



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 109 OF 2016**

**CELINA WARUI MURIUKI.....PLAINTIFF**

**VERSUS**

**VIRGINIA WANJIRU NGUU.....DEFENDANT**

**JUDGMENT**

**BACKGROUND**

The plaintiff filed this suit against the defendant seeking the following orders:

***(a) Determination of the trust in L.R. BARAGWI/KARIRU/2381.***

***(b) Transfer of half (½) acre out of L.R. BARAGWI/KARIRU/2381 to the plaintiff.***

***(c) An order for the defendant to give vacant possession of ½ acre out of L.R. BARAGWI/KARIRU/2381 to the plaintiff and in default, the defendant and her agents and/or servants be evicted therefrom forthwith.***

***(d) Costs of the suit.***

The defendant in a statement of defence dated 28<sup>th</sup> July 2016 filed on 27<sup>th</sup> July 2016 denied the plaintiff's claim.

**PLAINTIFF'S CASE**

The plaintiff testified on oath and adopted her statement dated 15<sup>th</sup> July 2016. In her testimony, the plaintiff stated that they are sisters with the defendant. Their other siblings are Peter Mugo Nguu (brother), Julius Njiru Nguu (brother), Charles Njeru Nguu (brother), Esther Murangi (sister) and Martha Micere (sister). She stated that their father was Nguu Nganyu and their mother was Margaret Wamarwa Nguu. Both their parents are deceased. Their father was registered as proprietor of land parcel No. BARAGWI/KARIRU/198 which was a clan/ancestral land acquired during land demarcation which is customarily passed from generation to generation. She further stated that on or about the 3<sup>rd</sup> April 2009, their father Nguu Nganyu (deceased) decided to determine the trust in L.R. BARAGWI/KARIRU/198 by subdividing the land to give rise to L.R. BARAGWI/KARIRU/2380, 2381, 2382 and 2383. Thereafter, their late father transferred L.R. No. BARAGWI/KARIRU/2382 to his son Julius Njiru Nguu, L.R. No. BARAGWI/KARIRU/2383 to Charels Njeru Nguu. He also transferred L.R. No. BARAGWI/KARIRU/2381 to his wife Margaret Wamarwa Nguu (deceased) and all the daughters Esther Murangi, Martha Micere and herself. She stated that their father caused the said parcel of land to be registered in the joint names of their mother Margaret Wamarwa Nguu and Virginia Wanjiru Nguu who is the defendant herein to hold in trust for Esther Murangi, Martha Micere and herself. Upon the death of their mother Margaret Wamarwa Nguu, her name was deleted from the register of L.R. No. BARAGWI/KARIRU/2381 on 6/01/2016 by operation of law leaving the defendant the sole registered proprietor of L.R. No. BARAGWI/KARIRU/2381. The plaintiff contends that the defendant holds the said parcel of land in trust for her and the other siblings namely Esther Murangi and Martha Micere and that she has blatantly refused and/or neglected to transfer her share in L.R. BARAGWI/KARIRU/2381 despite demand and notice to sue.

The plaintiff produced green cards for land parcels No. BARAGWI/KARIRU/198 and L.R. No. BARAGWI/KARIRU/2381. She also produced certificates of search for land parcels No. BARAGWI/KARIRU/2380, 2382 and 2383. The plaintiff called one witness namely Charles Njeru Nguu who is also her brother. The witness stated that both the plaintiff and the defendant are sisters. He stated that his father (Nguu Nganyu (deceased) sub-divided his land into four (4) portions. He then gave one portion measuring one (1) acre to Julius Njiru and one (1) acre to himself. The remaining two (2) acres was for his father, mother and their four sisters. The sons got title deeds for their one acre each. He later came to discover that the two (2) acres was registered in the name of Virginia Wanjiru Nguu (defendant). He attended the Land Control Board for the transfer of all the five (5) acres. His sister who is also the plaintiff in this case attended the Land Control Board and that there was no one opposed to the sub-division and transfer. He stated that his sister Virginia Wanjiru Nguu was to hold the land in trust for herself and the rest of the sisters who were married.

## DEFENCE CASE

The defendant stated that the plaintiff is her sister. She recalled that on or about April 2009, her late father Nguu Nganyu partitioned his original land parcel No. BARAGWI/KARIRU/198 into four (4) portions as follows:

BARAGWI/KARIRU/2380, 2381, BARAGWI/KARIRU/2382 and 2383 respectively. She also stated that his late father Nguu Nganyu (deceased) transferred parcel of land No. BARAGWI/KARIRU/2381 to her late mother Margaret Wamarwa Nguu and herself jointly. She stated that Margaret Wamarwa Nguu is her biological mother who passed on later and that she was left as the sole proprietor by operation of law. The defendant produced two documents in support of her defence being a green card and certificate of official search for land parcel No. BARAGWI/KARIRU/2381. The defendant also called one witness who is also her sister namely Esther Murangi who recalled that before her late father Nguu Nganyu passed on, he sub-divided his land into four (4) portions and gave her brothers Peter Mugo Nguu one acre, Charles Njeru Nguu one acre and Julius Njiru Nguu one acre and the remaining to their mother Margaret Wamarwa Nguu jointly with their sister Virginia Wanjiru Nguu. She stated that they agreed to have the remaining portion registered in the joint names of their mother and their sister Virginia who was not married and had six (6) children who were all living in the disputed parcel of land.

## ISSUES FOR DETERMINATION

The following are issues for determination:

- (1) Whether the defendant, now the registered proprietor after the demise of Margaret Wamarwa Nguu, holds L.R. BARAGWI/KARIRU/2381 in trust for herself, the plaintiff CELINA WARUI MURIUKI, ESTHER MURANGI and MARTHA MICERE?**
- (2) Whether the plaintiff should be granted the orders sought?**
- (3) Who shall bear the costs of this suit?**

## ANALYSIS AND DETERMINATION

It is trite law that trust which is an overriding interest need not be registered in the register. It is a customary law and practice that can determine whether trust has been established or not. A number of Judges in the Superior Courts have come up with the threshold of what constitutes customary law rights in land.

In the case of *JASON GATIMU WANGARA VS MARTIN MUNENE WANGARA & OTHERS (2013) e K.L.R.*, it was held:

*“Ms Wangari’s submission that the registration of the plaintiff as owner of the suit land is conclusive proof of ownership is not supported in law or Judicial precedence. 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 first registration. Secondly, Section 28 of the same Act contemplates the holding of land in trust – see MUMO VS MAKAU (2004) 1 K.L.R 13 (C.A). The parties are Kikuyu and in KANYI VS MUTHIORA (1984) K.L.R. 712 (C.A), 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 entitled to it under Kikuyu Customary Law. See also MUKANGU VS MBUI (2004) 2 K.L.R 256. The new Land Registration Act 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 their being noted on the register and one such interest is a trust including customary trust. In view of the above, M/S Wangari’s submission cannot be upheld. A customary trust need not be registered. The existence of such customary trust is clearly borne out of the evidence herein. During cross-examination by the defendants’ counsel, M/S Thungu, the plaintiff stated as follows:*

*“It is true that it was then the practice that the first born is given land. I was not holding the land in trust for anybody. The land is my land and my family. It was not for my brothers”.*

*However, the plaintiff does not explain why only he was given the whole 35 acres of the suit land. It can only be that the “practice” of giving land to the first born that he himself alludes to arises out of Kikuyu custom. The defendant did confirm that the plaintiff as the eldest son was given the land by the clan to hold in trust for the family. In my view, there is sufficient evidence on record to make a finding that the plaintiff holds the suit land in trust for the family. This is supported by the fact the parties who are all family live on the suit land and so too did their father who was buried on the same land together with the six wives as well as other family members. There is also evidence that there are some twenty homesteads on the suit land. Under those circumstances, the only conclusion that this Court can arrive at is that the plaintiff, though registered as proprietor of the suit land, holds the same in trust for the family and that registration does not relieve him of his duty as a trustee. As such, he cannot evict the defendants from the suit land as he now seeks and his claim is therefore dismissed”.*

A similar determination of trust was also arrived at in the case of *MWANGI & ANOTHER VS MWANGI (1986) 328* where it was held:

*“The registration of a title to land is a creation of the law and one must look into consideration surrounding the registration in order to determine whether it was envisaged that a trust should be created. From the evidence, the Court was satisfied that the original intention of the parties’ father was that all of them were to hold the land in equal shares. Kikuyu Customary law and the Registered Land Act (Cap. 300), under which the land fell, recognized the law of trust”.*

I agree with the Judges in the two decisions. It is not in dispute that the defendant and her mother were registered jointly as proprietors of the two acres of land which was twice as big as that given to each of the brothers. The defendant did not explain why she was registered jointly with her mother as proprietors and not the rest of the siblings. The suit land being an ancestry land in which every family member is entitled to equal rights and protection of the law, I find that the registration of the suit land in the joint names of the defendant and her mother was to hold the same in trust for herself, the plaintiff Celina Warui Muriuki, Esther Murangi and Martha Micere. I find that registration of the defendant as owner of the suit land does not extinguish the right of other parties who may be entitled to it under Kikuyu Customary Law. The explanation given by the defence witness that all the daughters were entitled to get a share of the suit land but that they had chosen not to get any portion has no substance and the same is hereby rejected. Flowing from this analysis, I find that a customary trust was created when the suit property was registered jointly between the defendant and her late mother Margaret Wamarwa Nguu.

The upshot of my finding is that the plaintiff has proved her claim against the defendant on a balance of probabilities. I therefore make the following orders:

***(1) Determination of trust in L.R. BARAGWI/KARIRU/2381.***

***(2) Transfer of half (½) acre out of L.R. No. BARAGWI/KARIRU/2381 to the plaintiff.***

***(3) An order that the defendant gives vacant possession of ½ acre out of L.R. No. BARAGWI/KARIRU/2381 to the plaintiff failing which the defendant by herself or her agents and/or servants and/or employees to be evicted therefrom in accordance with the law.***

***(4) In view of the relationship between the plaintiff and the defendant, I order each party to bear her own costs.***

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 24<sup>th</sup> day of January, 2020.**

.....

**E.C. CHERONO**

**ELC JUDGE**

**24<sup>TH</sup> JANUARY, 2020**

In the presence of:

1. Mr. Abubakar for Plaintiff

2. Mr. Munene holding brief for S.G. Wachira for Defendant