



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 220 OF 2013

NDEGE KABIBI KIMANGA.....1ST PLAINTIFF

AGNES WANGECHI.....2ND PLAINTIFF

VERSUS

KARINGA GACIANI.....1ST DEFENDANT

BEATRICE MUTHONI KARINGA.....2ND DEFENDANT

EUNICE WAGATWE KARINGA.....3RD DEFENDANT

MWANGI KARINGA.....4TH DEFENDANT

DENIS MURIMI KARINGA.....5TH DEFENDANT

MARY MUTHONI KARINGA.....6TH DEFENDANT

SARAH WANJIRU NJOGU.....7TH DEFENDANT

JOHN WAWERU KARINGA.....8TH DEFENDANT

SAMUEL WACHIRA KARINGA.....9TH DEFENDANT

FRANCIS GITHINJI KARINGA.....10TH DEFENDANT

FREDRICK KAVATIA KARINGA.....11TH DEFENDANT

JACKSON MACHARIA KARINGA.....12TH DEFENDANT

BEATRICE MUTHONI KARINGA.....13TH DEFENDANT

JUDGMENT

The plaintiffs filed this suit on 21st December 2011 seeking the following orders against the defendants:-

(a) Cancellation of the registration of the defendants from the register as proprietors of land parcels No. MUTIRA/KAGUYU/4932, 4933, 4934, 4935, 4936, 4937, 4938, 4939, 4940, 4941, 4942 and 4943 and consolidation of the same into the former land parcel No. MUTIRA/KAGUYU/637.

(b) Determination of transfer (sic) – the plaintiff must have meant determination of trust – and thereafter transfer of 1.5 acres each out of land parcel No. MUTIRA/KAGUYU/637 to the plaintiffs.

(c) Costs of the suit.

(d) Interest on (c) above at Court rates.

(e) Any other or further relief this Honourable Court may deem fit to grant.

According to the pleadings, the 1st plaintiff is a brother to the 2nd defendant whereas the 2nd plaintiff is a sister-in-law to the 1st plaintiff and 1st defendant. The 1st defendant is husband to the 2nd and 3rd defendants whereas the 4th to 13th defendants are their children. It is the plaintiffs case that the 1st defendant (although the pleadings wrongly say it is the 1st plaintiff) was registered to hold land parcel No. MUTIRA/KAGUYU/637 in trust for all the family members but on 16th February 2011, the 1st defendant fraudulently caused the said land to be sub-divided into portions number MUTIRA/KAGUYU/4932 to 4943 which he then transferred to the other defendants herein. The particulars of fraud are pleaded in paragraph seven (7) of the plaint.

In a joint statement of defence, the defendants deny that the 1st defendant was registered as proprietor of land parcel No. MUTIRA/KAGUYU/737 (suit land) in trust for the plaintiffs. The defendants also deny all the allegations of fraud adding that they are the absolute proprietors of the resultant sub-divisions of the suit land and that if the plaintiffs have any claim at all, it should be on land parcel No. MUTIRA/KAGUYU/635 owned by their late father **KABIBI KIMANGA** and not on the suit land.

The defendants further plead that this suit is time barred by virtue of the *Limitation of Actions Act* and is also res-judicata in view of the decision in **Arbitration Case No. 37 of 1982** and **KERUGOYA L.D.T Case No. 13 of 2011**.

Pre-trial directions having been finalized, the trial commenced before me on 17th February 2014.

The two plaintiffs testified and called as their witness **CHARLES NGIRIGACHA KABIBI** (PW3).

The 1st plaintiff **NDEGE KABIBI KIMANGA** (PW1) told the Court that the 2nd plaintiff is the wife to his deceased brother **NDIGA KABIBI** and the 1st defendant is his brother. He added that his late father **GACIANI KIMANGA** had nine children – three sons and six daughters and that in 1959 the suit land was registered in the names of the 1st defendant their eldest brother to hold in trust for the family because at that time, women were not being registered as land owners. He produced a copy of the Green Card to the suit land. However, in 1998, the 1st defendant transferred the suit land into the names of his two wives, the 2nd and 3rd defendants without informing him and later, the suit land was sub-divided into twelve portions and registered the same in the names of the 4th to 13th defendants as follows:-

4th defendant	- MUTIRA/KAGUYU/4932
5th defendant	- MUTIRA/KAGUYU/4933
3rd defendant	- MUTIRA/KAGUYU/4936
1st, 2nd & 3rd defendants	- MUTIRA/KAGUYU/4937
8th defendant	- MUTIRA/KAGUYU/4938

9th defendant	- MUTIRA/KAGUYU/4939
10th defendant	- MUTIRA/KAGUYU/4940
11th defendant	- MUTIRA/KAGUYU/4941
12th defendant	- MUTIRA/KAGUYU/4942
13th defendant	- MUTIRA/KAGUYU/4943.

Although he did not mention the 6th and 7th defendants as beneficiaries of that sub-division, the certificate of official search that he produced in respect of the resultant sub-division of the suit land (Plaintiffs Exhibit 2 to 13) show that the 6th defendant is the registered proprietor of land parcel No. MUTIRA/KAGUYU/4934 while the 7th defendant is the registered proprietor of land parcel No. MUTIRA/KAGUYU/4935. When he discovered that the suit land had been sub-divided in 2011, he moved to the then **KIRINYAGA LAND DISPUTES TRIBUNAL** and filed Case No. 13 of 2011 which ordered that both he and the 2nd plaintiff be given one acre each from the suit land – see Plaintiffs Exhibits 14, 15 & 16. The 1st defendant would then retain 1 ½ acres of the suit land. However, the 1st defendant refused to honour that award and the resultant decree. Instead, he filed an appeal which was never prosecuted. The 1st plaintiff said he has no other land and had constructed a house on parcel No. MUTIRA/KAGUYU/4943 which is registered in the names of the 13th defendant. However, the 1st defendant demolished that house and took his crop of tea. He now rents a house in Kigumo and his in-laws have given him a portion of their land. The 1st plaintiff therefore urged this Court to cancel the resultant sub-divisions and restore the suit land which should then be shared equally between himself, the 2nd plaintiff and the 1st defendant because his attempts to talk to the 1st defendant for an amicable settlement have borne no results.

The 2nd plaintiff **AGNES WANGECHI** (PW2) adopted the evidence of the 1st plaintiff.

CHARLES NGIRIGACHA KABIBI (PW3) testified that his father **KABIBI GACIANI** and the 1st defendant's father **GACIANI KIMANGA** were brothers and that **GACIANI KIMANGA** had three sons being 1st defendant who was the eldest son, followed by **NDIGA KABIBI** while the third son was the 1st plaintiff. He also had six daughters. The witness added that the 1st defendant was registered as proprietor of the suit land by the clan to hold in trust for the family all of who lived thereon until 1989 when the 1st defendant demolished the 1st plaintiff's house. He too urged the Court to cancel the resultant sub-divisions to the suit land.

The 1st defendant **KARINGA GACIANI** (DW1) told the Court that the 2nd and 3rd defendants are his wives while the 4th to 13th defendants are their children. He could not recall when he was born but stated that his father was called **GACIANI KIMANGA** and his mother **WANGECHI GACIANI**. After he was born, his father went to Tanzania leaving him and his sister **MUTHONI** with their mother. When his father came back from Tanzania before the emergency, he found that his brother **KABIBI** had sired other children with his wife.

The 1st defendant told the Court that he was given the suit land in 1959 but denied that he was to hold it in trust for anybody. He added that the 1st plaintiff was also given land. He confirmed that his mother **WANGECHI** also had children with **KABIBI** and that when his sisters were married, it was **KABIBI** who received the dowry.

BEATRICE MUTHONI KARINGA (DW2) who is the 2nd defendant told the Court that she is the wife of the 1st defendant. She testified that the 1st defendant's father had one wife and two children being the 1st defendant and his sister **MUTHONI** and that the 1st plaintiff and **NDIGA** were children of **KABIBI**. She told the Court that when she married the 1st defendant in 1962, she lived on **KARINGA**'s land while the 1st plaintiff and **NDIGA** lived on **KABIBI**'s land and that **KARINGA** had moved to Tanzania and his wife re-married **KABIBI**. The plaintiffs should therefore get land from **KABIBI**.

Submissions have been filed by **NGIGI GICHOYA** advocate for the plaintiffs and **KIGURU KAHIGA** advocate for the defendants.

I have considered the evidence by both sides and the submissions by counsel.

Before I interrogate the evidence by the parties further, two legal issues were raised by the defendants which I must address because they go to the jurisdiction of this Court to handle this dispute. Those two issues are:-

1. **That this suit is res-judicata in view of the proceedings in Arbitration Case No. 37 of 1982 and KERUGOYA L.D.T Case No. 13 of 2011.**
2. **That this suit is time barred by virtue of the provisions of the Limitation of Actions Act CAP 22 Laws of Kenya.**

As those issues touch on the jurisdiction of this Court, they must be addressed at this early stage. This is because, although they were pleaded in paragraphs six and seven of the defence, they were not raised as Preliminary Objections although notice was given that they would be raised. As jurisdiction is everything and without it the Court must down its tools once it forms the opinion that it has no jurisdiction in a matter before it, – **OWNERS OF THE MOTOR VEHICLE “LILLIAN S” VS CALTEX OIL (KENYA) LTD 1989 K.L.R** - I must therefore confirm if indeed I have the requisite jurisdiction to determine this dispute.

On the issue of res-judicata, it is clear from the documentary evidence produced herein that this dispute was the subject of proceedings before the District Officer **NDIA DIVISION** in 1982 and later on before the **LAND DISPUTES TRIBUNAL KIRINYAGA CENTRAL in 2011**. However, both the District Officer **NDIA DIVISION** and the Tribunal had no jurisdiction to determine issues relating to ownership of registered land. For res-judicata to be up-held, the Tribunal must have the requisite jurisdiction to determine the dispute before it. In this case, both the District Officer **NDIA DIVISION**'s decision and the award of the Tribunal were null and void for want of jurisdiction. In the case of **JOSEPH MALAKWEN LELEI & ANOTHER VS RIFT VALLEY LAND DISPUTES TRIBUNAL & TWO OTHERS 2014 e K.L.R**, the Tribunal made a determination of a trust over registered property. The Court of Appeal said:-

“... It is trite that where a Court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decision are null and void. It then follows that every other proceeding, decision or award that results from such a process must be construed as a nullity”

See also **DESAI VS WARSAMA 1967 E.A 351** where the Court held that a Court cannot confer jurisdiction upon itself and where a Court assumes jurisdiction and proceeds to hear and determine a matter that is not within its jurisdiction, those proceedings and determination are nullities. It follows therefore that res-judicata does not apply in this case because the previous proceedings were conducted by bodies that had no jurisdiction.

On the second issue that this suit is time barred by virtue of the provisions of the **Limitation of Actions Act**, this case is founded both on a claim of trust and also of fraud. With regard to trust, it is clear from **Section 20 of the Limitation of Actions Act** that the twelve (12) years limitation period provided under **Section 7** of the said Act within which to file an action to recover land does not apply in actions concerning trust property. The claim by the plaintiffs is that the suit land is in fact trust property. Whether in fact it is or is not trust property will be a matter to be determined later in this judgment.

On the issue of fraud, it is also clear from **Section 26 of the Limitation of Actions Act** that where fraud is pleaded, the period of limitation does not begin to run until the plaintiff has discovered the fraud or could have, with reasonable diligence, have discovered it. It is now clear from the 1st plaintiff's oral evidence that he only discovered in 2011 about the sub-division of the suit land. Indeed the Green Card that he produced (Plaintiff's Exhibit 1) shows that the suit land was sub-divided on 16th February 2011 when new titles to the resultant sub-divisions were issued. Time therefore started running in 2011 and since

this suit was filed the same year, it is not barred by the **Limitation of Action Act**.

It is therefore clear from the above that the plaintiff's suit against the defendants is neither res-judicata nor statute barred. It is therefore properly before this Court.

I will now consider the plaintiff's case on its merits.

The plaintiff's claim is premised on both fraud and trust. In paragraph six (6) of their plaint, the plaintiffs have pleaded that the 1st defendant fraudulently caused the suit land to be sub-divided into new numbers being MUTIRA/KAGUYU/4932 to 4943. Particulars of fraud are pleaded in paragraph seven (7) of the plaint. However, it is not enough to merely plead fraud. A party alleging fraud must prove those allegations. In **R.G PATEL VS LALJI MAKANJI 1957 E.A 314**, the Court of Appeal stated thus:-

“Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”

See also **KOINANGE & 13 OTHERS VS KOINANGE (1968) K.L.R 23** where it was stated that allegations of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the usual standard in Civil Proceedings, that is, on the balance of probabilities. To prove fraud, the plaintiffs were required to lead direct or circumstantial evidence tested in cross-examination to enable the Court conclude that the defendants committed acts of fraud in the sub-division of the suit land to warrant the cancellation of the resultant titles. In the circumstances of this case, apart from pleading fraud in their plaint, the plaintiffs have not led any evidence of fraud against the defendants. The claim based on fraud cannot therefore be sustained.

The plaintiffs have also based their claim on trust. The 1st plaintiff gave evidence as follows in support of that claim:-

“The 1st defendant was holding the land MUTIRA/KAGUYU/637 in trust for myself, and the other brother and sisters. I have no other parcel of land and I had put up a house as part of MUTIRA/KAGUYU/4943 which is in the names of the 13th defendant. I had planted tea on that land but I was chased away by the 1st defendant and his children took the tea and demolished my house”

That evidence was supported by the 2nd plaintiff while their witness **CHARLES NGIRIGACHA KABIBI (PW3)** said as follows:-

“I know the land No. MUTIRA/KAGUYU/637. It was given to the 1st defendant to hold for his family since he was the first born and women were not being allowed to be registered as owners. That was in 1959. The land was given to him by the clan to hold in trust for his family. The clan was called Ucera Clan. All the family were living on that land until 1989 when the 1st defendant demolished the house of the 1st plaintiff Ndege Kabibi Kimanja”

All that was rebutted by the 1st defendant. In his evidence in chief, he asserted as follows:-

“The land MUTIRA/KAGUYU/637 was five acres and it was given to me in 1959 as my sole property. It was not given to me to hold in trust for anybody. Kabibi Kimanja the 1st plaintiff was also given land”.

It is not disputed that the suit land was registered in the names of the 1st defendant on 21st November 1959. The Green Card shows that at that time, his names read **KARINGA GACIANI** but on 1st December 1998, it was registered in his names as **KARINGA GACIANI KIMANGA** and also in the names of the 2nd and 3rd defendants jointly. That title was closed on 16th December 2011 following the sub-division and creation of new titles registered in the names of the 4th to 13th defendants. What this Court has to determine is whether the original suit land was registered in the names of the 1st defendant to

hold in trust for himself and the plaintiffs and whether therefore the resultant sub-divisions thereof are trust property.

The parties herein are Kikuyu and therefore what the plaintiff must be referring to is a trust under Kikuyu Customary Law. It was stated in **KANYI VS MUTHIORA 1984 K.L.R 712** that the registration of land under the **Registered Land Act (now repealed)** whether as a first or subsequent registration does not extinguish rights under Kikuyu Customary Law and neither does such registration relieve the registered owner of his or her duties or obligations under **Section 28 of that Act** as a trustee. A similar provision is found in **Section 25 (2) of the new Land Registration Act**. See also **MBUI MUKANGU VS GERALD MBUI C.A CIVIL APPEAL No. 231 OF 2000 (NYERI)**.

As indicated above, the parties herein are Kikuyu and in **NJUGUNA VS NJUGUNA 2008 1 K.L.R 889**, the Court of Appeal held that under Kikuyu Customary Law, the eldest son inherits land as a muramati to hold it in trust for himself and the other heirs and that as a muramati, he is duty bound to distribute such land to the heirs. See also **GITUANJA VS GITUANJA 1983 K.L.R 575**.

From the evidence herein, it is not contested that **GACIANI KIMANGA** was the biological father to the 1st defendant and his sister **MUTHONI**. Their mother was **WANGECHE** and sometimes in the 1940's, the said **GACIANI KIMANGA** left for Tanzania and upon his return, he found that his younger brother **KABIBI KIMANGA** had sired children with his wife. He was not happy and therefore returned to Tanzania never to return home and in his absence, his wife **WANGECHE** proceeded to cohabit with **KABIBI KIMANGA** and they had other children including the 1st plaintiff and **NDEGE KABIBI** the deceased husband to the 2nd plaintiff. The 1st plaintiff did concede in cross-examination that he is the son of **GACIANI KIMANGA** and that he died in Tanzania. Nonetheless, the 1st plaintiff's Identity Card reads that he is son of **KABIBI**. It is because of this that the 1st defendant has told the Court that the plaintiffs should get land from **KABIBI** and not himself. It is clear from the 1st defendant's testimony that he is challenging the plaintiffs claim to the suit land and the resultant sub-divisions on two grounds. Firstly, he does not think that the 1st plaintiff, with whom he shares a mother but not a father, should have a share of the suit land. Indeed in cross-examination by counsel for the plaintiffs **Mr. NGIGI**, he said:-

“The 1st plaintiff has his own father who should give him land”

Secondly, his testimony is that he does not hold the suit land in trust for the plaintiffs. During re-examination by his counsel **Mr. KAHIGA**, he said:-

“It is not true that the land was given to me to hold in trust for the plaintiffs”

Trust is a matter of evidence and the Court will not presume it except in cases of absolute necessity – **MBOTHU VS WAITITU 1986 K.L.R 171**. In view of the fact that the 1st plaintiff and his late brother **NDEGE KABIBI** who was the husband to the 2nd plaintiff were born out of the levirate union between **KABIBI KIMANGA** and his late brother's wife **WANGECHE**, the issue that I have agonized over is whether in those circumstances, the plaintiffs are family to the 1st defendant for whom he could hold the suit land in trust. Counsel for the defendants, **Mr. KAHIGA**, does not think so. He has submitted as follows:-

“From the foregoing facts, we humbly submit that at the time the 1st defendant got registered over L.R MUTIRA/KAGUYU/637 on 21st November 1959, his only family to whom he could correctly be stated to hold land in trust for was his own father GACIANI KIMANGA who had left Kenya for Tanganyika for good and his blood sister MUTHONI”

In his submissions however, counsel for the plaintiffs **Mr. NGIGI**, took the view that the 1st plaintiff and 1st defendant are brothers and since the 1st defendant is the first born, he was registered as the owner of the suit land to hold in trust for the family.

To answer that question, I have looked at **A.N. ALLOTT'S RESTATEMENT OF AFRICAN LAW NO.**

2 and with respect to rights of widows, the author states at **page 17** that a widow may continue living at her deceased husband's home and enter into a levirate union usually with the younger brother of her deceased husband. The author then goes on to state that:-

“Children resulting from a levirate union take the name of the deceased husband and are regarded for all purposes as his children. They inherit his property or share the inheritance with any previous sons”.

On the other hand, a widow may choose to be inherited by a younger brother of her deceased husband in which case she abandons the home of her deceased husband and any children born are regarded as those of the brother inheritor and not those of the deceased husband as in a levirate union. Hence they take the inheritors name and succeed to his property. Perhaps it is due to that custom that the 1st plaintiff described himself as the son of **GACIANI KIMANGA** although the name **KABIBI** also appears in his Identity Card. In cross-examination by **Mr. KAHIGA**, he said:-

“I am not a son of KABIBI. My Identity Card reads KABIBI but my father is GACIANI KIMANGA”.

It is conceded by the 1st defendant that the suit land was given to him by the clan. During cross-examination by **Mr. NGIGI**, he admitted that when he was given the suit land, his father had already died. And in re-examination by his counsel **Mr. KAHIGA**, he said:-

“I was given the land by the clan. It is not true that the land was given to me to hold in trust for the plaintiffs”

Therefore, the suit land was not purchased by the 1st defendant as his own property. Being clan land and as his father was not there, the intentions of the clan could only have been that he, as the eldest son, would hold it in trust for himself and his family including the children born out of the levirate union between his mother and his uncle. It is noteworthy that **WANGECHE** the mother to both the 1st plaintiff and 1st defendant did not leave her matrimonial home and was in fact buried there. The 2nd plaintiff also testified that she still lives on the suit land and the 1st plaintiff lived there until 1989 when the 1st defendant and his sons chased him away and took over his crop of tea after demolishing his house. Therefore, there is proven possession and occupation of part of the suit land by the plaintiffs which is evidence upon which this Court can conclude that the 1st defendant holds it in trust for the plaintiffs. Since the suit land was given to him by the clan, the 1st defendant cannot purport to deal with it as his private property as was the case in **MURIUKI MARIGI VS RICHARD MARIGI MURIUKI C.A CIVIL APPEAL No. 189 of 1996**. It is also instructive to note that when the 2nd plaintiff's husband **NDIGA KABIBI** died, he too was buried on the suit land. The 1st defendant's wife **BEATRICE MUTHONI KARINGA** who is the 2nd defendant herein said as follows in her evidence in cross-examination:-

“I know Ndiga died but the 2nd plaintiff is his wife. She was given a portion to live on. Ndiga Kabibi was her husband and was buried on the land in dispute”

This was further reinforced by the testimony of PW3 **CHARLES NGIRIGACHA KABIBI** that the whole family was living on the suit land until 1989 when the 1st plaintiff was chased away by the 1st defendant.

In light of all the above, this Court finds that the 1st defendant was registered as proprietor of the suit land to hold the same in trust for his family which includes the plaintiffs. To hold otherwise would not be in keeping with the guiding principles provided for under **Section 18 of the Environment and Land Court Act** which include recognizing the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources and the principles of intergenerational and intragenerational equity. It would also amount to rendering the plaintiffs destitute and a Court of justice should not take that route especially in a case such as this where the parties have a legitimate claim to the land in dispute.

I am therefore satisfied that the plaintiffs have proved as required in law that the defendants hold the suit land and the resultant sub-divisions thereof in trust for them. It is therefore proper that the said trust be determined so that they can each get a share of the same.

Judgment is therefore entered for the plaintiffs against the defendants in the following terms:-

1. *The trust is determined.*
2. *The defendants to transfer to each of the plaintiffs (1) one acre.*
3. *The parties to each meet their own costs.*

B.N. OLAO

JUDGE

11TH NOVEMBER, 2016

Judgment dated, delivered and signed in open Court this 11th day of November 2016

Mr. Macharia for Mr. Ngigi for Defendants present and also holding brief for Mr. Kiguru for Plaintiffs

Right of appeal explained.

B.N. OLAO

JUDGE

11TH NOVEMBER, 2016