



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 127 'B' OF 2014

JAMES MUTHII GATHOGO (Suing as a Legal Representative of the Estate of

ELIJAH GATHOGO KAMAKU (deceased).....PLAINTIFF

VERSUS

KARIUKI KAMAKU KIMOTHO.....1ST DEFENDANT

REBECCA NJOKA KARIUKI.....2ND DEFENDANT

SIMON MAINA KARIUKI.....3RD DEFENDANT

GEORGE NJOGU KARIUKI.....4TH DEFENDANT

DAVID WACHIRA KARIUKI.....5TH DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit vide a plaint dated 19th May 2014 and amended on 17th January, 2020. The plaintiff is seeking the following orders;

a. A declaration that the 1st defendant held title to land No. Mutira/Kaguyu /219 upon trust for himself and the plaintiff in equal shares and therefore had no capacity to transfer the plaintiff's interest to the 2nd to 5th defendants and their registration be cancelled.

b. An order for the dissolution of the trust and for sub-division of the title No. Mutira/Kaguyu/219 into 2 equal portions and for transfer of an equal share of the parcel of land to the plaintiff.

c. A permanent injunction restraining the defendants themselves their servant, agents, employees or otherwise whomsoever from entering, harassing dispossessing and or interfering in any way with the plaintiff quiet possession and occupancy on the title No. Mutira/Kaguyu /219 and from selling, transferring, creating a charge or any other way from dealing with the Plaintiff entitled share of the said parcel of land.

d. Alternatively, an order that the defendants' title to the land title No. Mutira/Kaguyu /219 occupied by both the defendants and the plaintiff has been extinguished, be revoked and the said parcel of land be subdivided into 2 equal portions and the portion under occupation by the Plaintiff be transferred to him.

e. Cost of the suit.

f. Any other relief that the Honourable Court may deem fit to grant.

2. The defendants defended the suit vide their Statements of defence dated and filed on 23rd June, 2014.

PLAINTIFF'S CASE

3. The Plaintiff adopted his statement dated 17th January, 2020. he also relied on the statement of his deceased father dated 19th May, 2014.

4. The plaintiff testified that he is the son of Elijah Gathogo Kamaku who died on 27th August, 2017. He thereafter obtained Letters of Administration ad litem on 23rd November, 2018 and in his capacity as a legal representative he was granted leave to substitute the deceased as a plaintiff on 4th October, 2019.
5. He stated that the 1st Defendant was registered as proprietor of Title No. Mutira/Kaguyu/219 during the land consolidation and demarcation to hold the same in trust for his father Kamaku Kimotho as the deceased was the eldest son and most educated in the family.
6. He stated that the deceased had a half share interest in the suit land and that he was brought up on the said land where they have lived for a period of over 38 years and have extensively developed it.
7. In his statement the deceased plaintiff stated that he and the 1st Defendant were sons of the late Ephantus Kamaku Kimotho also known as Kamaku Kimotho.
8. He stated that during the land consolidation and demarcation the land could not be registered under all the members of the family. Their father and clan thus opted to have the 1st defendant registered as proprietor of the suit land to hold in trust for the family as he was the eldest son and had some formal education.
9. He stated that the 1st defendant was thus entered in the records of the register to hold it in trust for himself, their deceased father and other siblings under the Kikuyu Customary tenure.
10. He stated that their father lived and was buried on the suit land. in the late 1960s their father demarcated the suit land into 3 equal portions of 2 acres each. The deceased plaintiff was allocated 2 acres, and so was the 1st defendant and their father retained the remaining 2 acres.
11. The deceased plaintiff stated that he had extensively developed his portion of land where he has planted over 6,000 tea bushes, built a permanent house and his sons had also built permanent houses where they reside with their families.
12. Due to his ailing health, he had requested the 1st defendant to officially subdivide the suit land so that they he may also be able be capable to distribute it to his children who had become of age.
13. He stated that the 1st defendant declined to subdivide the suit land claiming that he had nothing to transfer. upon conducting a search, he found out that the suit land had been distributed amongst the 1st – 5th defendants.
14. He stated that on 18th February, 2014 he was summoned by the local chief and obeyed the said summon on 21.2.2014 whereby his brother informed him that he should vacate the suit land.
15. The plaintiff prayed that they be awarded half portion out of the suit land as the defendants are holding the same in trust.

DEFENDANTS' CASE

16. Three witnesses testified in the Defendants' case.
17. DW1 who is the 1st Defendant herein adopted his statement filed on 14th July, 2014. He also produced the documents outlined in his list of documents dated 12th October 2017 as Defendants exhibits 1 – 4.
18. He testified that he was given the suit land by the clan upon making contributions to the clan and was obedient to the demands of the committee in that he was a messenger. Further that his father and brother were not given because they did not pay the required contribution.
19. He stated that when he was given the suit land, he called his parents and siblings to stay with him as he didn't want them to go back to the village.
20. He stated that the only people who got a share of land during demarcation were those who made contributions to the clan.
21. He stated that he had invited the deceased plaintiff to the land control board so as to give him 2 acres but he slept on his right to transfer till now. Further that he decided to give the plaintiff 1 acre as he has 6 issues who also need to share what he got from the clan.
22. He stated that he was still willing to give the deceased plaintiff 1 acre out of the suit land as a gift as agreed on 16/01/2014. He remained adamant that no trust was created and that the plaintiff should pay costs of the suit.
23. DW2 and DW3 testified that they belong to the clan of Agaciku mbari ya Muchiri.
24. They stated that the mandate of the elders during the demarcation process was to distribute KIAMUONDU BLOCK which belonged to Agaciku mbari ya Muchiri clan.
25. They stated that the process included paying back to other clans who had leased and were cultivating the clans' block. Meetings were

held whereby members made contributions for the same. In the event a member failed to make contributions, he was never given any land.

26. They stated that the committee also used to consider the young men who were obedient during the demarcation period and thus the 1st Defendant was given land because he used to be a messenger for the clan.

27. They stated that there was nothing like holding land in trust for anyone.

28. They stated that in terms of the agreement dated 16/1/2014 whereby the deceased plaintiff would get 1 acre out of the suit land as a gift.

29. They stated that the deceased plaintiff never contributed anything to the clan and was a problem to the community.

PARTIES SUBMISSIONS

30. On 2nd March, 2021 the parties through their advocates on record agreed to file submissions. The Plaintiff filed his on 1st July, 2021 whereas the Defendant filed on 7th July, 2021.

PLAINTIFF'S SUBMISSIONS

31. The plaintiff submitted that his claim was properly before the court and it is not mandatory for the word trustee to appear on the register.

32. He submitted that the registration of land in the names of a proprietor does not relieve him of the obligations as a trustee. He relied on the case of *Mbui Mukangu Vs Gerald Mutwiri Mbui C.A Civil Appeal No. 231 of 2000 Nyeri*.

33. He also submitted that the alleged agreement dated 16.1.2014 was signed through coercion and under influence as there was no arbitration undertaken by the clan and nobody was informed of any hearing and the deceased plaintiff was not asked to call a witness.

34. He submitted that the suit land was originally clan land and the registration of the 1st defendant did not relieve him of his obligation as a trustee. He relied on the case of *David Murimi Muriuki & another vs. Mwathi Kara & another High Court ELC case No. 204 of 2013, Kerugoya*.

35. He submitted that from evidence it is clear that the 1st Defendant is aware that he holds the suit land as a trustee for himself and his deceased brother.

36. He also submitted that a complete and perfect gift in land cannot be recalled or revoked in law. He relied on the case of *Registered Trustees Anglican Church of Kenya Mbeere Diocese v David Waweru Njoroge (2007) e KLR*.

37. He urged that this Honourable Court finds that he has proved his case on a balance of probabilities and grant the prayers sought.

DEFENDANTS' SUBMISSIONS

38. The defendants submitted that if there was any trust existing the same was extinguished by the agreement dated 16/1/2014 which was voluntary as the deceased plaintiff is the one who requested the meeting.

39. They submitted that the issue of trust was displaced as there was a procedure that was followed for one to get a shamba in the Agaciku Ambari ya Muchiri clan as one had to contribute to the clan's expenses.

40. They submitted that the 1st Defendant's father failed to contribute anything and said that his God would provide for him and got nothing from the clan.

41. They submitted that each clan dealt with shamba issues differently and thus there was no trust created in favour of the plaintiff.

42. They submitted that they were in agreement on the issue of overriding interest but one had to prove the same. They submitted that the plaintiff failed to prove the same on a balance of probability.

43. They submitted that nothing was donated in respect of the 2 acres being claimed but the scenario was different for the one acre as the 1st Defendant was still willing to transfer the same to the plaintiff.

44. They submitted that the plaintiff ought to pay costs as he brought the matter to court even after they agreed on determining the alleged trust.

ANALYSIS

45. I have considered the pleadings of the parties herein, the documents produced as evidence thereof, their submissions and authorities in support. The issues for determination in this matter are as follows: -

- a. Whether the 1st defendant holds the suit land in trust for the plaintiff's deceased father Elijah Gathogo Kamaku; and
- b. Who should bear the costs of the suit?

WHETHER THE 1ST DEFENDANT HOLDS THE SUIT LAND IN TRUST FOR THE PLAINTIFF'S DECEASED FATHER ELIJAH GATHOGO KAMAKU

46. The prerequisites of proving existence of a trust have been set out in the case of *Isack M'inanga Kiebia Vs Isaaya Theuri M'lintari & another [2018] e KLR* where the Supreme Court at paragraph stated as follows: -

"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."*

47. From the above authority the plaintiff was required to prove that the suit land was before registration family, clan or group land.

48. From the evidence tabled before this Honourable Court, it is admitted that the suit land was before registration part of KIAMUONDU BLOCK which belonged to Agaciku mbari ya Muchiri clan.

49. It is also not disputed that the plaintiff's deceased father belonged to the said clan and has been occupying the suit land together with his family.

50. This fact was admitted by the 1st Defendant who alleged that he took in his father and siblings to the suit land so that they wouldn't go back to the suit land.

51. What is left for the Plaintiff to prove is that his deceased father could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.

52. The plaintiff alleged that the 1st Defendant was registered as proprietor of the suit land because he was the eldest and had formal education.

53. The 1st Defendant on the other hand insisted he was registered to hold the suit land absolutely as he helped the clan through his role as a messenger of the clan. He alleged that his father and brother failed to make contributions and thus were denied land. He did not produce evidence of the contributions he allegedly made.

54. The defendant did not call the Clan Elders who allegedly participated in the distribution of the land during the land demarcation and Adjudication period.

55. I am of the view that the said elders are the only ones in a position to explain the true position of the demarcation process in this matter failing which this Court is left to make inference on the intention of the parties.

56. Given that the suit land emanated from clan land, every family was thus entitled to a share of the same otherwise they would have been rendered destitute. The 1st Defendant stated that if he didn't take this family in, they would have remained in the village.

57. I am thus convinced that the 1st Defendant was indeed registered as proprietor of the suit land to hold the same in trust for himself and his family members as the eldest son in accordance to the Kikuyu Customary Law. This explains why he allowed his father and the plaintiff's father to move into the suit land and develop the suit land without any protest. this concept of Kikuyu Customary trust was discussed in the case of *Kimani Gituanja Vs Jane Njoki Gituanja (1983) e KLR* where it was held as follows: -

"Land inheritance among the Kikuyu is as stated by Jomo Kenyatta in his book Facing Mt Kenya page 32 (1965 Edition). The position has been as follows:

"After the death of the father the land passed on to his sons, the eldest son took his father's place. At this juncture the system of land tenure changed a little, there was no one who could regard the land as "mine" all would call it 'our land" The eldest son who had assumed the title of muramati (titular or trustee) had no more rights than his brothers, except the title; he could not sell the land

without the agreement of his brothers who had the same full cultivation rights on the piece of land which they cultivated as well as those which were cultivated by their respective mothers.”

58. Again in the case of **JASON GATIMU VS MARTIN MUNENE WANGARA & OTHERS (2013) e KLR**, the court observed as follows:

“There is nothing in the Registered Land Act now Repealed) and under which the suit land was registered , which precludes the declaration of a trust in respect of registered land even if it is a first registration. secondly section 28 of the same Act contemplates the holding of land in trust- see *MUMO -VS- MAKAU 2004 1 KLR 13 (CA)*. The parties herein are Kikuyu and in *KANYI -VS- MUTHORA (1984) KLR 712 (CA)*, the Court held that the registration of land in the name of one party under the REGISTERED LAND ACT does not extinguish the right of other parties who may be entrusted to it under Kikuyu Customary Law.

See also *MUKANGU VS MBUI (2004) 2 KLR 256*. The new **Land Registration Act No. 3 of 2012** makes it very clear in section 28 that unless the contrary is expressed in the register, all registered land shall be subject to various overriding interest without being noted on the register and one such interest is a trust including customary trust. In view of the above, Ms Wangari’s submissions cannot be upheld. A customary trust need not be registered.”

59. I agree with the holdings in the above decisions. The Plaintiff’s father was thus entitled to an equal share of the suit land.

60. The arguments by the defendants even if the said did indeed trust exist, then the same was extinguished by the agreement dated 16/1/2014 as the plaintiff’s father agreed to be granted 1 acre out of the suit land as a gift. On this point, it is important to note that a clan land is not a personal right that you can agree to extinguish at will.

61. It is a right that is intra-generational as well as inter-generational. One cannot take away rights which do not belong to him but rights that belong to the past, present and future generations.

62. In my view the alleged agreement entered between the 1st Defendant and the plaintiff’s deceased father is null and void and of no legal effect as it did not extinguish the customary trust in the suit land that is from generation to generation.

CONCLUSION

63. In view of the matters aforesaid, I find that the plaintiff has proved his claim against the defendants on a balance of probabilities. I therefore enter judgment in the following terms: -

a. A declaration that the 1st defendant held title to land No. Mutira/Kaguyu/219 upon trust for himself and the plaintiff in equal shares and therefore had no capacity to transfer the plaintiff’s interest to the 2nd to 5th defendants and their registration be and is hereby cancelled and reverted to original land No. MUTIRA/KAGUYU/219.

b. An order for the dissolution of the trust and for sub-division of the title No. Mutira/Kaguyu/219 into 2 equal portions and for transfer of an equal share of the parcel of land to the plaintiff.

c. A permanent injunction restraining the defendants, themselves, their servant, agents, employees or otherwise whomsoever from entering, harassing, dispossessing and/or interfering in any way with the plaintiff’s quiet possession and occupancy on the title No. Mutira/Kaguyu /219 and from selling, transferring, creating a charge or any other way from dealing with the plaintiff share of the said parcel of land.

d. The plaintiff and the defendant being close relatives, I order each party to bear his own costs.

JUDGMENT READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 3RD DAY OF DECEMBER, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. P.M. Muchira holding brief for Munene Muriuki for Defendant

2. Mr. Macharia holding brief for Makida Plaintiff

3. Kabuta – Court clerk.