



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. E006 OF 2021**

**SIMON NYAGA MWAL.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**ALICE WANJIKU MUTHIKE.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**ROSE WANJIRU NYAGA.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**NANCY MUTHONI NYAGA.....DEFENDANT/RESPONDENT**

**RULING**

By a Notice of Motion dated 15<sup>th</sup> February 2021, the Plaintiff/Applicant is seeking the following orders;

i) (Spent).

ii) THAT this Honourable Court be pleased to issue prohibitory orders in respect of L.R NO. GICHUGU/SETTLEMENT/SCHEME/161 pending the hearing and determination of this suit.

iii) THAT the Respondent either by herself, her servants and/or agents or otherwise whosoever be restrained from evicting and/or interfering with the Applicant's peaceful occupation of L.R NO. GICHUGU/SETTLEMENT/SCHEME/161 pending the hearing and determination of this suit.

iv) THAT the costs of this Application be borne by the Respondent.

The said application is premised on the following five Grounds:

(a) THAT the Applicants have lived their entire life on the suit land being L.R. NO. GICHUGU/SETTLEMENT/SCHEME/161 which land was, before its subsequent registration in the name of the Respondent, family land, and the Applicants herein belong to the family by dint of being Grand-children to one GRACE NJOKI KAMAU (deceased) who was to be registered as proprietor as the suit land was clan land.

(b) THAT the Applicants recently found out that the Defendant caused the land to be solely registered in her name when the said Respondent started threatening to evict the Applicants and bringing strangers to the land to view the land with an aim of buying it.

(c) THAT the Applicants have reliably learnt that the Respondent is in the process of selling the suit land and this could very well render them homeless and destitute yet they also had every right to be registered as owners or beneficiaries of the land save for the Respondent being registered solely as proprietor.

(d) THAT the Applicants place reliance on the doctrine of customary trust and aver that the Respondent was a wife to the son of the said GRACE NJOKI KAMAU (deceased) and the said Respondent was not solely entitled to the land as she holds it in trust of the family.

(e) THAT unless the orders sought herein are issued, the Applicants stand to suffer irreparable harm and loss by being evicted from their land and losing the same to 3<sup>rd</sup> parties.

## APPLICANTS SUMMARY OF FACTS

The Applicants in their Supporting Affidavit made the following depositions:

- (1) THAT the 1<sup>st</sup> Plaintiff/Applicant is the son of MWAI KAMAU (deceased) who was the son of GRACE NJOKI KAMAU (deceased) and the said GRACE NJOKI KAMAU was to be registered as proprietor of the suit land which was clan land.
- (2) THAT the 2<sup>nd</sup> plaintiff/Applicant is the daughter of PETER MUTHIKE KAMAU (deceased) who was the son of GRACE NJOKI KAMAU (deceased) and the said GRACE NJOKI KAMAU was to be registered as proprietor of the suit land which was clan land.
- (3) THAT the 3<sup>rd</sup> Plaintiff/Applicant is the daughter of SIMON NYAGA KAMAU (deceased) who was the son of GRACE NJOKI KAMAU (deceased) and the said GRACE NJOKI KAMAU (deceased) was to be registered as proprietor of the suit land which was clan land.
- (4) THAT the Defendant/Respondent was the wife of the said SIMON NYAGA KAMAU (deceased) and is the mother to the 3<sup>rd</sup> Applicant herein.
- (5) THAT the Applicants herein were all born on the suit land and have lived thereupon all their lives. They have also extensively developed the suit land in their respective portions.
- (6) THAT the suit land was previously registered in the name of the now defunct County Council of Kirinyaga which land was originally clan land and was to devolve to the Applicants' grand mother and her children who however are now all deceased.
- (7) THAT the Respondent herein, without any color of right and without the knowledge and/or consent of the other beneficiaries to the land, proceeded to have the suit land solely registered in her name and this was done on 06/07/2007.
- (8) THAT the Applicants had no idea that the Respondent herein had proceeded to be issued with the certificate of title to the land on 11/07/2007 until the said Respondent started threatening them with eviction and also bringing strangers to the land who they later found out that they are proposed buyers of the suit land.
- (9) THAT the Applicants have reliably learnt that the Respondent is in the process of selling off the suit land and this could very well render them homeless and destitute yet they also had every right to be registered as owners or beneficiaries of the land save for the Respondent being registered solely as proprietor
- (10) THAT the Applicants place reliance on the doctrine of customary trust and aver that that the Respondent was the wife to the son of the sad GRACE NJOKI KAMAU (deceased), one SIMON NYAGA KAMAU (deceased) and the said Respondent was not solely entitled to the land as she holds it in trust of the family.
- (11) THAT the Applicants wholly place reliance in *Section 28 of the Land Registration Act*.
- (12) THAT unless the orders sought herein are issued, the Applicants stand to suffer irreparable harm and loss by being evicted from their land and losing the same to 3<sup>rd</sup> parties.

The Respondent filed a replying Affidavit in response to the said Application and made the following depositions:-

- 1) THAT I strongly oppose the Notice of Motion as the same is misconceived, vexatious, mischievous and hence an abuse of court process.
- 2) THAT I do not hold land parcel No. GICHUGU/SETTLEMENT/SCHEME/161 in trust for the Applicants.
- 3) THAT the aforesaid parcel of land was initially allocated to my late husband Simon Kamau.
- 4) THAT the allocation was done during the life time of Grace Njoki Kamau who was my mother in law and the mother of my husband.
- 5) THAT my husband was from Muranga County where his father's ancestral land was and where his siblings could claim customary trust.
- 6) THAT after the death of my husband, I successfully applied for the change of name of my husband to my name in the land parcel number GICHUGU/SETTLEMENT/SCHEME/16.
- 7) That the County Council of Kirinyaga as it was then informed the Commissioner of Lands of the approval.
- 8) THAT my husband died on 29<sup>th</sup> October, 1999 and I was issued with a letter by the Area Chief confirming the death to enable me apply for death certificate.

- 9) THAT the Applicants have never lived in the parcel of land in issue and they cannot claim customary trust just because my husband had accommodated his mother Grace Njoki Kamau in his land.
- 10) THAT the Applicants have not exhibited any application by Grace Njoki Kamau for allocation of the land.
- 11) THAT my late husband was not holding the land in trust for anyone and none of the Applicants claimed the same during my husband's life time.
- 12) THAT Peter Muthike was a brother to my husband and though he was buried in my land illegally after an order was issued and served in Kerugoya Chief Magistrate's Court Civil Case No. E005 of 2021.
- 13) THAT even PETER Muthike's children do not reside in my land.
- 14) THAT my mother in law had no claim on my husband's land the reasons why she never claimed the same during her life time.
- 15) THAT my registration in my husband's land was regular and with no customary trust alleged.

### **LEGAL ANALYSIS AND DECISION**

I have considered the Notice of Motion, the supporting affidavit and the annexures thereto. I have also considered the replying affidavit, annexures in support and the rival submissions. An order for inhibition is a discretionary power which a Court can issue for a particular period pending further directions. The Applicant is seeking the inhibition orders pending the hearing and determination of the main suit. From the prayers in the plaint dated 15/02/2021, the Applicants are seeking for inter-alia orders of declaration that the Defendant/Respondent holds the suit land parcel No. GICHUGU/SETTLEMENT/SCHEME/161 in trust for herself and the Applicants. The issue of trust can only be determined by calling of witnesses. The Applicants contend that unless the orders sought are granted, the Respondent may dispose of the subject matter thereby rendering the hearing an academic exercise. I agree with the arguments by the Applicants that unless the subject matter of the dispute is preserved, the hearing of this suit will be rendered nugatory and an exercise in futility. In the result, I find the Notice of Motion dated 15/02/2021 merited and the same is allowed as prayed. Costs in the cause.

**JUDGMENT DATED, DELIVERED IN OPEN COURT AT KERUGOYA AND SIGNED THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2021.**

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**HON. E.C. CHERONO**

**ELC JUDGE**

**In the presence of:**

1. Ms Wambui holding brief for Agnes Maina
2. Respondent/Advocate – absent
3. Kabuta, Cour clerk – present.