



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 1332 OF 2013**

**KIMUHU KIMANDO KANGARA.....PLAINTIFF**

**VERSUS**

**KANGARA KIMANDO.....DEFENDANT**

**JUDGMENT**

1. The defendant is the registered proprietor of all those parcels of land known as Title No. Kiambaa/Kanunga/920, Kiambaa/Kanunga/921 and Kiambaa/ Kanunga/1483 (hereinafter referred to only as “the suit properties”). The suit properties are subdivisions of Title No. Kiambaa/Kanunga/329(hereinafter referred to as “the original parcel”). The original parcel was registered in the name of the defendant on 24<sup>th</sup> May, 1958 after land adjudication and demarcation in the area where the original parcel is situated. The defendant was the first registered owner of the original parcel. The defendant’s father was known as Kimando Kangara while his mother was known as Maria Wambui Kimando alias Wambia. The defendant’s father died in 1950 before the process of land adjudication mentioned above took place. The defendant’s father left the defendant’s mother with two (2) children namely; Mungai Kimando, deceased and the defendant. The defendant’s father had five (5) wives. The defendant was the eldest son in his mother’s house.

2. The plaintiff is a step-brother of the defendant. The plaintiff was born in 1959, 9 years after the death of the defendant’s father in a relationship between the defendant’s mother and another man. The original parcel was ancestral land. During land adjudication, the original parcel was registered in the name of the defendant as the eldest son to hold in trust for the family of Kimando Kangara who was deceased by then. On 31<sup>st</sup> May, 1988, the defendant subdivided the original parcel into two portions; Kiambaa/Kanunga/874 and Kiambaa/Kanunga/875. Kiambaa/Kanunga/874 was subsequently subdivided to give rise to Kiambaa/Kanunga/1482 and Kiambaa/ Kanunga/1483. Kiambaa/ Kanunga/875 was also subdivided into two portions namely, Kiambaa/Kanunga/920 and Kiambaa/ Kanunga/921. The defendant transferred Kiambaa/Kanunga/1482 to his brother Mungai Kimando, deceased and remained with Kiambaa/Kanunga/920, Kiambaa/Kanunga/921 and Kiambaa/ Kanunga/1483 (hereinafter referred to only as “the suit properties” where the context so permits) in his name.

3. The plaintiff brought this suit on 5<sup>th</sup> November, 2013 claiming that the defendant held the original parcel in trust for him and that he was entitled to be registered as the owner of a portion measuring a total of 0.7 acres of Kiambaa/Kanunga/920, Kiambaa/Kanunga/921 and Kiambaa/ Kanunga/1483 (the suit properties) which were registered in the name of the defendant. The defendant filed a defence on 27<sup>th</sup> November, 2013 denying the plaintiff’s claim in its entirety. The defendant averred that as at the time of his death, his father had only two children. The defendant averred that upon the death of his father, his mother opted to remarry and was married to one, Njuguna with whom she had the plaintiff. The defendant denied that he held the original parcel in trust for the plaintiff and that he had breached the alleged trust.

4. At the trial, the parties gave evidence and called one witness each. The evidence by the parties and their witnesses are on record and it is not necessary to rehearse the same in this judgment. After the close of the defendant’s case, the parties were directed to make closing submissions in writing. The plaintiff filed his submissions on 18<sup>th</sup> September, 2019 while the defendant filed his submissions on 2<sup>nd</sup> December, 2019. In his submission, the plaintiff submitted that the defendant was appointed as the *Muramati* for his mother’s house that was made up of the defendant, their mother and two brothers, Mungai Kimando and the plaintiff. The plaintiff reiterated that the defendant held the original parcel in trust for their mother’s house which was the 5<sup>th</sup> house of the deceased, Kimando Kangara. With regard to the defendant’s contention that he was not a child of Kimando Kangara and as such the defendant did not hold the original parcel in trust for him, the plaintiff submitted that their mother Maria Wambui remained the wife of Kimando Kangara until her death and that there was no evidence that she remarried after the death of Kimando Kangara. The plaintiff submitted that if their said mother had remarried, she could not have been buried on the original parcel on her death. In support of his submission, the plaintiff cited Njuguna & 5 others v Njuguna [1983]eKLR, in which the Court of Appeal stated that;

**“Under customary law the eldest son inherits land to hold it in trust for himself and the other heirs. This is a firmly embedded and regular feature of land holding among the Kikuyu in Kenya. Normally no “uramati” is given. It is a derivative duty which by custom falls upon the eldest son, and he discharges it also as a moral obligation.”**

5. The plaintiff submitted that at the time of land adjudication, the plaintiff’s mother who was also the mother of the defendant was alive.

The plaintiff submitted that there was no dispute that he was a dependant of his mother, Maria Wambui Kimando. The plaintiff reiterated that the defendant held the original parcel in trust for his mother, Maria Wambui Kimando and her children who included the plaintiff. The plaintiff submitted that since it was not disputed that his mother, Maria Wambui Kimando was a wife of Kimando Kangara, it must be presumed that the children born of her during that union were the children of Kimando Kangara. The plaintiff submitted that if the defendant was serious that he was not his brother, he would not have allowed him to occupy the original parcel for over 50 years.

6. In his submissions in reply, the defendant argued that the plaintiff who was born 9 years after the death of Kimando Kangara was neither a son nor a dependant of Kimando Kangara and as such was not entitled to inherit his property. In support of this submission, the defendant relied on Re Estate of M'boroki s/o Maraja[2009]eKLR that was cited in Re Estate of the Late Wandimu Munyi[2019]eKLR where the court stated that:

**“That exclusion is in my opinion in order for a child born posthumously to a widow not less than nine months upon the death of the husband cannot be regarded as having survived the deceased and is therefore not entitled to inherit the net estate.”**

The defendant submitted further that the estate of Kimando Kangara was distributed in accordance with Kikuyu Customary Law which was the operative law at the time of the death of Kimando Kangara in 1950 which law permitted discrimination on matters of personal law and inheritance. The defendant submitted that as the first born son of Kimando Kangara in his mother's house, he held the property in trust for the other sons in that house. The defendant submitted that wives were not entitled to inherit land under Kikuyu Customary Law and that he gave his mother a portion of land measuring 0.2 acres out of love, mercy and respect since she had been chased away from the home where she remarried after the death of Kimando Kangara. The defendant submitted that the plaintiff lived with their mother on that portion of land until her demise and that it was the same portion of land that he had offered to give to the plaintiff.

7. I have considered the plaintiff's case as pleaded and the evidence that was tendered in proof thereof. I have also considered the defendant's statement of defence and the evidence that was tendered by the defendant in his defence. Finally, I have considered the submissions filed by the parties. The parties did not agree on the issues for determination by the court. From the pleadings, I am of the view that the issues arising for determination in this suit are as follows;

- i. Whether the defendant holds the suit properties in trust for himself and the plaintiff?
- ii. Whether the plaintiff is entitled to the reliefs sought in the plaint?
- iii. Who should bear the costs of the suit?

Whether the defendant holds the suit properties in trust for himself and the plaintiff?

8. There is no dispute that the suit properties are registered in the name of the defendant. As I stated earlier, the original parcel that gave rise to the suit properties was registered in the name of the defendant on 24<sup>th</sup> May, 1958. It is common ground that the defendant was the first registered owner of the original parcel. The original parcel was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Although the defendant was registered as the proprietor of the original parcel on first registration, his rights were subject to whatever duty or obligation that he owed as a trustee in relation to the said property. See, the proviso to section 28 of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) and section 25 (2) of the Land Registration Act, 2012. See also, Kanyi v Muthiora [1984] KLR 712 and Gatimu Kinguru v Muya Gathangi [1976] KLR 253.

9. The plaintiff's case is that the defendant held the original parcel in trust for him. The plaintiff brought this suit to enforce that trust. The law is now settled that the existence of a trust must be pleaded and proved. The onus was upon the plaintiff to prove the trust which is the basis of his claim against the defendant. In Mwangi Mbothu & 9 others v Gachira Waitimu & 9 Others [1986] eKLR, the court stated that;

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

In Mumo v Makau[2004] 1 KLR 13 , it was held that:

**“1. Trust is a question of fact and has to be proved by evidence. Section 28 of the Registered Land Act Contemplates the holding of land in trust.**

**2. There is nothing in the Registered Land Act which precludes the declaration of trust in respect of registered land, even if it is a first registration.”**

In Muiruri v Kimemia[2002] 2KLR 677 it was held that:

**“A party relying on the existence of trust must prove through evidence the existence of such trust.”**

The plaintiff's claim is based on customary trust. In his submission, the plaintiff submitted that his claim is based on Kikuyu customary trust known as *Uramati*. In Gatimu Kinguru v Muya Gathangi (*supra*) Madan J. referred to his earlier decision in Mwangi Muguthu v Maina Muguthu, High Court Civil Case No. 377 of 1968 where he had stated as follows:

**“As regards Section 126, there is no need to register the defendant as “trustee.” He was registered as owner as the eldest son of the family in accordance with Kikuyu Custom which has the notion of trust inherent in it. Ordinarily in pursuance of Kikuyu custom he would have transferred a half share in “Marango” (land) to the plaintiff. In any event this section does not make registration “as trustee” obligatory. It states may be described by that capacity.”**

In Muthuita v Wanoe[1982] KLR 166 at pages 169 and 170, Potter J.A stated that:

**“In Gatimu Kinguru v. Muya Gathangi [1976] KLR 253 Madan J(as he then was) held that the absence of any reference to a trust in the instrument of acquisition of the land does not affect the enforceability of the trust as the provisions of section 126(1) of the Registered Land Act as to the reference to the capacity as trustee in the instrument of the acquisition are not mandatory but merely permissive. That decision has been followed and in my respectful opinion it is correct. .... In the High Court the learned judge correctly directed himself as to the functions of a first appellate court and as to the relevant provisions of the Registered Land Act, and having carefully reviewed the evidence, found that the appellant was registered as proprietor of the suit premises as trustee for himself and the three plaintiffs. In my view there was ample evidence of the history of the suit land and of the relevant customary law on which the learned judge could find as he did. With respect I agree with the learned judge.” (emphasis added)**

10. It is common ground that the original parcel was ancestral land before it was registered in the name of the defendant. Before the original parcel was registered in the name of the defendant, it was owned by the defendant’s father, Kimando Kangara, deceased. It is also common ground that the defendant’s father, Kimando Kangara died before land adjudication took place and that the original parcel was registered in the name of the defendant as the eldest son in the house of his mother, Maria Wambui Kimando alias Wambia to hold in trust for the heirs of Kimando Kangara in that house. The only issue in contention is whether the plaintiff was among the heirs of Kimando Kangara on whose behalf the defendant held the original parcel in trust. It is common ground that Kimando Kangara was not the biological father of the plaintiff. The plaintiff was born 9 years after his death.

11. It is also common ground that when the original parcel was registered in the name of the defendant on 24<sup>th</sup> May, 1958, the plaintiff had not been born. I am unable to see how the defendant could have become a trustee of the plaintiff in respect of the original parcel before the plaintiff was born. I am also unable to see from the evidence on record any basis upon which the plaintiff can lay a claim to land that belonged to Kimando Kangara who was not his father. I am in agreement with the defendant that there is no basis upon which the defendant can be said to have held the original parcel in trust for the plaintiff. It is my finding therefore that the plaintiff has not established the customary trust on which his case is based.

Whether the plaintiff is entitled to the reliefs sought in the plaint.

12. As I have stated above, the plaintiff’s claim was based on customary trust. I have made a finding that the plaintiff has not proved the existence of the trust. In the circumstances, the plaintiff’s claim is not proved on a balance of probabilities. The plaintiff is therefore not entitled to the reliefs sought in the plaint. At the trial, the defendant indicated that he was willing to give the plaintiff a portion of land measuring 0.2 acres on an ex gratia basis. Since the plaintiff is occupying one of the parcels of land in dispute, I will direct that the said portion of land that was offered to him be transferred to him so that he is not evicted from the suit properties which he seems to be occupying without any right to do so.

Who should bear the costs of the suit?

13. Costs follow the event. The plaintiff has failed in his claim against the defendant. No reason has been put forward to warrant a departure from the general rule on costs. Since the parties are relatives, I would have ordered each party to bear its own costs. I have however noted from the record that this is not the first suit that the plaintiff has brought against the defendant and it may not be the last. The defendant has had to defend himself against other cases brought against him by the plaintiff over the same subject matter. Due to the foregoing, the plaintiff shall pay the costs of the suit to the defendant.

Conclusion

In the final analysis and for the forgoing reasons, I find no merit in the plaintiff’s suit. The suit is dismissed with costs to the defendant. On an ex gratia basis, the defendant shall transfer to the plaintiff at the plaintiff’s own cost within sixty (60) days from the date hereof, a portion of land measuring 0.2 acres from Kiambaa/Kanunga/920, Kiambaa/Kanunga/921 and Kiambaa/ Kanunga/1483 or from any one of them. In determining the portion of the said parcels of land to transfer to the plaintiff, the defendant shall take into consideration the location of the plaintiff’s residence. The defendant shall not be obliged to effect the ex gratia transfer of the said portion of land measuring 0.2 acres if the plaintiff is dissatisfied with this judgment and opts to challenge the same which is his right. This is because it would not be necessary to disturb the status quo if there is prospect of the orders given herein being reversed.

**Delivered and Signed at Nairobi this 18<sup>th</sup> day of June 2020**

**S. OKONG’O**

**JUDGE**

**Judgment read through Microsoft Teams Video Conferencing platform in the presence of;**

N/A for the plaintiff

Mr. Maina h/b for Ms. Waithira Mwangi for the defendant

Ms. C. Nyokabi-Court Assistant