



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC 40 OF 2018

MOSES MBOGO GACHANGO.....1ST PLAINTIFF

ANNAH WANGUI GASANGO

(suing as the personal representatives

of **JOSIAH GACHANGO MWANGI, DCD).....2ND PLAINTIFF**

VERSUS

RUTH WANJIRU NGANGA.....1ST DEFENDANT

SIMON GITHUKU NGANGA 2ND DEFENDANT

JUDGMENT

1. By a plaint filed and later amended on the 19/12/18 the Plaintiffs filed suit against the Defendants seeking the following orders;
 - a. A declaration that SULEIMAN NGANGA (deceased) held half of the land parcel No LOC2/KANGARI/1000 (suit land) in trust for JOSIAH GACHANGO MWANGI (deceased) and his personal representatives' survivors and beneficiaries.
 - b. Cost of the suit.
 - c. Any other orders that the Court deems fit to grant.
2. It is the Plaintiffs' case that the Defendants' father Suleiman Nganga (Suleiman) held the suit land in trust for his brother, Josiah Gachango Mwangi (Josiah) who was the father and husband of the 1st and 2nd Plaintiffs respectively.
3. The particulars of trust have been set out on para 7 of the Plaint. That the suit land being family and ancestral land was registered in the name of Suleiman who died in 1969 before the said trusts were determined.
4. The Defendants filed a defense in which they denied the claim of the Plaintiffs and undertook to raise a preliminary objection to wit; the suit does not disclose any claim in law; suit is defective incompetent and an abuse of the process of the Court; Plaintiffs have no locus to file and sustain the suit; suit is time barred.
5. Further that their father Suleiman was the absolute and indefeasible owner of the suit land and held devoid of any trusts. They denied the particulars of trusts set out on para 7 of the plaint. They aver that to the contrary, Josiah was their father's step brother and each had their own parcels of land; that Josiah Gachango alias Nganga Mwangi alias Nganga Gachango owned his own land parcel LOC 2/MARIRI/46 which he sold to GAKUIYA WARUINGI in the 1970s and proceeded to purchase another land in Kericho, KERICHO/LONDIANI/BLOCK2/KAMUINGI/152 registered in the name of the 2nd Plaintiff.
6. At the hearing the 2nd Plaintiff led evidence on her own behalf and that of the 1st Plaintiff. She adopted her witness statement dated the 15/5/18. In it, she averred that she is the mother of the 1st Plaintiff and the widow of JOSIAH GACHANGO MWANGI alias MWANGI GACHANGO (JOSIAH) who died in 1969. That Josiah was the son of Gachango Kiarie deceased and a brother of Suleiman. Suleiman and Josiah were brothers born of the same mother, Wanjiru Gachango, the wife of Gachango Kiarie. That the suit land was registered in the name of Suleiman and upon his death the estate devolved to his wife, Rahab Wanjiru Nganga (Rahab). That Josiah planted tea and lived on the suit land until 1966 when he relocated to Londiani and settled there but never renounced his share of the family land. He died in 1969. That in 2004 she sued the wife of Suleiman at the Land Dispute Tribunal (LDT) No 172 /2004 and the elders ruled that she is entitled to ½ share of the land. On Appeal, the Provincial LDT set aside the award and referred the dispute to the succession Court for determination since the suit

land was registered under the Registration of Land Act. By then Suleiman had passed on. Rahab successfully filed a succession cause in the estate of Suleiman and was granted letters of representation. On an application for revocation of the grant in 2000 by the 2nd Plaintiff, the Court in 2016 revoked the grants and the ownership of the suit land was reverted to Suleiman. The Court further ordered, inter-alia, that the dispute in respect to the determination of trust be referred to the ELC Court for determination, hence the filing of this suit.

7. In addition, the 2nd Plaintiff relied on the list of documents filed on the 11/3/19.

8. Further that she married Josiah in 1966 and lived in parcel 152, Londiani until his demise in 1969. She stated that Josiah bought 2 acres of the land in Londiani using the proceeds of charcoal business that he run and later she personally purchased another 5 acres and amalgamated it to 7 acres and the title was issued in her name in the year 2000. During the land clashes in Kericho in 1992, she relocated back to Muranga.

9. That she entered the suit land in 1999. That she lived on the suit land until December 2018 when the Defendants entered the suit land and violently removed her. That during the course of the suit, the Court ordered that she continues living on the suit land until the matter is determined, but on her return she found her house had been demolished and she sought accommodation elsewhere for fear of her life. That due to the interference of the Defendants her son Peter Kiarie too left the suit land.

10. Giving the history of the suit land, the 2nd Plaintiff stated that the suit land belonged to Gachango Kiarie, the father of Josiah. The original land was parcel 450 measuring 12.4 acres. Later Suleiman sold 2 acres of the land to Peter MWANGI Kibiru and the remainder of 10.4 acres was registered in the name of Suleiman after partition as parcel 1000. That this was family land having devolved from his father Gachango. It was her evidence that Suleiman did not purchase the suit land.

11. She produced a document christened a special Crops Development Authority receipt for tea stumps in the name of Gachango Kiarie dated the 21/2/63 as evidence that her husband Josiah planted tea on the suit land. She stated that she has been plucking the said tea for over a period of 10 years and produced green leave delivery receipts for the months of December 2017, and February, March 2018 in support.

12. In cross examination the witness stated that she was not aware that Suleiman and Josiah were half-brothers, being the sons of Wanjiru Gachango. As to whether Josiah was sired by Gachango's brother namely Mwangi Kiarie, the witness answered in the negative. She informed the Court that though Rahab permitted her to utilize the land and built a house, she sued her in the LDT claiming a share of her husband's ancestral/family land.

13. PW2- Peter Gachango Muhoro testified and informed the Court that Kiarie Gachango (great grandfather) had 4 children; Gachango, Muhoro, Muthoni and Mwangi Kiarie. He stated that he is the son of Muhoro. That each of the three sons of the grand patriarch were given about 10 acres each. That upon the death of Gachango the land was registered in the name of Suleiman to hold in trust for his brother Josiah. According to him Suleiman was the son of Mwangi Kiarie, the brother of Gachango Kiarie.

14. The defense case was led by Ruth Wanjiru Kiarie who testified and adopted her witness statement dated the 9/1/19 as evidence in chief. She stated that she and the 2nd Defendant are children of Suleiman who died in 1985. Her mother Rahab died in 2007. That Josiah was the step brother of Suleiman. Suleiman was the absolute registered owner of the suit land. Both parents are buried on the suit land. That Josiah sold his family land at parcel 46 Mairiri and purchased land in Londiani in 1970s where he relocated and settled with his family. Josiah died in 1969 and was buried in his land at Londiani.

15. She testified that during the land clashes in Rift Valley the 2nd Plaintiff came back to Muranga where on pure benevolence and kindness, her mother Rahab accommodated her on one acre of the suitland temporarily with the understanding that she would go back to her land in Londiani once peace returned. It was her evidence that Rahab later sold the 1 acre to Beth Nyambura when the 2nd Plaintiff started claiming a half share of the suit land on grounds of trust.

16. The witness produced a list of documents marked as DEX No.s 1-12 in support of her defense in the suit.

17. In cross examination she reiterated her evidence that Josiah sold his family land at Mairi in Kang'ari to one Gakuuya Waruingi in the 1970s. She stated that the registered owner of the suit land was Nganga Mwangi, her father. That though the land was registered in the name of Suleiman he gave it to Josiah. Pressed further she stated that she did not have any evidence in support of her averments. That by the time the land is transferred/sold to Gakuuya on 12/8/1970, Josiah had died on 14/12/1969.

18. Further she testified that Suleiman did not purchase the suit land; that it was family land. Suleiman wrestled the suit land from Mwangi Kiarie, the brother of Gachango Kiarie in a suit between them. No details of the suit were availed by the witness.

19. She testified that Josiah having sold the family land parcel 46 and purchased land in Londiani has no entitlement to the suit land on any account least of all by way of trust. Pressed by the Plaintiffs' Counsel she conceded that she had no documents to authenticate her averments.

20. It was her testimony that Josiah was the son of Mwangi Kiarie and Suleiman was the son of Gachango Kiarie. Both sons shared one mother, Wanjiru Gachango. She alluded that after the death of Gachango Kiarie, his wife Wanjiru was inherited by his brother Mwangi Kiarie. That Josiah therefore should inherit land from Mwangi Kiarie and not Gachango Kiarie. It is her evidence that the Plaintiffs being of the lineage of MWANGI Kiarie are not entitled to the suit land which is rooted in the lineage of Gachango Kiarie.

21. The 2nd Defendant testified and wholly adopted the joint witness statement, the list of documents produced by the 1st Defendant and associated himself fully with the evidence of the 1st Plaintiff.

22. DW3- the Assistant Land Registrar testified and produced the certified copies of the parcel Nos for LOC 2/KANGARI/450 and

LOC2/KANGARI/1000. He led evidence that parcel 450 was the original parcel out of which parcel 1000 was excised from.

23. The Plaintiff submitted that the land was family land and that explains why Rahab gave the Plaintiff one acre to occupy. If the contrary were true, she would not have done so. That Josiah and Suleiman were brothers and the suit land was registered in the name of Suleiman to hold in trust for Josiah as determined by the LDT award in Kigumo. That parcel 450 shows that it was registered in the name of Gachango Kiarie, the father of Josiah and Suleiman.

24. The Defendants testified that the suit arises out of the judgement in the succession Court wherein the Court inter-alia directed the parties to canvass the claim of trust in the ELC Court before the succession Court renders its decision in respect to the succession of the suit land.

25. That Josiah and Suleiman were born of the same mother, Wanjiru but different fathers. The registered owner of parcel 450 was Gachango Kiarie, the father of Suleiman. That after the death of Gachango his brother Mwangi Kiarie inherited his wife Wanjiru together with his properties namely parcels 450 and 46. At this time Suleiman was in Mau detention. Upon his release Suleiman successfully claimed the suit lands from Mwangi Kiarie.

26. That out of brotherly love Suleiman sold a portion of his inheritance from his father Gachango in parcel 46 and gave the proceeds to Josiah which funds were used to purchase Londiani land parcel 152 where he finally settled with the 2nd Plaintiff. That Josiah married the 2nd Plaintiff in 1967 but died in 1969. Upon his death the 2nd Plaintiff moved back to her parents' home until 1975 and in the meantime Mwangi Kiarie settled on the land at Londiani. Suleiman sold 2 acres out of parcel 450 in order to finance the eviction case against Mwangi Kiarie from Londiani land. They cited cases Nos 94 of 1975 and 102 of 1975 between Suleiman and Mwangi Kiarie. Upon removal of Mwangi Kiarie the 2nd Plaintiff moved back to Londiani until 1992 when she and her children relocated due to the land clashes in the area to the suit land where they were offered 1 acre by Rahab, Suleiman's widow. That she signed an agreement stating that she would claim no more land. That she later demanded land and filed suit at the LDT which resolved that she is entitled to 1/2 share of the land. Rahab appealed and the Provincial LDT set aside the decision and directed the parties to file succession as the land was registered under Registered Land Act.

27. As to whether Suleiman held the suit land in trust for Josiah, the Defendants reiterated that Josiah had been given his share of the family land which he sold and acquired the land in Londiani and that explains why Josiah never demanded any land from Suleiman when he was alive or in 1976 when the land was being registered in the name of Suleiman. That Suleiman was the absolute and indefeasible owner of the suit land devoid of any trust. That neither did the Plaintiffs raise any objection in 1976 and only laid claim after being forced out of Londiani land. That there was never an intention to create any trust on the suit land in favour of Josiah as exemplified in the conduct of the two half - brothers during their lifetimes. See the case of **Peter Ndungu Njenga Vs Sophia Watiri Ndungu (2000) ECLR**.

28. Relying on the decision of this honorable Court in the case of **Alice Wairimu Macharia Vs Kirigo Philip Macharia (2019) ECLR** the Defendants submitted that burden of proving trust rests with the one asserting the claim. That trust is a question of fact which must be proved by a claimant. See the case of **Njenga Chogera Vs Maria Wanjira Kimani & 2 others (2005) ECLR**.

29. Further that the property was not held in trust for Josiah nor the Plaintiffs. Whilst citing the case of **Issack Kieba M'Inanga Vs Isaaya Theuri M'Linturi & Anor SCOCK No 10 of 2015** the Defendants stated that the facts of this case do not support a claim in trust.

30. It is their submissions that the Plaintiffs failed to satisfy the burden of proof as to how the alleged trust was created, the circumstances under which it was created and the common intention as to its establishment.

31. Having considered the pleadings, the evidence adduced on trial and the written submissions, the issues that have crystalized for my determination are; whether Suleiman held the suit land in trust for Josiah and consequently the Plaintiffs in this case; who meets the costs of the suit.

32. Customary trust is a concept through which land may be acquired in Kenya. It is anchored in statute. It is an overriding interest in land which need not be registered. It subsists on and binds the land. Article 60 (1) (a) of the Constitution alludes to this concept when it refers to intergenerational and intra-generational equity. 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. If land was passed down from the family member to another, the presumption of trust subject to evidence is high.

33. Section 28 (b) of Land Registration Act provides as follows;

i. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

ii. (a).....

iii. (b) trusts including customary trusts;

34. The provisions of Section 27 & 28 of Registered Land Act, Cap 300 state that the rights of a registered proprietor of registered land under the Act are absolute and indefeasible and only subject to rights and encumbrances noted on the register or overriding interests which are set out under section 30 of the Act. The provisions of 27 & 28 are similar to the provisions set out in section 24, 25 26 & 28 of the Land Registration Act, 2012.

35. Section 30 of the Registered Lands Act provides:

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without them being noted on the registers:

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g. the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such a person and the rights are not disclosed.

One of the overriding interests under Section 30 (g) is the right of the person in possession or actual occupation of the registered property.

36. In the case of **Kanyi Vs Muthiora 1984 KLR 712 CA**, the Court held that the registration of land in the name of a proprietor under the Land Registration Act did not extinguish rights under Kikuyu Customary law and neither did it relieve the proprietor of the duties or obligations as trustee. A customary trust need not be registered on the title. It is an overriding interest that subsists on the land. It binds the land.

37. In the case of **Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others [2005] eKLR** which quoted with approval the holding in the case of **Muthuita –vs- Muthuita [1982 – 88] 1 KLR 42**, the Court of Appeal held that customary law trust is proved by leading evidence on the history (root) of the suit property and the relevant customary law on which the trust is founded and the claimants subscribe to.

38. Similarly in the case of **Peter Gitonga Vs Francis Maingi M’ikiara Meru HC.CC NO. 146 OF 2000**- it was stated that:-

i. A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged”. (emphasis is mine).

39. The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must prove that the suit properties were ancestral clan land; that during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; that the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. See the case of **Issack Kieba M’Inanga Vs Isaaya Theuri M’Linturi & Anor SCOCK No 10 of 2015**

40. In the case of **Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] Eklr 9**(supra) the Court also held that It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because: -

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

41. It is borne of the pleadings and the evidence that the parties are related. The Plaintiffs are son and wife of Josiah while the Defendants are the son and daughter of Suleiman respectively.

42. The relationship between Josiah and Suleiman is in dispute. According to the 2nd Defendant, Josiah and Suleiman were brothers borne of one mother and one father that is to say Wanjiru Gachango and Gachango Kairie. On the other hand, the Defendants have put up a spirited defence that Josiah was the son of Mwangi Kiarie and Wanjiru Gachango while Suleiman was the son of Wanjiru Gachango and Gachango Kiarie. It is conceded by both parties that Gachango Kiarie and Mwangi Kiarie were brothers. Admittedly they are saying that upon the death of Gachango Kiarie his wife Wanjiru was inherited by Mwangi Kiarie with whom they sired Josiah. According to PW2, Suleiman was the son of Mwangi Kiarie. He further contradicted himself and stated that Suleiman was the brother of Gachango Kiarie. The 2nd Plaintiff on the other hand stated that she did not know the history of the family as she got married into the family in 1966 and did not even meet the said Gachango and Wanjiru. She challenged the evidence of DW1 when she asked her source and knowledge of the history when DW1 was much younger than her. The Court is of the view that there is no evidence to support the claim that Josiah and Suleiman were half-brothers. This evidence was not challenged by the Defendants which challenge would have been in form of evidence by an independent witness who was familiar with the history of the family lineage.

43. I will now examine the root of the suit land. It is the evidence of the Defendants that the suit land was a resultant subdivision of parcel 450. According to the evidence adduced by DW3, the Assistant Land Registrar, parcel 450 was registered in the name of Gachango Kiarie on the 22/5/1962. On the 20/2/1976, the land was registered in the name of Peter Mwangi Kibiru (2/15 share) and Suleiman (13/15 share). Upon the partitioning of parcel 450, the resultant subdivision being parcel 1000 was registered in the name of Suleiman on the 24/11/1976. It is the Defendants’ case that Suleiman sold 2 acres of parcel 450 to Peter Kibiru to finance the eviction of Mwangi Kiarie from the Londiani land. The balance is comprised in the suit land which he was registered as an absolute proprietor. The conclusion is that the suit land was excised from the original land parcel 450 which was in the name of the father of the parties which points to a case of a parcel of land rooted in the family lineage.

44. Evidence was led that Josiah relocated to Londiani in 1966 and therefore when the land was being registered in the name of Suleiman, he was not present.

45. The Defendants have admitted in their evidence that the suit land was family land. However, their bone of contention is that Josiah got his share of the family land and sold it and applied the proceeds to purchase the land in Londiani. The 2nd Plaintiff led evidence that the land in Londiani was bought by Josiah (2 acres) through the proceeds of charcoal business that he managed. She testified that later she added

another 5 acres to make it 5 acres and had the land registered in her name. It is acknowledged by the Defendants that parcel No 46 was registered in the name of Suleiman whose other name is Nganga Mwangi in 1962. On the 12/8/1970 it was transferred to Gakuiya Waruingi. According to the grant of administration of the estate of Josiah, it is disclosed that he died on the 14/12/1969. It therefore follows that Josiah did not sell the land to Gakuiya. In any event the said land was registered in the name of Suleiman. The 2nd Plaintiff by then was married to Josiah and if that was the case she would have been consulted. She denied this evidence. Even if it is to be believed that 2 acres was indeed sold for the benefit of Josiah, what was the basis of giving Josiah 2 acres out of 12 acres? In the absence of evidence adduced by the Defendants that Josiah sold parcel 46 to finance the acquisition of Londiani land, the Court finds the evidence shaky and unbelievable.

46. It is the evidence of the Defendants that the Plaintiffs were permitted to reside on the suit land from 1999 to 2018 on account of the benevolence and kindness of their mother, Rahab. The 2nd Plaintiff stated that she enjoyed a good relationship with Rahab and she knew that Josiah's share was in the suit land and that is why she allowed her to stay on the land. The 2nd Plaintiff adduced evidence that Josiah had planted tea before relocating to Londiani which she continued to pick on her return. She adduced evidence in form of tea delivery receipts in 2017 and 2018 to show that the land was still family land. Having weighed the evidence of the Plaintiff against that of the Defendants, it is not plausible for Rahab to have allowed the Plaintiffs to occupy the land if the land was not family land. It is probable that she offered her 1 acre and later 2 acres on recognition that the land was family land. It is admitted by both parties that Suleiman did not purchase the land.

47. Evidence has been led and admitted by the Plaintiffs that they fled the suit land in 2018 after the Defendants descended on the land and forcefully demolished houses and destroyed their houses and fearing for their safety, they sought accommodation elsewhere. That the continuous interference of the Defendants has forced them to stay away from the land despite a Court order that they continue in occupation pending the hearing and determination of the case. The Court of Appeal in the **Kieba** case held that for one to claim for a right to title through customary trust, one need not be in possession.

48. It is the conclusion of the Court that the Plaintiffs are entitled to half share of the suit land having proved customary trust on a balance of probabilities.

49. In the upshot I grant judgment in favour of the Plaintiffs as follows;

a. It is hereby declared that SULEIMAN NGANGA (deceased) held half of the land parcel No LOC2/KANGARI/1000 (suit land) in trust for JOSIAH GACHANGO MWANGI (deceased) and his personal representatives' survivors and beneficiaries.

b. The parties being related I order that each shall bear their costs of the suit.

50. **It is so ordered.**

DATED, SIGNED & DELIVERED BY EMAIL THIS 12TH DAY OF MAY 2020.

J. G. KEMEI

JUDGE