



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 98 OF 2017

MARGARET OMOROJE.....1ST PLAINTIFF
BONIFACE KATHENGE.....2ND PLAINTIFF
PHILLIP KIOKO KATHENGE.....3RD PLAINTIFF
BENSON MBUVI KATHENGE.....4TH PLAINTIFF
NELSON KIEMA KATHENGE.....5TH PLAINTIFF
FRED MBITHI KATHENGE.....6TH PLAINTIFF
ABDALLAH JUMA KATHENGE.....7TH PLAINTIFF
RACHEL SYONTHI MWATU8TH PLAINTIFF

VERSUS

JOHNSON KITHEKA KATHENGE.....1ST DEFENDANT
JACKSON WAMBUA KITHEKA.....2ND DEFENDANT
JAMES KATHENGE KITHEKA.....3RD DEFENDANT
MARGARET MUSUKI KITHEKA.....4TH DEFENDANT
MARTHA KITHEKA.....5TH DEFENDANT
KITHOI MUKUU.....6TH DEFENDANT
CLEOPUS MASILA KINDIU7TH DEFENDANT

JUDGMENT

Introduction:

1. In the Plaintiff dated 1st December, 2015, the Plaintiffs averred that they are the sons and daughters of the late Paul Kathenge Kisithe; that the 1st Defendant is the eldest brother of the Plaintiffs and that the 2nd and 3rd Defendants are the sons of the 1st Defendant while the 4th and 5th Defendants are his wives.
2. The Plaintiffs have averred that in July, 1990, the 1st Defendant caused hitherto un-surveyed portions of land to wit, Kisasi/Nguuni/1266 and 1269 belonging to the late Paul Kathenge Kisithe to be registered in his name to the exclusion of the Plaintiffs; that the Plaintiffs are entitled to a share of the property and that the 1st Defendant is holding the suit properties in trust for them and himself.
3. The Plaintiffs have further averred that in July, 1990, the 1st Defendant caused the hitherto un-surveyed land known as Kisasi/Nguuni plot

number 1265 belonging to the deceased to be registered in the name of Kung'u Kuria, which was then registered in his name and then to the 3rd Defendant in July, 2013.

4. It is the Plaintiffs' case that in the same year, the 1st Defendant caused parcels of land known as Kisasi/Nguuni/342 and 81 belonging to the Plaintiffs' and the 1st Defendant's step-grandmother, one Martha Imale Kisithe, to be registered in his name to the exclusion of the Plaintiffs and that the 1st Defendant then transferred the said land to the 2nd Defendant (*parcel number 342*) and to the 4th Defendant (*parcel number 81*).

5. The Plaintiffs have averred that according to the custom, it was expected that the deceased's land would devolve to the Plaintiffs and the 1st Defendant but not to the 1st Defendant alone; that 1st Defendant caused land parcel number 1267 belonging to the deceased to be registered in favour of the 5th Defendant; that the 1st Defendant caused parcel number Kisasi/Nguuni/347 to be registered in the name of the 2nd Defendant who then sold the land to the 7th Defendant and that he also caused plot number 17 situate at Kisasi market belonging to the deceased to be registered in favour of 2nd, 4th and 5th Defendants.

6. The Plaintiffs are seeking for the following reliefs:

a. A declaration that the 1st Defendant holds Land Reference Kisasi/Nguuni plot numbers 1266 and 1269 in trust for himself and the Plaintiffs.

b. An order for the rectification of the register adding the names of the Plaintiffs to the title to Land Reference Kisasi/Nguuni Plot number 1266 and 1269.

c. A declaration that the 3rd Defendant holds Land Reference Kisasi/Nguuni Plot number 1265 in trust for the Plaintiffs and the 1st Defendant.

d. A declaration that the 2nd Defendant holds Land Reference Kisasi/Nguuni/342 in trust for the Plaintiffs and 1st Defendant.

e. An order for the rectification of the register substituting the name of 2nd Defendant in the title for Land Reference Kisasi/Nguuni/342 with the names of the Plaintiffs and the 1st Defendant.

f. A declaration that the 4th Defendant holds Land Reference Kisasi/Kimuuni/81 in trust for the Plaintiffs and 1st Defendant.

g. An order for the rectification of the register substituting the name of the 4th Defendant in the title for Land Reference Kisasi/Kimuuni/81 with the names of the Plaintiffs and the 1st Defendant.

h. A declaration that the 6th Defendant's title for Land Reference Kisasi/Nguuni Plot Number 1267 was obtained irregularly and wrongfully.

i. An order for the rectification of the register for Land Reference Kisasi/Nguuni Plot Number 1267 substituting the name of the 6th Defendant with name of the Plaintiffs and 1st Defendant.

j. A declaration that the 7th Defendant's title for Land Reference Kisasi/Nguuni/347 was obtained irregularly and wrongfully.

k. An order for the rectification of register for Land Reference Kisasi/Nguuni substituting the name of the 7th Defendant with name of the Plaintiffs and 1st Defendant.

l. A declaration that the 2nd, 4th and 5th Defendants holds Land Reference Block Kisasi/Plot 17 in trust for the Plaintiffs and 1st Defendant.

m. An order for the rectification of register substituting the names of the 2nd, 4th and 5th Defendants in the title for Land Reference Block Kisasi/Plot 17 in trust for the Plaintiffs and 1st Defendant.

n. Costs of this suit.

7. The Defendants did not file a Defence within the prescribed time, or at all.

The Plaintiffs' case:

8. The 2nd Plaintiff, PW1, informed the court that the 1st Defendant is his brother; that the 2nd Defendant is the 1st Defendant's son, and so is the 3rd Defendant and that the 4th and 5th Defendants are the wives of the 1st Defendant. According to PW1, he is the second eldest son of the late Paul Kathenge Kisithe and Sala Nanu Kathenge who died in the year 1971 and 2007 respectively and that the other Plaintiffs are his siblings.

9. It was the evidence of PW1 that the 1st Defendant is the eldest son in the family; that in 1973, their neighbour encroached on their land in Kisasi Market whereafter the 1st Defendant sued him on behalf of the family and that later on, they learnt that the 1st Defendant had sold 9 out of the 10 acres of family land at Kisasi market.

10. PW1 stated that in 1990, the 1st Defendant sub-divided the one (1) acre of land at Kisasi market into six (6) plots for himself; that he registered plot numbers 1262, 1266 and 1269 in his name and that he sold plot numbers 1265 and 1267 to Kung'u Kuria and Kithoi. It was the evidence of PW1 that the 1st Defendant transferred plot numbers 1262 and 1268 to the 4th Defendant.

11. PW1 stated that their late step-grandmother, Martha Imale Kisithe, never had children; that her inheritance was to pass to their family and that during the land adjudication process, the 1st Defendant registered their step-grandmother's land, namely Kisasi/Nguuni/342 and Kisasi/Kimuuni/81 in his name.

12. PW1 stated that parcel number Kisasi/Nguuni/347 belonged to their mother; that it was registered in her name in 1990 and that the 1st Defendant secretly transferred the land in his son's name, the 2nd Defendant in 2010, who then transferred it to the 7th Defendant.

13. It was the evidence of PW1 that the other family land that the 1st Defendant appropriated was plot number 17 in Kisasi market where their father used to carry on business. According to PW1, the 1st Defendant transferred this plot to the 2nd, 4th and 5th Defendants.

14. PW1 stated that to try and resolve the dispute, they had two clan meetings - one on 30th May, 2015 and the other one on 25th July, 2015 and that at the second meeting, the clan agreed that the 1st Defendant revert the land to the family for equal distribution.

15. In cross-examination, PW1 stated that the 1st Defendant held the titles for the family land in trust for the whole family; that they are claiming the suit land as the family members of Paul Kathenge and that they have never filed succession proceedings in respect of their father's Estate.

16. PW1 denied that the 1st Defendant bought any land from Wambua Mulu; that the 1st Defendant did not sue Mulu in his personal capacity and that parcel number 81 belonged to their grandfather who bequeathed it to their step-grandmother.

17. The 3rd Plaintiff, PW2, stated that the eight Plaintiffs and the 1st Defendant are the children of the late Paul Kathenge Kisithe and that their father owned several parcels of land which were un-surveyed at the time of his death in 1971.

18. It was the evidence of PW2 that the 1st Defendant helped their late father run his businesses. PW2 repeated the evidence of PW1 and especially on how the 1st Defendant appropriated their father's, step-grandmother's and mother's land. According to PW2, they are entitled to the suit properties as a family.

19. PW3 stated that he is the Locational Chairman of the Eombe Nthoka Katemi Clan Association (Kenya) of which the Plaintiffs' and the 1st Defendant's family belong; that the Plaintiffs' father was his first cousin and had nine children and that on 25th July, 2015, he attended a clan meeting whose agenda was to discuss a complaint by the Plaintiffs against the 1st Defendant.

20. It was the evidence of PW3 that the Plaintiffs' step-grandmother had no children; that her property was to be shared by the children of Kathenge; that the 1st Defendant unlawfully registered the land in the name of his wife and parcel number 347 was given to the Plaintiffs' mother but the 1st Defendant unlawfully registered it in the name of the 2nd Defendant who then sold it to the 7th Defendant.

21. PW3 stated that the Plaintiffs' father owned plot number 17 situate in Kisasi market where he used to run his business and that the 1st Defendant took over the running of the business on the land. It was the evidence of PW3 that all the property belonging to Kathenge should revert to the family and be shared equally.

22. The Secretary of Eombe Nthoka Katemi Clan Association, PW4, stated that he called a meeting of the clan on 30th May, 2015 and that during the meeting, both the Plaintiffs and other members of the clan were in agreement that the 1st Defendant should share the family property with the Plaintiffs, a suggestion that the 1st Defendant opposed.

Submissions:

23. The Plaintiffs' advocate submitted that the Plaintiffs' and the 1st Defendant's father, the late Paul Kathenge Kisithe, owned various properties; that as at the time of his death in 1971, the land adjudication process had not commenced and that it was during the demarcation process in the 1990's that the 1st Defendant, who was their eldest brother, registered the land belonging to their father in his name and in the name of his children and wives.

24. Counsel submitted that the 1st Defendant could only have been holding the land in trust for himself and his siblings, who are the Plaintiffs herein; that the Defendants did not call any evidence and that the cross-examination of the Plaintiffs and their witnesses did not raise any issue of law that the court can consider.

25. The Defendants' counsel submitted that a party cannot file a claim over a cause of action for a deceased person's Estate without a Grant of Letters of Administration; that the Plaintiffs did not have Letters of Administration and that the suit is incompetent.

26. Counsel submitted that the Plaintiffs' cause of action is time barred; that the alleged fraudulent registration of the Defendants as proprietors of the suit properties took place between the years 1990 and 2000 and that this suit was commenced 15 years from the time the actions, they complained of took place.

27. Counsel submitted that the Plaintiffs did not set out the specific acts constituting fraud; that the Plaintiffs did not plead customary trust and that parties are bound by their pleadings. The Defendants' counsel submitted that the Defendants are the registered proprietors of the suit properties and that the Plaintiffs have not shown that there exists a customary trust. Counsel relied on numerous authorities, including the Supreme Court decision in ***Isack M'inanga Kiebia vs. Isaya Theuri M'lintari & Another (2018) eKLR***.

Analysis and findings:

28. The suit by the Plaintiffs is founded on their Plaint dated 1st December, 2015. In the Plaint, the Plaintiffs pleaded that they are the sons and daughters of the late Paul Kathenge Kisithe and the late Sala Nanu Kathenge, and that the 1st Defendant is their eldest brother. This averment was not rebutted by the Defendants. The other plea that was not rebutted by the Defendants was that the 2nd and 3rd Defendants are the children of the 1st Defendant while the 4th and 5th Defendants are the 1st Defendant's wives.

29. Limitation of Actions Act is not applicable in claims of trusts. In the case of ***Macharia Kihari vs. Ngigi Kihari, Civil Appeal No. 170 of 1993***, the Court of Appeal held as follows:

"We are unable to accept Mr. Thiongo's contention that the suit was time barred. Limitation prescribed in Section 20(2) of the Limitation of Actions Act, will not apply to a trust coming into existence under customary law. Under customary law, the land even after the right of action has accrued, is held in trust even for decades before any step is contemplated for a formal transfer or division. Limitation does not apply in customary law. We reject this ground of Appeal."

30. In ***Stephens & 6 Others vs. Stephens & Another, Civil Appeal No. 18 of 1987***, the court held as follows:

"The period of limitation as prescribed in the Limitation of Actions Act do not apply to actions by a beneficiary under a trust which is an action to recover from the trustee trust properly or proceeds thereof converted by the trustee for his own use."

31. In ***Macharia Kihari vs. Ngigi Kihari (1994) eKLR***, the Court of Appeal held as follows:

"Limitation prescribed in Section 20(2) of the Limitation of Actions Act, will not apply to a trust coming into existence under customary law."

32. PW1 and PW2 pleaded and testified that their father owned land measuring 10 acres at Kisasi market, and that when one of the neighbours encroached on the land, the 1st Defendant on behalf of the family, sued him and won the case. However, he went ahead to sell 9 acres, and sub-divided the remaining 1 acre into several plots known as parcels number 1262, 1265, 1266, 1267, 1268 and 1269. All these plots, according to the Plaintiffs belong to the family.

33. The Plaintiffs' case is that plot number Kisasi/Nguuni/342 belonged to their late step-grandmother, and that because she did not have children and was taken up by their family, her land, upon her death, reverts to the family. The Plaintiffs' evidence was that plot number Kisasi/Nguuni/347 belonged to their late mother while Kisasi plot number 17 belonged to their late father. In the Plaint, the Plaintiffs have pleaded that the said parcels of land are held in trust for the Plaintiffs and the 1st Defendant.

34. Although the suit was undefended, the Defendants' advocate raised legal issues in his submissions to the effect that; firstly, the Plaintiffs do not have the requisite *locus standi*; secondly, that the suit is time barred; thirdly, that the Plaintiffs did not plead and prove customary trust and lastly, that the Plaintiffs have not shown that there exists customary trust.

35. The Plaintiffs produced in evidence the Abstracts of Title for Kisasi/Nguuni plot numbers 1265, 1266 and 1267; Kisasi/Nguuni/81, 342 and 347. The Abstract of Title of the parcel of land registered as Kisasi/Nguuni/1266 shows that the same was registered in favour of the 1st Defendant on 23rd July, 1990, the register having been opened on the same day. The land has a charge in favour of Kenya Commercial Bank.

36. The Abstract of the Register of parcel of land known as Kisasi/Nguuni/1269 was registered in favour of the 1st Defendant on 23rd July, 1990 and charged to Kenya Commercial Bank on 9th August, 1991, while parcel number Kisasi/Nguuni/1265 was registered in favour of Kung'u Kuria, before it was registered in favour of the 1st Defendant on 20th September, 2012. On 4th March, 2013 the said plot was transferred to the 3rd Defendant.

37. The Abstract for parcel number Kisasi/Nguuni/1267 was registered in favour of Kithoi on 23rd July, 1990, which is the same date that the register of the said title was opened.

38. Although PW1 and PW2 informed the court that parcels number Kisasi/Nguuni/1267, 1266, 1269, 1265 and 1267, whose titles they have produced in evidence, were a sub-division of one (1) acre piece of land, no mutation or any other form of evidence was produced to how the said plots were created.

39. Indeed, having stated that their father owned ten (10) acres in Kisasi Market, and that a neighbour encroached on the said land whereafter the 1st Defendant sued him on behalf of the whole family, the Plaintiffs should have produced in evidence the proceedings to enable the court

ascertain the history of the said land. Indeed, an assertion that one (1) acre piece of land within Kisasi market was not enough to prove, on a balance of probabilities, to show that the land belonged to their late father.

40. Considering that some of the parcels of the suit land like parcel number 1267 is not even registered in the name of the 1st Defendant, or his children or wives, but to a stranger to the family, and parcel of land number 1265 having been registered in the name of Kung'u Kuria as the first registered proprietor before it was transferred to the 1st Defendant, I find that the Plaintiffs did not prove that the plot numbers 1262, 1264, 1265, 1266, 1267, 1268 and 1269 ever belonged to their late father. Other than the Abstracts, the Plaintiffs should have tendered more evidence to show how their father acquired the land before he died in 1971, if at all.

41. The Abstract for parcel of land known as Kisasi/Nguuni/341 shows that the register was opened on 23rd July, 1990. On the same day, the said land measuring approximately 1.0 Ha was registered in favour of the 1st Defendant before he transferred it to Jackson Wambua Kitheka. The Abstract for parcel of land known as Kisasi/Kimuuni/81 shows the register was opened on 1st January, 2000 and the same registered in favour of the 1st Defendant the same day before he transferred it to the 4th Defendant on 1st July, 2003.

42. The oral evidence of PW1 and PW2 was that the two parcels of land belonged to their step-grandmother, and that because she was under the care of their family and did not have children, the same should have been allocated to all the Plaintiffs and the 1st Defendant.

43. The Plaintiffs did not show by way of evidence how the said two parcels of land were created, neither did they show the nexus between the said parcels of land and their late grandmother. This also applies to parcel number 347 which allegedly belonged to their late mother.

44. The law relating to customary trust in Kenya was settled by the Supreme Court of Kenya in the case of *Isack M'inanga Kiebia vs. Isaaya Theuri M'lintari and Isack Ntongai M'lintari (2018) eKLR* as follows:

“[52] Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

Each case has to be determined on its own merits 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 v. 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 presumed to have been 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:

- 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.”*

45. The Plaintiffs in this case failed to establish that before registration, the suit properties belonged to their late father, mother, step-grandmother or was family land. Indeed, the two clan elders did not add any value to the Plaintiffs' case. The question of how a trust is created is a question of fact to be proved by evidence, which the Plaintiffs failed to do.

46. Considering that the customary law trust has to be established by way of evidence, I find that the Plaintiffs did not prove their case on a balance of probabilities. The Plaintiffs' suit is therefore dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF MAY, 2020.

O.A. ANGOTE

JUDGE