



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 49 OF 2015**

**KAREU NDEBU.....PLAINTIFF**

**VERSUS**

**NDEGE NDEBU.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

The original plaintiff Kareu Ndebu filed this suit vide a plaint dated 22<sup>nd</sup> April 2015 and sought the following orders:

- (1) An order that the defendant holds land parcel No. BARAGWE/RAIMU/237 in trust for himself and the plaintiff and order do issue for sub-division of the subject land parcel into two (2) equal portions and the Land Registrar Kirinyaga do rectify the Register accordingly.***
- (2) Costs of the suit.***

The suit was filed simultaneously with a Notice of Motion under certificate of urgency in which he sought the following orders:

- 1. That the application be certified as urgent and be heard ex-parte in the instance.***
- 2. That the Honourable Court be pleased to place a prohibitory order to the register to land parcel No. BARAGWE/RAIMU/237 pending inter-parties hearing and thereafter the main suit.***
- 3. That costs be provided for.***

On 13<sup>th</sup> October 2015, the said interlocutory application came up for inter-parties hearing and the parties recorded an order allowing prayer 2 by consent. On 12<sup>th</sup> October 2015, the defendant filed defence to the plaintiff's claim. In a Notice of Motion application dated 21<sup>st</sup> December 2017, the plaintiff sought to substitute the original plaintiff Kareu Ndebu with the current plaintiff James Muriithi Kareu. On 25<sup>th</sup> September 2018, the plaintiff amended his plaint to reflect the new plaintiff and on 13<sup>th</sup> February 2019, the defendant filed a defence to the amended plaint. The plaintiff first filed his list of documents together with the plaint on 23<sup>rd</sup> April 2015 and on 6<sup>th</sup> October he filed another list of documents and on 11<sup>th</sup> June 2019, he filed yet a further list of documents. On 25<sup>th</sup> June 2019, the defendant filed a further list of documents/Exhibits.

**PLAINTIFF'S CASE**

The plaintiff stated that the defendant is the registered proprietor of land parcel No. BARAGWE/RAIMU/237 which is an ancestral land allocated to him in the year 1957 in his capacity as the first born son to hold in trust for himself and the rest of his siblings including the plaintiff. He stated that since the allocation was made, he has been living on the suit property with his family and children together with his grandchildren. He said that in mid 2014 or thereabouts, the defendant threatened to sell the suit land to a third party notwithstanding their concern and right over the same. He further stated that the defendant in 2015 made his threats true by visiting the offices of the Assistant County Commissioner with a view of removing the restriction placed on the suit land L.R No. BARAGWE/RAIMU/237. Based on those threats, the plaintiff filed this suit on 23<sup>rd</sup> April 2015 seeking a declaration of trust be determined in the suit land. Before this suit would be heard and determined, the original plaintiff passed on and his son James Muriithi Kareu filed an application to be substituted which was allowed. In his statement dated 24<sup>th</sup> May 2017, the substituted plaintiff namely James Muriithi Kareu stated that the defendant is his uncle and also brother to his late father Kareu Ndebu. He said that they have lived on the suit property L.R. No. BARAGWE/RAIMU/237

registered in the name of the defendant which was allocated to him during the land demarcation period to hold in trust for the other siblings. The witness stated that when his late father passed on, the defendant and his family refused to be buried in the suit land. He filed a suit being CMCC No. 88/2017 where he sought an order to have him buried in the suit land which was granted. He stated that he is the only son and that his sisters are all married. He seeks to be given a share of the suit land which is ancestral land as he has no any other land. He stated that his house was demolished and that he lives in a rented house. He relied on a list of documents filed with the original plaint on 23<sup>rd</sup> April 2015, another list of documents dated 6<sup>th</sup> October 2016 and a further list of documents dated 9<sup>th</sup> June 2019 and filed in Court on 11<sup>th</sup> June 2019.

#### **DEFENDANT'S CASE**

The defendant testified and stated that he does not know the substituted plaintiff but he know the original plaintiff Kareu Ndembu (deceased) who was his brother. He said that his late brother took the substituted plaintiff. He also admitted that his late brother used to live in the suit land parcel No. BARAGWE/RAIMU/237 measuring approximately 4½ acres. He also admitted that his late brother Kareu Ndembu had built a house in the suit land where he was living with his family. The defendant also stated that his late brother had four (4) children and that the substituted plaintiff was one of his sons. The defendant also stated that his late brother moved out his family and he demolished the house. He stated that the suit property is not a clan land and that he was given in the year 1959 during land demarcation and adjudication. He admitted that he is the elder brother to Kareu Ndembu (deceased) and uncle to James Muriithi Kareu (current plaintiff) and that they all belong to Ucera Clan.

#### **ANALYSIS AND DETERMINATION**

The one and single issue for determination is whether the plaintiff has established the existence of a customary trust on the suit property L..R No. BARAGWE/RAIMU/237. The issue of customary trust was succinctly put by the Court of Appeal in the case of *MUMO VS MAKAU (2004) 1 K.L.R. 13* as follows:

***“Mrs. Nzei further submitted that the appellant as the registered proprietor of the suit land had a good and indefeasible title which could not be challenged in Court. This argument, we think, is fallacious for two reasons. Firstly, there is nothing in the Registered Land Act Cap. 300 Laws of Kenya, (the Act) which precludes the declaration of a trust in respect of registered land, even if it is first registration. Secondly, Section 28 of the Act, which reads as follows:***

***“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-***

***(a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and***

***(b) Unless the contrary is expressed in the register to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require nothing on the register. Provided that nothing in this section shall be taken to relieve a proprietor from any duty, or obligation to which he is subject as a trustee” contemplates the holding of land in trust. We reject this ground of Appeal”.***

It is trite that despite being registered as proprietor of land, such proprietorship cannot relieve him of his duty as a trustee. From the evidence adduced by the plaintiff, the defendant and the original plaintiff Kareu Ndembu (deceased) were biological brothers. According to him, the defendant was allocated the suit land parcel Number BARAGWE/RAIMU/237 in the year 1959 in his capacity as the first born son in their family. The plaintiff further stated that since the allocation was done, they have been living on the suit land which also forms his matrimonial home where his children and grandchildren have known as home alongside the defendant. The plaintiff also stated in his evidence that the defendant hold the suit land as a trustee under Kikuyu Customary Law for himself and the plaintiff.

I have considered the evidence adduced by the plaintiff and the defendant. I have also considered the documents produced by the parties in evidence. It is not in dispute that the defendant is the registered proprietor of land parcel No. BARAGWE/RAIMU/237. It is not also in dispute that both the defendant and the plaintiff Kareu Ndembu (deceased) are brothers. It is not a disputed fact that the defendant Ndege Ndembu is the elder brother to Kareu Ndembu and that the defendant Ndege Ndembu was registered as proprietor of the suit land in 1959 which was the land demarcation and adjudication period in Kenya. It is trite law that customary law trust is proved by leading evidence as was held by the Supreme Court of Kenya in the case of *ISACK KIEBA M'INANGA VS ISAAYA THEURI M'LINTARI & ANOTHER SCOK NO. 10 of 2015* as follows:

***“..... each case has to be determined on its own merit 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 Vs 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 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:***

***(a) The land in question was before registration, family, clan or group land.***

***(b) The claimant belongs to such family, clan or group.***

***(c) 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 adventures.***

*(d) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and*

*(e) The claim is directed against the registered proprietor who is a member of the family, clan or group”.*

I agree with the decision by the Supreme Court which is also binding on me. The plaintiff has stated that they are biological brothers with the defendant and that the defendant who is his elder brother was allocated and registered as proprietor of the suit land under Kikuyu Customary Law to hold in trust for himself and the plaintiff. The plaintiff has also stated

that they have been living in the suit land with his family and children together with grand children. The plaintiff has also stated that after the demise of his father who is also the original plaintiff in this case, the defendant who is his uncle refused to allow them to bury him in the suit land until he moved to Court and obtained a Court order in CMCC 88 of 2017 (Kerugoya) where he was granted the orders by Hon. Y.M. Barasa, S.R.M on 31<sup>st</sup> May 2017. These averments given on oath were not controverted and/or challenged by the defendant in his defence. The green card produced in evidence also confirms that the defendant was registered as proprietor of the suit land on 16<sup>th</sup> January 1959 which agrees with the plaintiff’s assertion that the defendant was allocated the land during the land demarcation and adjudication period to hold in trust for himself and the plaintiff in accordance with the Kikuyu customary law. That lend credence to the plaintiff’s evidence that the defendant is holding the suit land parcel No. BARAGWE/RAIMU/237 in trust for the plaintiff.

In the case of *Kimani Githanja Vs Jane Njoki Gituanja (1983) e K.L.R.*, the issue of trust land under Kikuyu Customary Law was put into perspective as follows:

*“Land inheritance among the Kikuyu is as stated by Jomo Kenyatta in his book Facing Mt. Kenya page 32 (1965 Edition) 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 would call it “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”.*

Again in the case of *Jason Gitimu Wangara Vs Martin Munene Wangara & others (2012) e K.L.R.*, it was held:

*“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 K.L.R 13 (C.A) the parties herein 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”.*

I entirely agree with the law as expounded in that decision. Turning now to the instant case, I find and hold that the suit land parcel No. BARAGWE/RAIMU/237 is a clan land which was registered in the name of the defendant who is the elder brother to hold in trust for himself and the plaintiff Kareu Ndembu (deceased). The plaintiff’s evidence is supported by the fact that both the defendant and his brother Kareu Ndembu (deceased) and their families lived on the suit land. It was only after the demise of the plaintiff Kareu Ndembu (deceased) that the defendant even refused to have his remains interred on the suit land and even demolished his house where the substituted plaintiff was living forcing him to live in a rented house.

In the final analysis, I find the plaintiff has proved his claim against the defendant on a balance of probabilities and issue the following orders:

*(1) A declaration that the defendant holds land parcel No. BARAGWE/RAIMU/237 also described as BARAGWE/RAIMU/223 measuring 2.34 Ha. in trust for himself and the plaintiff.*

*(2) The Land Registrar Kirinyaga County do conduct sub-division of the said land parcel No. BARAGWE/RAIMU/237 described as BARAGWE/RAIMU/223 into two equal portions and the Land Registrar do rectify the Register accordingly.*

*(3) In view of the family relationship between the plaintiff and the defendant, I direct each party to bear his own costs of this suit.*

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 29<sup>th</sup> day of May, 2020.**

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

**ELC JUDGE**

*In the presence of*

1. *Mr. Nganga for Plaintiff*
2. *Defendant in person – present*
3. *Mbogo, Court clerk – present*