



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 116 OF 2017**

**JECINTA WANJIKU NJUKI.....PLAINTIFF**

**VERSUS**

**JANE WAMBURA MUGO.....1<sup>ST</sup> DEFENDANT**

**ELIUD MURAGE RURIGA.....2<sup>ND</sup> DEFENDANT**

**JACOB MUGO MURAGE.....3<sup>RD</sup> DEFENDANT**

**SILAS RURIGA MURAGE.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

In a plaint dated 26<sup>th</sup> July 2017 and amended on 26<sup>th</sup> June 2018, the plaintiff sought judgment for the following orders:

***(a) A declaration that customary trust existed in respect of land parcel No. MWERUA/KABIRIRI/1909 and a further declaration that by operation of the law, the plaintiff is entitled to a share of her father's property. The defendant therefore held 2 acres out of the land in trust for the plaintiff.***

***(b) An order for determination of the trust and that land parcel No. MWERUA/KABIRIRI/4044, a resultant parcel of subdivision, be transferred to the plaintiff.***

***(c) Costs of the suit with interest.***

On 9<sup>th</sup> November 2017, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed their joint statement of defence and defence to the amended plaint on 12<sup>th</sup> July 2018.

**PLAINTIFF'S CASE**

The plaintiff in her testimony stated that land parcel No. MWERUA/KABIRIRI/347 measuring approximately 25 acres belonged to their father. She stated that their father had two wives and after his death, the land was shared out with each household getting ten (10) acres. The remaining five (5) acres was given to one William Gakono who was a brother to their father. The plaintiff further stated that her mother Eunice Wanjiru was given land parcel No. MWERUA/KABIRIRI/1909 and that before her death, the said parcel of land was sub-divided into two portions. She said that the resultant parcels were MWERUA/KABIRIRI/1976 and 1977.

Parcel No. MWERUA/KABIRIRI/1976 was registered in the name of Eliud Murage Ruriga the defendant herein while parcel No. MWERUA/KABIRIRI/1977 was registered in the name of Jane Wambura Mugo, sister to both parties herein.

**DEFENDANTS CASE**

The 2<sup>nd</sup> defendant, Eliud Murage Ruriga stated that the 1<sup>st</sup> defendant is his sister and the 3<sup>rd</sup> and 4<sup>th</sup> defendants are her sons. He stated that land parcel No. MWERUA/KABIRIRI/1909 measuring approximately 10 acres belonged to their mother Eunice Wanjiru Ruriga (deceased) and that their mother shared the land in the presence of all of them including the plaintiff as follows:

- Eliud Murage Ruriga - 8 acres

He further stated that the plaintiff was present and she said that she did not want to have a share of the same since she was married and she had her own land together with her husband. She also stated that sometimes in the year 2004, the land was sub-divided into four portions and the resultant parcels being MWERUA/KABIRIRI/1976 was given to him and parcel No. MWERUA/KABIRIRI/1977 was given to Jane Wambura Mugo, the 1<sup>st</sup> defendant herein. He stated that in July 2017, he sub-divided land parcel No. MWERUA/KABIRIRI/1976 into four (4) portions and the resultant parcels were MWERUA/KABIRIRI/4043, 4044, 4045 and 4046 respectively. He said that he gave land parcels Number MWERUA/KABIRIRI/4043 to the 4<sup>th</sup> defendant and 4045 to the 3<sup>rd</sup> defendant while he sold land parcel No. MWERUA/KABIRIRI/4046 to finance the sub-division of the land and that he remained with land parcel No. MWERUA/KABIRIRI/4044 which now belongs to him. He stated that he lives on the said land parcel No. 4044 with his family and that they have fully developed the same.

#### SUBMISSIONS BY THE APPLICANT

The applicant through the firm of Maina Kagio submitted that there is no dispute that the initial parcel of land was an ancestral land which belonged to the plaintiff's father and upon his demise, the plaintiff's mother succeeded ten (10) acres. The applicant also submitted that according to the defendant, the plaintiff had renounced her right to inheritance in a meeting that had allegedly been convened. However, he submitted that there was no evidence tendered to prove such allegation and that no minutes of such a meeting were produced. The learned counsel cited the following authorities:

- (1) *Mbui Mukango Vs Gerald Mutwiri Mbui C.A. No. 281 of 2000 (UR)*
- (2) *Elizabeth Njoki & Mary Nyawira Muriuki Vs Muthoni Muriuki & others*
- (3) *Section 35 (1) of the Succession Act.*

#### DEFENDANTS SUBMISSIONS

The firm of R. Muthike Makworo & Co. Advocates submitted that the plaintiff has failed to prove her case to the required standards. She stated that the plaintiff failed to prove that the registration of her mother in the title created a trust and that the plaintiff never challenged the subsequent registration of the defendant and her sister.

#### ANALYSIS AND DECISION

I have considered the evidence adduced by the plaintiff and the defence. I have also considered the submissions by the counsels and the applicable law. The plaintiff's claim is based on customary trust. **Justice Okongo** stated how customary trust can be determined in the case of *Richard Nyamemba Auka & 2 others Vs Josephine Motarohi & 2 others* as follows:

***“The existence or not of a customary trust is a matter of fact. The alleged trust must be pleaded, particularized and proved ..... Customary trust is classified as an overriding interest which means that it may affect registered owner although it does not appear in the register ..... “***

Again, **Section 28 of the Land Registration Act No. 3 of 2012** recognizes customary trust and provides as follows:

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

- (a) .....
- (b) ***Trust including customary trust”***

The parties gave their testimony and the following came out as undisputed facts:

- (i) *That the plaintiff and the 2<sup>nd</sup> defendant are sister and brother*
- (ii) *That their father was known as Ruriga Kariuki and was given land parcel No. MWERUA/KABIRIRI/347 measuring approximately 25 acres by the clan.*
- (iii) *That the plaintiff/2<sup>nd</sup> defendant's father had two wives.*
- (iv) *That the mother to the plaintiff and the 2<sup>nd</sup> defendant was Eunice Wanjiru Ruriga*
- (v) *Upon demise of their father, a succession cause was filed whereby the title to the land was closed on partition whereby William Gakono Ruriga received 5 acres while the two wives of the deceased received 10 acres each.*
- (vi) *The plaintiff's and the 2<sup>nd</sup> defendant's mother upon receiving the 10 acres gave 8 acres to the 2<sup>nd</sup> defendant and 2 acres to*

Jane Wambura Mugo who is the 1<sup>st</sup> defendant herein.

(vii) Consequently, the title to land parcel No. MWERUA/KABIRIRI/1909 was closed on sub-division creating land parcel Numbers MWERUA/KABIRIRI/1976 measuring 8 acres and MWERUA/KABIRIRI/1977 measuring 2 acres.

The one and only issue for determination in this case is whether the plaintiff was able to establish customary trust and what share, if any. The plaintiff in her evidence stated that her father shared his land between his two wives and her mother's household was given ten (10) acres being land parcel No. MWERUA/KABIRIRI/1909. She stated that the land was registered in favour of their mother's name Eunice Wanjiru Ruriga to hold in trust. She further stated that their mother sub-divided the land and gave the 1<sup>st</sup> defendant 2 acres and gave Eliud Murage Ruriga who is the 2<sup>nd</sup> defendant eight acres. I am satisfied that the plaintiff has proved the existence of a customary trust in the original land parcel No. MWERUA/KABIRIRI/347 which is a family clan land. When the land was sub-divided by the proprietor between his two wives and the plaintiff's and the 1<sup>st</sup> and 2<sup>nd</sup> defendant's mother Eunice Wanjiru Ruriga, she was also to hold the same in trust for her children including the plaintiff herein. Before the plaintiff's father died, he shared his land between his two wives where each household was given ten (10) acres. He was not only performing his obligation as a responsible father in sharing resources equally between his two wives, but he was also alive to the fact that he was holding the land in trust for the family the same way he had been given. When the plaintiff's mother was given the land, she was also expected to hold the same in trust and share it amongst all her children in a proportionate manner. The explanation by the 2<sup>nd</sup> defendant Eliud Murage Ruriga that the plaintiff had renounced her right to inheritance in a meeting that had been convened was not corroborated by minutes of the purported meeting considering that the plaintiff denied the existence of such a meeting. If the plaintiff's mother opted to distribute the suit land which was a trust land during her lifetime, she should have done so in the spirit of **Section 35 (1) of the Law of Succession** which provides as follows:

***“Subject to the provisions of Section 40, when an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to:-***

***(a) The personal and household effects of the deceased absolutely and***

***(b) A life interest in the whole residue of the net intestate estate”.***

In the case of *M' IKIUGU M' Mwirichia and another Vs Esther Ntruiria M' Ikiugu and 2 others, Nyeri Court of Appeal Case No. 95 of 2009*, the Court stated as follows:

***“Whether as an issue of inter-generational equity arising from ancestral land, or trust arising from rights under customary law, the conclusion is that the first appellate held the suit land for the respondents and that he was not at liberty to dispose of the same without prior approval of the ultimate beneficiaries”.***

A similar dispute arose in the case of *Mbui Mukangu Vs Gerald Mutwiri Mbui C.A. No. 281 of 2000 (Nyeri) reported in (2004) e K.L.R* where it was held thus:

***“It is significant we think, that unlike Muriuki Marigi case (supra) where the father had his own land and could therefore do whatever he wished with it, the land registered in the name of Mbui was ancestral land that devolved to him on the death of his father, it was unregistered land held under custom but the tenure changed during land consolidation process and subsequent registration under the Registered Land Act. It is a concept of inter-generational equity where the land is held by one generation for the benefit of succeeding generations .....”.***

I cannot agree more with the two decisions by the Judges of the superior Court. The plaintiff's mother Eunice Wanjiru Ruriga was registered as proprietor of land parcel No. MWERUA/KABIRIRI/1909 in trust for all her children and she could not distribute it as she wished but she was under obligation to distribute it to all the children, male or female without favour or discrimination. There was no basis or reasonable explanation why she decided to give Eliud Murage Ruriga the 2<sup>nd</sup> defendant 8 acres and Jane Wambura Mugo 2 acres leaving the plaintiff without a share of her father's clan/customary land. *Makhandia J.* (as he then was) faced with a similar dispute made a strong statement on the issue of discrimination against daughters generally in the case of *RE ESTATES OF SOLOMON NGATIA KARIUKI (DECEASED) (2008) e K.L.R* as follows:

***“The law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary law. Like most other customary laws in this country, they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forgo their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family”.***

I fully agree with the observation by the learned Judge. Turning now to the instant suit, I find that the 1<sup>st</sup> and 2<sup>nd</sup> defendants though registered as proprietors of land parcel No. MWERUA/KABIRIRI/1976 and 1977 held the same in trust for the plaintiff and their siblings. The sub-division of land parcel No. MWERUA/KABIRIRI/1976 by the 2<sup>nd</sup> defendant into four portions being MWERUA/KABIRIRI/4043, 4044, 4045 and 4046 did not relieve him of his obligation as a trustee. The transfer of land parcels No. MWERUA/KABIRIRI/4043 and 4045 to his sons Jacob Mugo Murage and Silas Ruriga Murage was therefore null and void. The 2<sup>nd</sup> defendant would not transfer the land to the third generation while his siblings including the plaintiff have not been given any share.

The customary/clan land rights are still intra-generational and not yet inter-generational. The 2<sup>nd</sup> defendant is registered as proprietor of land parcel No. MWERUA/KABIRIRI/4044 measuring approximately 0.873 Ha. while his sons Jacob Mugo Murage and Silas Ruriga Murage are registered as proprietors of land parcels No. MWERUA/KABIRIRI/4045 and 4043 respectively. The two parcels registered in the names of his two sons are measuring 1.01 Ha and 1.01 Ha. each. The transfer by the 2<sup>nd</sup> plaintiff of the two parcels of land to his two sons was un-procedural, irregular and un-lawful. Being an ancestral land, the 2<sup>nd</sup> defendant had no capacity to gift ancestral land to his children before his own siblings who are intra-generational have gotten a share from their father's ancestral land. Since I have held that the two land parcels No. MWERUA/KABIRIRI/4043 and 4045 were acquired unlawfully, un-procedural and irregularly, I am satisfied that the plaintiff has proved his claim on a balance of probabilities and enter judgment for the plaintiff against the defendants as follows:

***(1) A declaration that customary trust existed in respect of land parcel No. MWERUA/KABIRIRI/1909 and a further declaration that by operation of the law, the plaintiff is entitled to a share of her father's property.***

***(2) The two parcels of land transferred to Jacob Mugo Murage and Silas Ruriga Murage, the 3<sup>rd</sup> and 4<sup>th</sup> defendants being L.R. No. MWERUA/KABIRIRI/4043 and 4045 was irregular, un-procedural and illegal and the two titles are hereby cancelled.***

***(3) An order for determination of the trust and that land parcels number MWERUA/KABIRIRI/4043 and 4045, a resultant parcels of sub-division be transferred to the plaintiff to hold in trust for herself and the siblings who did not get a share.***

***(4) In view of the close relationship between the parties, I order each party to bear her own costs.***

READ, DELIVERED and SIGNED in open Court at Kerugoya this 12<sup>th</sup> day of June, 2020.

**E.C. CHERONO**

**ELC JUDGE**

In the presence of:

1. Ms Wambui holding brief for Maina Kagio for Plaintiff
2. Ms Makworo for Defendant
3. Mbogo – Court clerk.