



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 202 OF 2014**

**DORIS WANGITHI MAINA**

**KENNEDY MUKURI MAINA**

**MARTHA WANGARI.....PLAINTIFFS**

**VERSUS**

**PERIS WANJIRU MAINA.....1<sup>ST</sup> DEFENDANT**

**MARK MURIUKI MAINA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**BACKGROUND**

The plaintiffs commenced this suit by way of a plaint dated 27<sup>th</sup> June 2014 seeking the following orders:

- (a) A declaration that the sub-divisions of the original title number KIINE/THIGIRICHI/2119 and the subsequent transfer of the sub-divisions being KIINE/THIGIRICHI/2134 and 2135 is illegal.*
- (b) An order for the cancellation of land title number KIINE/THIGIRICHI/2134 and 2135 to revert to the original title number KIINE/THIGIRICHI/2119.*
- (c) An order that land parcel number KIINE/THIGIRICHI/2119 be shared out equally amongst the three (3) plaintiffs.*
- (d) Any other or better relief the Honourable Court may deem fit to grant.*
- (e) Costs of the suit and interest thereof.*

On 9<sup>th</sup> October 2014, the 2<sup>nd</sup> defendant filed a statement of defence and on 25<sup>th</sup> January, the 2<sup>nd</sup> defendant filed an application for orders inter alia amendment of his statement to include a counter-claim and on 21<sup>st</sup> April 2017, the 2<sup>nd</sup> defendant filed his amended defence and counter-claim. On 5<sup>th</sup> June 2017, the plaintiffs filed their reply to the 2<sup>nd</sup> defendant's counter-claim.

**PLAINTIFFS CASE**

The 1<sup>st</sup> plaintiff testified on behalf of the plaintiffs and stated that the 2<sup>nd</sup> plaintiff is her brother while the 3<sup>rd</sup> plaintiff is her sister. The 1<sup>st</sup> defendant is her mother and their father is one Danson Maina (deceased) who died on 6/2/1994. She stated that at the time of his demise, they were all minors. A succession cause was filed in Karatina RM's Court No. 10 of 1994 whereby their mother was given the grant of letters of administration which was confirmed on 17<sup>th</sup> May 2001. According to the said confirmed grant, the 1<sup>st</sup> defendant was registered as proprietor of the following properties to hold in trust as follows:

**(a) KIINE/THIGIRICHI/1242 - 1.62 Ha.**

(1) Doris Wagithi Maina

(2) Elijah Kamau Maina

(3) Kennedy Mukuri Maina

(4) Martha Wangari

**(b) KIINE/RUKANGA/329** - 1.0 Acre

(1) Doris Wagithi Maina

(2) Elijah Kamau Maina

(3) Kennedy Mukuri Maina

(4) Martha Wangari

**(c) KIINE/THIGIRICHI/346** - 5 Acres

(1) Doris Wagithi Maina

(2) Elijah Kamau Maina

(3) Kennedy Mukuri Maina

(4) Martha Wangari

However, land parcel No. KIINE/RUKANGA/329 measuring approximately 3 acres was confirmed in the name of one Joseph Gichoya Chuti. The confirmed grant was identified in the list of documents and produced as Plaintiffs Exhibit No. 1. The green card for land parcel No. KIINE/THIGIRICHI/346 also produced as Plaintiffs Exhibit 5 indicates that the same was registered in favour of the 1<sup>st</sup> defendant on 10/07/2012 as trustee for her children - Dorcas Wangithi, Maina Elijah Kamau, Maina Kennedy Mukuri and Martha Wangari and on 12<sup>th</sup> July 2012, a title deed was issued. On 31<sup>st</sup> July 2012, the suit land was closed on sub-division after the same was partitioned into land parcel numbers KIINE/THIGIRICHI/2134 and 2135 respectively. The certificates of search for the two resultant sub-divisions were produced showing that land parcel No. KIINE/THIGIRICHI/2134 was registered in the name of Mark Muriuki Maina while land parcel No. KIINE/THIGIRICHI/2135 was registered in the name of the 1<sup>st</sup> defendant Peris Wanjiru Maina as trustee for Doris Wangithi Maina, Elijah Kamau Maina, Kennedy Mukuri Maina and Martha Wangari.

## **2<sup>ND</sup> DEFENDANT'S CASE**

The 2<sup>nd</sup> defendant stated that before sub-division of the original land parcel No. KIINE/THIGIRICHI/346, the 1<sup>st</sup> defendant Peris Wanjiru Maina came to him and asked whether he could buy land from her family and he answered in the affirmative. The 1<sup>st</sup> defendant told him that the land was yet to be sub-divided and asked him to assist in the sub-division. They went to the surveyor who was conducting the survey and was asked to pay Ksh. 18,500/=. He paid the surveyor the said amount and was issued an official receipt dated 19<sup>th</sup> January 2012 for the sum of Ksh. 18,500/=. The particular surveyor never surveyed the land as instructed and they reported the matter to Kerugoya C.I.D office but have not been able to trace the suspect to-date. They decided to look for another surveyor whom he solely paid to conduct and assist in the sub-division of the land parcel No. KIINE/THIGIRICHI/346. The land was subsequently sub-divided into two portions namely KIINE/THIGIRICHI/2118 and KIINE/THIGIRICHI/2119 measuring 5 acres each. Later again there was a further sub-division of L.R. No. KIINE/THIGIRICHI/2119 to two portions being KIINE/THIGIRICHI/2134 and KIINE/THIGIRICHI/2135 measuring 3 acres and 2 acres respectively. Land parcel No. KIINE/THIGIRICHI/2118 was registered in the name of Joseph Gachoya while the 1<sup>st</sup> defendant was registered in L.R. No. KIINE/THIGIRICHI/2119 to hold in trust for Doris Wangithi, Kennedy Mukuri and Martha Wangari.

The 2<sup>nd</sup> defendant stated that before drawing the sale agreement, the 1<sup>st</sup> defendant showed him an affidavit giving authority to the 1<sup>st</sup> defendant to conduct all necessary transactions including the sale agreement. After giving the said authority to the 1<sup>st</sup> defendant, they then moved to execute a sale agreement and made a down payment of Ksh. 175,000/= being 10% of the sale price. The sale agreement was for the purchase of five (5) acres out of land parcel No. KIINE/THIGIRICHI/346. The 2<sup>nd</sup> defendant also stated that after negotiations with the vendors, it was agreed that he buys 3 acres only out of L.R. No. KIINE/THIGIRICHI/2119 which after sub-division became L.R. No. KIINE/THIGIRICHI/2134. He stated that they obtained the relevant Land Control Board consent for the transfer and that he paid for the land in instalments. He stated that he is the registered proprietor of the suit land L.R. No. KIINE/THIGIRICHI/2134 and that the defendants were involved in the transaction. The 2<sup>nd</sup> defendant also stated that on 14<sup>th</sup> February 2012, he purchased a motor cycle for one Kennedy Mukuri Maina in the company of all the parties which was registration No. ICMCU 572 Q. He stated that he also bought an insurance for the said motor cycle through Policy Certificate No. D 1802590. The said motor cycle was stolen and the defendants asked him to purchase another one which he did and also produced Insurance Policy. The subsequent motor cycle which he purchased was registration No. ICMDB 472 P with Insurance Police No. 2008642. He stated that the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs are married and that they live with their husbands at a different property and locations. He stated that the 2<sup>nd</sup> plaintiff also lives on a different property adjacent to his land.

## **1<sup>ST</sup> DEFENDANT**

The 1<sup>st</sup> defendant did not Enter Appearance or file defence.

## ISSUES FOR DETERMINATION

The following are appropriate issues for determination:

- (1) Whether the 1<sup>st</sup> defendant, Peris Wanjiru Maina was registered as a trustee to hold the suit land parcel No. KIINE/THIGIRICHI/2119 for the plaintiffs?***
- (2) If the answer to (1) above is in the positive, whether the said trust subsisting and binding on the suit land was ever dissolved?***
- (3) Whether the transfer of the suit land parcel No. KIINE/THIGIRICHI/2119 was lawful?***
- (4) What are the appropriate orders to issue?***
- (5) Who will bear the costs of this suit?***

### **1. Whether the 1<sup>st</sup> Defendant, Peris Wanjiru Maina was registered as trustee to hold the suit land parcel No. KIINE/THIGIRICHI/2119 in trust for the plaintiffs?**

The grant and certificate of confirmation produced as Plaintiff Exhibit No. 1 clearly indicates that the 1<sup>st</sup> defendant herein, Peris Wanjiru Maina was registered as proprietor of the suit land parcel No. KIINE/THIGIRICHI/346 measuring five (5) acres to hold in trust for Doris Wagithi Maina, Elijah Kamau Maina, Kennedy Mukuri Maina and Maritha Wangari. The said land was later sub-divided into two portions being KIINE/THIGIRICHI/2134 and KIINE/THIGIRICHI/2135. The sub-division was done on 31/7/2012. Before the said partition was done on 31/7/2012, the original land parcel No. KIINE/THIGIRICHI/2119 was registered in the name of Peris Wanjiru Maina (1<sup>st</sup> defendant herein) to hold in trust for her children Doris Wagithi, Maina Elijah Kamau Maina, Kennedy Mukuri Maina and Martha Wangari.

### **2. Whether the trust subsisting and binding in the suit land parcel No. KIINE/THIGIRICHI/2134 was ever dissolved?**

In the grant and certificate of confirmation of grant issued in the Resident Magistrate Succession Cause No. 10 of 1994 (Karatina) in respect of the Estate of Danson Maina Churi (deceased), the 1<sup>st</sup> defendant Peris Wanjiru Maina was registered in respect of land parcel No. KIINE/THIGIRICHI/346 measuring five (5) acres to hold in trust for her children namely Doris Wangithi Maina, Elijah Kamau Maina Kennedy Mukuri Maina and Martha Wangari. That land was sub-divided and parcel No. KIINE/THIGIRICHI/2119 is one of the resultant sub-division. The 1<sup>st</sup> defendant further sub-divided that parcel into two portions being KIINE/THIGIRICHI/2134 and 2135. The 1<sup>st</sup> defendant thereafter caused land parcel No. KIINE/THIGIRICHI/2135 to the intended beneficiaries but transferred land parcel No. KIINE/THIGIRICHI/2134 to Mark Muriuki Maina, the 2<sup>nd</sup> defendant herein. According to the plaintiff, the purported sale and transfer of the suit property from the 1<sup>st</sup> to the 2<sup>nd</sup> defendant is tainted with fraud and irregularities. From the proceedings on record and the Exhibits produced, the 2<sup>nd</sup> defendant who is also a lawyer has represented the 1<sup>st</sup> defendant and her family in previous cases involving the Succession Cause No. 10 of 1994 which created the trust in favour of the 1<sup>st</sup> defendant's children which include the plaintiffs herein. This case had even been heard to its conclusion before on. B.N. Olao J. when counsel for the defendant vide a Notice of Motion dated 17/10/2017 which sought orders inter alia that the firm of Kirubi, Mwangi Ben & Co. Advocates do cease acting for the plaintiffs on grounds that one Joseph Mwangi Ben, an advocate of the High Court of Kenya and a partner in the firm of Kirubi Mwangi Ben & Co. Advocates which firm has the conduct of this case for the plaintiffs was the registered owner of land parcel No. KIINE/THIGIRICHI/1242 as a co-owner of 0.81 Ha. of the same together with Peris Wanjiru Maina, the 1<sup>st</sup> defendant herein. In a replying affidavit filed by one Mwangi Ben advocate, he admitted that he practices in the firm of M/S Kirubi Mwangi Ben & Co. Advocates and that his firm has the conduct of this case. The said Ben admitted that he bought 2 acres from the 1<sup>st</sup> defendant in 2005, a sale that was sanctioned by Court (Muranga Misc. Application No. 3 of 2005 (O.S) when the 1<sup>st</sup> defendant family had financial difficulties. Counsel further admitted that he had known the plaintiffs for long having represented them in Karatina Succession Cause No. 10 of 1994 and Nyeri High Court Civil Appeal No. 6 of 2005. In his ruling delivered on 15<sup>th</sup> June 2018, Hon. S.N. Mukunya (as he then was) observed as follows:

***“From the proceedings, once the magistrate at Karatina distributed the properties of the deceased, an appeal was preferred in Nyeri High Court which Mr. Mwangi Maina Ben was advocate also representing the plaintiffs and their mother the 1<sup>st</sup> defendant herein. It appears from the pleadings that the appeal was dismissed. On 12<sup>th</sup> April 2005, an Originating Summons was filed in the Muranga Magistrate's Court by the 2<sup>nd</sup> defendant herein as trustee of the plaintiffs and another to have the trust subsisting on land parcel No. KIINE/THIGIRICHI/1242 be dissolved and that the said land be shared out as follows:***

***- Peris Wanjiru Maina - 0.181 Ha.***

***- Joseph Mwangi Ben - 0.181 Ha.***

***The application was supported by the affidavit of the 1<sup>st</sup> defendant Peris Wanjiru Maina who alleged that she was un-employed and was finding it increasingly difficult to provide general care and maintenance to the minors and that one minor Martha Wangari had a heart condition and needed urgent operation at Kenyatta National Hospital and she needed Ksh. 180,000/= for the operation. That Joseph Mwangi Ben (counsel on record) had agreed to give that sum as part of the consideration of 0.81 Hectare out of KIINE/THIGIRICHI/1142 and that she was unable to complete that sale transaction as the land was encumbered by the trust. This is the pleading relied on to show that the Court determined the trust subsisting in KIINE/THIGIRICHI/1142. No Court order was annexed ....”.***

It is apparent from the proceedings and the annexures that the 2<sup>nd</sup> defendant had attempted through an Originating Summons filed in Muranga Magistrate's Court to have the trust subsisting in another property being L.R. No. KIINE/THIGIRICHI/1142 dissolved but the attempt was abandoned after this Court ordered this case re-opened. It is to be noted that the 2<sup>nd</sup> defendant had entered into a sale agreement in respect of land parcel No. KIINE/THIGIRICHI/1142 which he was unable to complete as the land was encumbered by trust. When this Court noticed the mischief the 2<sup>nd</sup> defendant shifted to the land parcel No. KIINE/THIGIRICHI/346 which he admitted to have participated in securing the surveyor who caused the sub-division into L.R. No. KIINE/THIGIRICHI/2119 and further sub-division into KIINE/THIGIRICHI/2134 and 2135 respectively. The 2<sup>nd</sup> defendant acted for the 1<sup>st</sup> defendant and the plaintiffs in numerous cases in the past including Succession Cause No. 10 of 1994 before the Resident Magistrate's Court at Karatina. It was that Court which directed that the 1<sup>st</sup> defendant was going to be registered as proprietor of land parcel No. KIINE/THIGIRICHI/346 in trust for her children which include the plaintiffs herein. A trust created by a Court can only be lifted or discharged by the same Court. The affidavit purported to have been signed by the plaintiffs giving the 1<sup>st</sup> defendant authorities to deal with the said property cannot by any stretch of imagination be regarded as lifting of the trust issued by a Court of competent jurisdiction. The 2<sup>nd</sup> defendant who is an advocate for the 1<sup>st</sup> defendant had also acted for the 1<sup>st</sup> defendant in other previous cases including Succession Cause No. 10 of 1994 (Karatina) where the 1<sup>st</sup> defendant was issued with grant which was confirmed on 17<sup>th</sup> May 2001 whereby she was to be registered as proprietor of all parcels of land belonging to the Estate of Danson Maina Churi (deceased) to be held in trust for their children including the plaintiffs herein. It appears that the 1<sup>st</sup> respondent was aggrieved by the decision of the Court in that succession and instructed the 2<sup>nd</sup> defendant to appeal to the High Court at Nyeri to have the trust lifted. The 2<sup>nd</sup> defendant ought to have known that the appropriate Court to make such an application for lifting of trust on properties belonging to the Estate of Danson Maina Churi (deceased) which the 1<sup>st</sup> defendant was given to hold in trust for their children was the Succession Court in Karatina in RM's Succession Cause No. 10 of 1994. The 1<sup>st</sup> defendant thereafter moved to Muranga Court in yet another attempt to have the trust dissolved. Though the subsequent Originating Summons was filed in Muranga by a different firm of Advocates practicing in the name of Mwaniki Warima & Co. Advocates, the 2<sup>nd</sup> defendant was singled out as a beneficiary of 0.81 Hectares upon the dissolution of the trust which was subsisting in L.R. No. KIINE/THIGIRICHI/1142. That seemed to have failed and the 1<sup>st</sup> defendant in yet another desperate attempt and for the benefit of the 2<sup>nd</sup> defendant crafted an affidavit purported to have been sworn by the plaintiffs herein giving her authority to do all the necessary transactions involving the suit land parcel No. KIINE/THIGIRICHI/346. That is not the lawful way to lift a trust issued by a Court of law. The 1<sup>st</sup> defendant should have gone back to the same Court where she was given the trust to have it discharged otherwise what she did by purporting to sell the suit property was not in the interest of the beneficiaries. In any event, the beneficiaries of the trust who are the plaintiffs in this case have denied that they swore the affidavit purporting to authorize the 1<sup>st</sup> defendant deal with the suit property registration No. KIINE/THIGIRICHI/346. Where the plaintiffs denied having sworn the purported affidavit, it was therefore incumbent upon the person alleging that it belongs to the plaintiffs to prove that it belongs to them by subjecting the contested signatures to examination.

The other issue I wish to comment is that since the 2<sup>nd</sup> defendant had acted for the 1<sup>st</sup> defendant in Succession Cause No. 10 of 1994 (Karatina) where the plaintiffs were also beneficiaries, his private interest in the suit property becomes incompatible with that of his clients which include the plaintiffs herein. There is real conflict of interest, period.

### **3. Whether the transfer of the suit land parcel No. KIINE/THIGIRICHI/2134 by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was lawful?**

It is trite law that the suit land parcel No. KIINE/THIGIRICHI/346 was registered in favour of the 1<sup>st</sup> defendant to hold in trust for the plaintiffs in this case. The purported sale and transfer by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was irregular, illegal and unlawful. The 1<sup>st</sup> defendant did not apply to vary the creation of the trust from the Court which issued the orders in Karatina being RM's Succession Cause No. 10 of 1994 (Karatina). I therefore find and hold that the purported sub-division of L.R. No. KIINE/THIGIRICHI/346 to create L.R. No. KIINE/THIGIRICHI/2119 and further sub-division of L.R. No. KIINE/THIGIRICHI/2134 and 2135 was illegal, irregular and unlawful.

### **DISPOSITION**

Having arrived at my findings on the four issues, I have no apparent reason to disallow the plaintiffs claim. In the final analysis, I enter judgment in the following terms:

- (1) A declaration that the sub-division of the original title number KIINE/THIGIRICHI/2119 and the subsequent transfer of the sub-divisions being No. KIINE/THIGIRICHI/2134 and KIINE/THIGIRICHI/2135 is illegal.***
- (2) An order for the cancellation of land title No. KIINE/THIGIRICHI/2134 and KIINE/THIGIRICHI/2135 to revert to the original title No. KIINE/THIGIRICHI/2119.***
- (3) An order that land parcel No. KIINE/THIGIRICHI/2119 be shared out equally amongst the three (3) plaintiffs herein.***
- (4) The 2<sup>nd</sup> defendant's defence and counter-claim is hereby dismissed.***
- (5) The costs of this suit and the dismissal of the counter-claim shall be borne by the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and severally.***

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 21<sup>st</sup> day of February, 2020.**

.....  
**E.C. CHERONO**

**ELC JUDGE, KERUGOYA**

In the presence of:

1. Mr. Asimwe holding brief for Abubakar for 2<sup>nd</sup> Defendant
2. Okatch – Court clerk