



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 397 OF 2017 (O.S)

(FORMERLY NRB ELC NO. 1552 OF 2014)

IN THE MATTER OF THE LAND REGISTRATION ACT

BETWEEN

MARGARET WANGUI KARUGU.....PLAINTIFF

VERSUS

JOHN NJENGA KARUGU.....1ST DEFENDANT

MARY NJERI NJENGA.....2ND DEFENDANT

ELIUD KARUGU GATAMBIA.....3RD DEFENDANT

ESTHER NYATUGA MURIITHI.....4TH DEFENDANT

DISTRICT LAND REGISTRAR KIAMBU.....5TH DEFENDANT

JUDGMENT

The instant suit was commenced by way of an Originating Summons dated **17th December 2014**. The same was later Amended and the Plaintiff in her Amended Originating Summons dated **27th March 2018**, and filed in Court on **28th March 2018**, sought for the following orders against the Defendants that;

- 1. THAT a Declaration that there exists a beneficial Interest over Land Title Number Muguga/Kahuho/470, in favour of the Plaintiff.***
- 2. THAT a declaration that John Njenga Karugu, (the 1st Defendant), who is the registered owner of the Land Title Number Muguga/Kahuho/470, Nairobi holds the subject parcel of land in trust for his lawful children.***
- 3. THAT a Declaration that John Njenga Karugu, (the 1st Defendant) who is the registered owner of the Land Title Number Muguga/Kahuho/470, Nairobi does not hold the subject parcel of land in trust for the 2nd Defendant or any other person under the Succession Act.***
- 4. THAT the Defendants do bear the costs of this Application.***

The Plaintiff averred that the 1st Defendant is her husband. That the 1st Defendant is the registered proprietor of the suit property which is ancestral land which was passed on to him by his father during his lifetime. That the 1st Defendant has been insistent on illegally alienating, subdividing, offering for sale the suit property without following due process of the law and obtaining consent from his wife and children, who hold an overriding interest in the subject property.

That to preserve the suit property, the Plaintiff placed a **caution** over the suit property claiming beneficial interest. That the 1st Defendant tried to remove the **caution**, but the same was sustained and he has devised ingenious ways to alienate and sell the suit property in Cahoots

with the 2nd Defendant. That the 1st Defendant has not been an administrator in respect of his **late father's Estate** over the suit property, which parcel of land was given to the 1st Defendant during his lifetime. Further, that the issue of the alleged trust has never arisen and the 1st Defendant is the sole proprietor and he holds the suit property in trust for his children and wife. That the Defendants are intent on fraudulently alienating the suit property so that they can sell it and circumvent the requirement of removing the lodged caution and it is in the interest of justice that they are stopped. That the 1st Defendant is intent on wasting the only parcel of land that is owned by the family and therefore rendering the family destitute.

The Plaintiff **Margaret Wangui Karugu** swore a Supporting Affidavit in which she reiterated the contents of the Affidavit sworn on **17th December 2014**.

In opposing the Amended Originating Summons, the 3rd Defendant **Eliud Karugu Gatamba** swore a Replying Affidavit filed in Court on **24th April 2019**, and averred that he had the authority of the 4th Defendant to swear the Affidavit on her behalf. That the 4th Defendant is his sister while the 1st & 2nd Defendants are his Uncle and Aunt respectively. He averred that the suit property **L.R 470**, is part of the ancestral land **L.R 369**, measuring approximately **23.5 acres** owned by his maternal grandfather. That his grandfather had four wives being **Ruth Waithera Karugu, Wangari Karugu, Elizabeth Wambui Karugu and Esther Njeri Karugu**, who are all deceased, but they left behind children. Further that his grandfather passed on in **1973**, and the land was subdivided among the four houses and trustees for each house were registered; **1st House 9.5 acres** registered trustee **James Boro Karugu**, **2nd House 6 acres** registered trustee **John Njenga Karugu**, **3rd House 4 acres** **Mary Wangari** and **Hannah Wakarura**, **4th House 4 acres** **Elizabeth Njeri Karugu** and the subdivision was registered at the District Lands Office. That as such, the 1st Defendant held the suit property in trust for himself and his two sisters, the 2nd Defendant and his mother.

That the elders have been involved in the issue of this property when they witnessed an undertaking by the 1st Defendant to subdivide the land and give the 2nd Defendant her two acres of land. That he has been advised by his Counsel on record, which Advise he believes to be true that the suit property is trust property and therefore does not fall into the ambit of matrimonial property and the Plaintiff has no interest. Further that the 1st Defendant has a legal duty to all the beneficiaries of the trust to subdivide the land and does not need the consent of his wife or children. That if the Plaintiff's children have an interest, it would be in the rightful share of their father and the Plaintiff is the one who is keen on disinheriting the Defendants and the 1st Defendant is intent on upholding the law and execute his legal duties. That his Aunt is of advanced in age and has nowhere to live and as Children of **Alice Nyakio**, his siblings and himself ought to enjoy a share that belonged to their late mother and it is therefore in the interest of justice that the Amended Originating Summons be dismissed.

The 2nd Defendant **Mary Njeri Njenga** swore a Replying Affidavit filed in Court on **24th April 2019**, and reiterated the contents of her Affidavit dated **30th October 2017**.

The matter proceeded by way of Viva Voce evidence wherein the Plaintiff called two witnesses and the Defendants also called two witnesses and closed their case.

PLAINTIFF'S CASE

PW1 Margaret Wangui Karugu adopted her witness statement dated **14th August 2019**, as her evidence in Court. She further produced her bundle of documents as **Exhibits 1 to 11** and testified that the 1st Defendant **John Njenga Karugu**, is her husband, **Mary Njenga**, her sister in-law, Eliud her Nephew and **Esther** her Niece. That she got married in **1965**, and they have 5 children. That the 1st Defendant wanted to sell the suit property, but she cautioned the land. She urged the Court to have the suit property, registered in the name of the 1st Defendant, but to be held in trust for the family as it is ancestral land.

That the issue is **L.R Muguga /Kahuho/470**, but she did not buy the land as it is an ancestral land. That the land is part of the larger parcel of land owned by her **father in-law**, which was **Muguga/Kahuho/369**. That the land was subdivided into four parcels for each of the four houses of the **late Karugu Ngata** and every house had Children. That the resultant subdivisions are **L.R 467,468, 469 and 470**, and each portion of the land was given to each house and registered in the name of one person to hold it in trust for the family. Further that **John Njenga** the 1st Defendant herein had **two sisters** and if the land is to remain in his name, then the sisters will be disinherited. That her father In-Law did not give the land to his daughters, but her family and that the said father-in-law is now deceased.

PW2 Moses Mbugua Karugu, adopted his witness statement as part of his evidence. That he farms on **L.R 470** and the 1st Defendant is his father. That his father showed them the land as their own and that his parents separated in **September 2018**, when people invaded their family home in **Huruma Flats** and all the documents and title deeds were taken away. He urged the Court to declare that their father was holding the suit property in trust for them. Further that the land in issue belongs to his father.

That the suit property came from his grandfather who had **four wives** who are also registered as the owners of the other parcels of land. Further that **Mary Njeri**, 2nd Defendant has nothing to claim from the land. That **Eliud** and **Esther** are children of the **late Nyakio**, and their grievance is that their father has included **Mary** 2nd defendant who is his sister and their cousins as proprietors of **L.R 470**

DEFENCE CASE

DW1 Mary Njeri Karugu adopted her two affidavits dated **24th April 2019**, and **23rd July 2019**, as part of her evidence in Court. It was her evidence that the land is ancestral land as it belonged to their biological father. That their father distributed the land amongst his four wives and that their mother was the 2nd wife and that in their house, they were three children. Further that **L.R 470**, was registered in the name of **John Njenga** to hold it in **trust** for their mother's house. That they wanted the land subdivided into **three portions** being the 1st Defendant, herself and the late **Nyakio**. She built on her portion of the land and started utilizing it upon subdivision. Further, that **Mbugua** (PW2) started utilizing the land and burnt her house and threatened to kill her and she reported the matter to the Police. Further, that she got the **Green Card** from **Kiambu Lands Office**, and that the land is registered in the name of the 1st Defendant as trustee for their mother's house. She urged the Court to allow each one of them to get a portion of the land.

That the said land was subdivided into four portions for the four houses in **1978**. The 1st Defendant was registered as the owner of **LR 470** in **1978**, to hold in trust for his mother's house. Further, that she was married and her marriage broke down, but that was not the reason that she was not given the land. That there was no **succession cause** that led to the distribution of their father's parcel of land and the trustees are holding it on their behalf as per the Green Card. That she filed a suit at **Kikuyu Law Courts**, and the land was subdivided but later the titles issued were cancelled.

DW2 Eliud Karugo Gatambia adopted his witness statement dated **23rd July 2019**, as part of his evidence. He further adopted his Affidavit dated **24th April 2019**, and produced the attachments therein as his **Exhibits 6 to 10**. He urged the Court to give him his rights over the suit property that is registered in his Uncle's name. That he is a son of **Alice Nyakio**, who passed on in **1983**, and his Uncle was registered as the proprietor of the suit property in **1978**. That he knows his Uncle was a trustee for them and that he filed a Case in **Kikuyu Law Courts**. Further that he represents his siblings, though he did not have any document from his siblings to show that he represents them. That he does not reside on the suit property. That there is no dispute between **John Njenga** and **himself** and he had had no reason to formal claim against the 1st Defendant. Further that he had been sued and there would be no reason for any authority. Further that the land was initially from their grandfather and it later passed to their uncle the 1st Defendant and the **succession cause** was done by the former **Attorney General: - James Karugu**.

The parties thereafter filed written submissions which the Court has carefully read and considered. The Court has also read and considered the Amended Originating Summons, the Affidavits by all the parties and the annexures thereto together with all documents produced in evidence and renders itself as follows;

From the evidence adduced and pleadings by the parties, it is not in doubt that the property in issue is **L.R Muguga/Kahuho/470**. It is further not in doubt that the said suit property is a resultant subdivision of **L.R Muguga/Kahuho/369**, which belonged to **Karugu Ngata (Deceased)**, who is the Plaintiff's father-in-law, the 1st & 2nd Defendant's father and the 3rd & 4th Defendant's grandfather. Further it is not in doubt that the suit property was registered in the name of the 1st

Defendant after the subdivision of the original property **LR 369**. As per the marriage certificate produced in Court and in the absence of any other evidence to the contrary, it is also not in doubt that the Plaintiff and the 1st Defendant are legally married.

Further, all parties in the instant suit acknowledge that the suit property is ancestral land and that the 1st Defendant was registered as owner of the suit property, which was a portion that was given to the house of his mother, (**Wangari Karugu**). The **Green Card** indicates that the persons registered after the subdivision were trustees. As to whether the 1st Defendant holds the land in trust for his immediate family or his siblings is the issue in contention as the Plaintiff alleges that the suit property is held in trust for her and her children and that the suit property is matrimonial land. On the other hand, the Defendants hold the position that the 1st Defendant holds the suit property in trust for the House of **Wangari Karugu**, the 2nd wife of **Karugu Ngata**, and the mother to 1st and 2nd Defendants and **late Nyakio**, and therefore all the **three children** are entitled to a fair share of the said property.

Having carefully considered the available evidence, it is the Court considered view that for it to determine whether or not the Plaintiff is entitled to the prayers sought, the Court must first determine on whose behalf the suit property is held **in trust** for. Unlike in majority of cases where the Court is usually left to determine whether or not to presume that the suit property is held in trust, in the instant case, it is not in doubt that the 1st Defendant who is the registered owner holds the suit property in trust. As per the entries on the **Green Card** opened on **30th September 1963**, there was a subdivision of **L.R 369**, and the resultant subdivisions were held registered in the names of **four persons**, who were registered so as trustees. Further it is not in doubt that the suit property was as a resultant subdivision, which subdivisions were shared amongst the four houses and the registered owners were to hold the said parcels of land in trust.

From the evidence adduced, upon the subdivision of the suit property, individuals were registered as owners to hold the same in trust for the various houses and the 1st Defendant held the suit property on behalf of the house of **Wangari Karugu**, which had 2 (two) other **children** being the 2nd Defendant and the 3rd & 4th Defendants' mother, (**Late Nyakio**).

During her testimony, the Plaintiff gave evidence that her father *in-law* left the suit property to the 1st Defendant and not his daughters. From the evidence adduced before this Court, none has been produced to show that only the 1st Defendant was given the suit property herein as a sole proprietor to hold it in trust for his wife and children.

It is important to note that with regards to ancestral land, which is in this case, there is no superior child; that no child of a parent is above the other child and all the children of an Estate of their parents are entitled to the Estate of the Deceased, whether they are children or not. In the case of *Joyce Kabiti M' Turuchu ...Vs...David M' Ntiritu Kiambi [2016] eKLR* the Court held that:

*[6] The above recapitulation of arguments on gender in the law on succession brings me to the point where I feel I should restate the position of the law as has come through from the Court of Appeal and dictated by the Constitution of Kenya, 2010. Today, it will be pretentious for any person to say he is or act ignorant of the fact that discrimination of any person on the basis of gender or status is prohibited discrimination under the Constitution of Kenya, 2010, because; other than abundantly clear provisions of the Constitution, the chain of judicial decisions on discrimination on the basis of gender or status are equally clear. As a matter of fact, traditional societies practiced and allowed discrimination of women because of their gender and this was also manifest in inheritance laws. But one bold decision of the Court of Appeal in *Rono v Rono & Another, 2008 1 KLR (G & F) page 803, in particular the opinion by Waki, J.A., changed all that and brought in new dawn that loathed any form of discrimination against women.**

The Court therefore affirms that there is no way that the daughters of the deceased would have been left out of a trust for the mere fact that they are daughters, unless a contrary position is produced before Court and which none has been produced. The Court therefore finds and holds that Customary trust exists as the 1st Defendant holds the suit property in trust

Concerning proving customary trusts, the Supreme Court in the case of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR* held as follows:

*“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. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:*

- 1. The land in question was before registration, family, clan or group land*
- 2. The claimant belongs to such family, clan, or group*
- 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.*
- 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.*
- 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”*

Relying on the above, the Plaintiff has therefore proved that the suit property is **held in trust**, but it is clear that the said land is held in trust for the house of **Wangari Karugu**, the mother of the 1st Defendant. The Plaintiff and her children being the wife and children of 1st Defendant, then the 1st Defendant also holds the land in trust for them, being his immediate family.

The Plaintiff has claimed that the 1st Defendant holds the suit property in trust for her and her children by virtue of the said land being a matrimonial property.

Section 6(2) of the matrimonial property Act provides that;

“ Despite subsection (1) trust property including property held in trust under customary law does not form part of matrimonial property .”

From the **Green Card** produced in evidence, it is not in doubt that the 1st Defendant holds the suit property in trust. Therefore, it follows that the suit property is **trust property** and thus cannot be matrimonial property. Further from the above case law, the Supreme Court whose decision is binding to this Court has pronounced itself on the elements that would make a claimant a trustee. It is not in doubt that the suit property was a resultant subdivision of **L.R 369**, which was subdivided amongst the wives of the late **Karugu Ngata**, and the registered owners were to hold the suit property in trust for their respective houses. The suit property herein which was registered in the name of the 1st Defendant was to be held in trust for the house of **Wangari Karugu**, who had 3 **children** being 1st and 2nd Defendants' and the late **Nyakio Karugu**, who is the 3rd & 4th Defendants' mother.

Therefore, it is not in doubt that the suit property was family land, and the **1st and 2nd Defendants** belong to the said family while the **3rd & 4th Defendants' mother** was also a member of the said family. Further the Plaintiff and her children also belong to the same family and they are

all entitled to own or benefit from the said parcel of land as proper Claimants. In the case of **Justus Maina Muruku v Jane Waithira Mwangi [2018] eKLR**, the Court stated that;

35. In the case of Mbui vs Mukangu vs Gerald Mutwiri Mbui C.A No. 281 of 2000, the Court of Appeal stated that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. The Court also held that possession and occupation are key elements in determining the existence of a customary trust.

Bearing in mind the above definition of Customary trust, the Court finds and holds that the **1st Defendant** holds the suit property in trust for himself, the **2nd Defendant** and his late sister **Alice Nyakio**, who is the mother to **3rd and 4th Defendants** herein.

Though the Plaintiff in her prayer No.3 had prayed that the court do find that the **1st Defendant** does not hold the suit property in trust for the **2nd Defendant** or any other person, the Court indeed finds and holds that the **1st Defendant** herein do hold the parcel of land **Muguga/Kahuho/470** in trust for the family of **Wangari Karugu**, who was the **2nd wife** of **Karugu Ngata**. The said family of **Wangari Karugu** consisted of **1st Defendant**, **2nd Defendant Mary Njeri Njenga** and the late **Alice Nyakio**. Since there is no child who is superior to the other, then the Court finds that each of the said child was to get an equal portion from the said

Parcel of land.

Even though the Defendants did not make such prayer in their Responses to the Originating Summons, the Court finds that for the interest of justice, the said customary trust should now be broken and each of the child of the house of **Wangari Karugu** wherein the **1st Defendant** is holding the land in trust for them should get their respective share as they are entitled to their share by virtue of the customary trust.

In the case of **Joyce Kabiti M' Turuchu ...Vs... David M' Ntiritu Kiambi (Supra)** the Court held that;

"In light of section 38 of the Law of Succession Act the estate should be distributed equally among all the children of the deceased. But, at this point, and before I make give my final decision on distribution, it is appropriate for me to fulfil my promise; to revert to the fact that the Protestor and Jacob are grandsons of the deceased. The two grandsons are not, therefore, children of the deceased in the sense of Section 3 (2) of the Law of Succession Act which defines child/children as follows:

References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility."

Having carefully considered the elements as set out by the Supreme Court in the above cited case of **Isack M'inanga Kiebia ...vs... Isaaya Theuri M'lintari & another** as to who can claim to be a trustee, it is the Court's considered view that the **3rd and 4th Defendants** by virtue of being the children of the late **Alice Nyakio**, a sister to **1st Defendant**, have proved that they are entitled to a beneficial Interest over the suit property held by the **1st Defendant**. However, the Court finds and holds that only the Succession Court is mandated to make a determination on how the succession or distribution of their mother's estate is to be shared and distributed. However, this Court arrives at a determination that the **1st Defendant** is holding the suit property in trust for the household of **Wangari Karugu**, which household consists of **1st Defendant, John Njenga Karugu, 2nd Defendant, Mary Njeri Njenga** and the late **Alice Nyakio** (or her estate).

Consequently, this Court finds and holds that the **1st Defendant** holds the suit property in trust for himself and his siblings who are **2nd Defendant** herein and the estate of the late **Alice Nyakio**. This Court being an Environment and Land Court has no jurisdiction to make a finding on how the estate of the late **Alice Nyakio** should be distributed.

The Upshot of the foregoing therefore is that the Court finds and holds that the Plaintiff has failed to prove her case on the required standard of balance of probabilities. Consequently, the Court finds no merit in the Amended Originating Summons dated **27th March 2018**, and the said Amended Originating Summons is dismissed entirely with costs to the Defendants.

Further, the Court finds and holds that the **1st Defendant, John Njenga Karugu**, was registered as the proprietor of the suit property **Muguga/Kahuho/470**, to hold it in trust for his siblings and consequently, the **1st Defendant** should subdivide the suit property herein **Muguga/Kahuho/470**, so that each of the siblings of the house of **Wangari Karugu** gets an equal share.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 9TH DAY OF DECEMBER, 2021.

L. GACHERU

JUDGE

9/12/2021

Delivered online in the presence of

Kuiyaki & Alex Mugo - Court Assistants

Mr. Njuguna for Plaintiff

Mr. Gekombe HB Mr. Ongoya for 1st – 4th Defendants

N/A for 5th Defendant

L. GACHERU

JUDGE

9/12/2021