Isaack M'Inanga Kiebia vs Isaaya Theuri M'Lintari & another (2018) eKLR** and **Muruki Marigi vs Richard Marigi Muriuki and others civil appeal no. 189 of 1996**.

#### **Determination**

17. Trust, including customary trust must be proved; see ***Jemaki Tanui vs Juliana Jeptepkeny & 5 others ELC 44 of 2013, Paul Kirinya vs Delfina Kathiri (2019) eKLR, Mumbi Waititu vs Mukuru Ndata & 4 others 19 of 2007 eKLR***.

18. The plaintiffs are claiming the suit parcels on the basis of customary trust averring that defendant inherited the suit land from his father. I have perused the documents availed by the plaintiffs. None can show how the land came into the hands of defendant from his father. The only green card availed which shows the history of registration of the land is that of parcel 760 and not the mother title 220. I find that there is no cogent evidence to show that defendant inherited the land such that the same can be termed as ancestral land.

19. Further, it has emerged during the testimony of pw1 that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs have duly been given parcels 758 and 757 respectively. The plaintiffs have proceeded as if the defendant has no entitlement to the land yet he was the actual registered owner of parcel 220.

20. I find that the plaintiffs claim has not been established. The same is hereby dismissed. This being a family dispute then I direct each party to bear their own costs of the suit.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Judgment was given to the advocates for the parties through a notice issued on 3.9.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**