



Matiri & another (Suing as the Legal Representative of Joseph Nkonge Matiri) v Matiri & another (Environment & Land Case E070 of 2018) [2024] KEMC 123 (KLR) (28 March 2024) (Judgment)

Neutral citation: [2024] KEMC 123 (KLR)

**REPUBLIC OF KENYA
IN THE GITHONGO LAW COURTS
ENVIRONMENT & LAND CASE E070 OF 2018
AT SITATI, SPM
MARCH 28, 2024**

BETWEEN

WILSON NDUBI MATIRI 1ST PLAINTIFF

JANE NDURU NKONGE 2ND PLAINTIFF

SUING AS THE LEGAL REPRESENTATIVE OF JOSEPH NKONGE MATIRI

AND

JOHNSON KABURU MATIRI 1ST DEFENDANT

MURITHI MATIRI 2ND DEFENDANT

JUDGMENT

I. PLAINTIFFS' PLEADINGS

1. This suit was instituted on 18th June, 2018 by the filing of a Complaint dated 14th June, 2018 duly verified by an affidavit. Thereafter, the Plaintiffs filed an Amended Complaint dated 1st December, 2021 praying for:
 - a. A permanent order of inhibition prohibiting any dealings either by way of transfers, registrations, charges or otherwise over the suit lands Abothuguchi/Githongo/750, Abothuguchi/Githongo/762 and Abothuguchi/Githongo/186 including the resultant subdivisions thereof L.R.nos. Abothuguchi/Githongo/4005, 4006, 4007, 4008 4009, 4010, 4011 and 4014 pending the hearing and determination of the suit.
 - b. A declaration that the defendants hold the suit lands Nos. Abothuguchi/Githongo/750, Abothuguchi/Githongo/762 and Abothuguchi/Githongo/186 including the resultant subdivisions thereof L.R. nos. Abothuguchi/Githongo/4005, 4006, 4007, 4008 4009, 4010, 4011 and 4014 in trust for the plaintiffs and themselves.



- c. Rectification of the register of the suit lands L.R. Nos. Abothuguchi/Githongo/750, Abothuguchi/Githongo/762 and Abothuguchi/Githongo/186 including the resultant subdivisions thereof to wit, Nos. Abothuguchi/Githongo/4005, 4006, 4007, 4008 4009, 4010, 4011 and 4014 and in place thereof registration of both plaintiffs and defendants herein as lawful owners of the said parcels in equal shares.
 - d. Costs of the suit and interest.
2. Accompanying the Plaint were:
1. List of documents dated 14th June, 2018 containing the following exhibits lined up in the case
 - i. Search certificates of the suit lands.
 - ii. Copies of the green cards of suit lands.
 - iii. Copy of chief's letter dated 19th April, 1988,
 - iv. Copies of the letter by the 1st Defendant's wife dated 20th April, 2017.
 2. The written witnesses' statements of the 2 Plaintiffs both dated 14th June, 2018.
 3. List of witnesses dated 14th June, 2018.
3. The firm of Ndubi Ondubi & Associates Advocates represented the Plaintiffs.

II. The Defendants' Pleadings

4. The Defendants opposed the suit by filing separate Statements of Defence and Counterclaims.
5. The 1st Defendant filed a Defence and Counterclaim dated 24th July, 2018 praying for a dismissal of the suit and Counterclaiming for the prayer that:
 11. The 1st Defendant claims that parcel no. Abothuguchi/Githongo/762 and Abothuguchi/Githongo/186 including the resultant sub-divisions are his parcels of land and that he does not hold the same in trust for himself and the plaintiffs herein.
6. The 2nd Defendant filed a Defence and Counterclaim dated 24th July, 2018 praying for a dismissal of the plaint and Counterclaiming for the prayer that:
 11. The 1st Defendant claims that parcel no. Abothuguchi/Githongo/750 is his parcel of land and that he does not hold the same in trust for himself and the plaintiffs herein.
7. Accompanying the Defences and Counterclaims were:
 1. Case Summary dated 21st August, 2018.
 2. List of Issues for determination dated 21st August, 2018.
 3. List of witnesses dated 21st August, 2018.
 4. Bundles of written witnesses' statements containing the statements of
 - i. Johnson Kaburu Matiri.
 - ii. M'Murithi M'Matiri.
 - iii. Johnson Kirugi M'Mutungu.



- iv. M'Rukara M'Irea.
- v. Ntarangui Matiri.
5. List of exhibits dated 21st August, 2018 containing the following exhibits lined up for the defences:
 - i. Green card
 - ii. Chief's letter
6. Framed issues dated 21st August, 2018.
8. The firm of Otieno C & Company Advocates represented the Defendants.

The Plaintiffs' Case

9. On 12th July, 2019 and 23rd September, 2019 the Plaintiffs prosecuted their case by adopting their witnesses' statements and producing their 5 bundle of exhibits are contained in the list of exhibits above. The said witnesses' statements bore similar contents. The summary of their testimonies was that the 2 plaintiffs and the 2 defendants are brothers and their father was Matiri Mwitia. The said Matiri Mwitia was himself a brother to M'ithinyai Mwitia who was the husband of Rael Muthoni. After the demise of M'ithinyai the 1st Defendant procured the fraudulent transfer of the subject parcels of land into his name to the prejudice of the widow Rael Muthoni. In spite of a resolution by clan elders and family members that the 1st Defendant surrenders ownership to the widow Rael Muthoni, he refused to yield parcels Abothuguchi/Githongo/186 and Abothuguchi/Githongo/762 in spite of his holding it trust for them hence this suit. It was their further case that 750 was similarly registered in the name of one of their brothers (2nd Defendant) in trust for them in 1963. On that basis, they prayed for the declaration of trust.

The Defendants'/counterclaimants' Case

10. On 24th October, 2019 and 27th November, 2020 the defendants prosecuted their defences and counterclaims and produced their respective bundles of documents as per the above list and bundle of documents. Their statements contained similar assertions.
11. In the 1st Defendant's witness' statement he asserted that he was the beneficiary of the land gift from his paternal uncle M'Ithinyai as he had no male heir in keeping with the Meru Customary law. He complained that RAEL had been incited severally to eject him from the land but all had been unsuccessful.
12. The 2nd defendant affirmed that the deceased made the bequest to the 1st Defendant who was required to take care of RAEL MUTHONI now the widow of the deceased M'Ithinyai.
13. On his part, Ntarangui Matiri the youngest brother of the plaintiffs and defendants told the court that he used to herd the cattle of the deceased M'ithinyai Matiri while he was alive and that Rael Muthoni (now widow of M'Ithinyai) was occupying the land. He affirmed that the deceased M'Ithinyai bequeathed the land 186 and 762 to the 1st Defendant only. This was supported by M'Rukaria M'Irea a clansman and Johnson Kirugi M'Itunga who was a neighbour to M'Ithinyai. Kirugi confirmed that a ceremony of the bequest was held in 1970 before the deceased died the following year in 1971.
14. At the close of their case, the defendants lodged written submissions dated 30th November, 2023. It was submitted that no trust was held by the defendants for themselves and for the plaintiffs. It was submitted that as registered owners, they were the legal owners to the exclusion of any other person.



The Defendants submitted that in Civil Case No. 102 of 1976 the 1st defendant was declared the legal owner of the subject land and thereafter in 1977 the 1st defendant was registered as the owner. The authorities relied on for the case were:

1. Isack M’Inanga Kiebia –v- Isaaya Theuri M’Lintari & Another (2018)eKLR (Supreme Court of Kenya) where the 2 elements of a trust relationship were set out as mandatory and these had not been satisfied in this case:
 - i. the land before the registration was a family or clan or group land;
 - ii. the claimant could not have been entitled to the registration of the land due to intervening circumstances.
2. Njenga Chokera –v Maria Wanjira & 2Others (2005)eKLR – where it was held that trust cannot be implied but it must be expressly stated.
3. Kirie –v- Kinuthia (citation not provided and copy of the decision not annexed).

Issues for Determination

15. The only issue to be decided is whether or not the defendants hold the respective mentioned title deeds 186, 762 and 750 on behalf for the plaintiffs as pleaded. There is no dispute that the defendants are registered on the respective title deeds.

Determination

A. As Against the 1st Defendant on Parcels 186 and 762

16. From the material placed before the court, it was established by the defendants that the parcels no. Abothuguchi/Githongo/762 and Abothuguchi/Githongo/186 were adjudged as owned by the 1st defendant in court decision in 1976 and thereafter the 1st Defendant was registered as owner in 1977. There was no proof of fraud since the decision that made the 1st defendant as owner was made in court which considered all the relevant facts and applicable laws as of 1976. Nowhere was it indicated in the court’s decision of 1976 that the 1st defendant was holding the said 2 parcels in trust for any the Plaintiffs or the clan or family. If it was true, and it is not, that the 1st defendant was ordered by the court in 1976 to hold the property in trust for the benefit of any person, nothing could have been easier for the plaintiffs than to produce the court order in this effect but no such order was produced before this court.
17. As of 1977 the *Law of Succession Act* (1981) was not yet enacted and land was inherited according to the Meru Customary law in which widows and female children of the deceased were excluded from inheritance. In the context of this customary law, the deceased gifted the 1st defendant the subject parcels as his successor in title since he and RAEL were childless. This position of law was discussed extensively in the authority of re Estate of Mwangi S/O Ngamba Alias Mwangi Ngamba (Deceased) [2015] eKLR (Mativo J. as he then was) the learned Judge held as follows:

“The scope of the *Law of Succession Act* is stated in Section 2 thereof. For avoidance of doubt, the said section states as follows:-

- “2(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the Law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of



persons dying after the commencement of this Act and to the administration of estates of those persons.

- (2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

The learned Judge went on to state:

“The effect of Section 2(1) of the *Law of Succession Act* is that the provisions of the said Act are to apply to the estates of all persons dying after the commencement of the Act on 1st July 1981, subject of course to the exceptions created by the Act. The Act applies both as the substantive law as well as the procedural law to the estates affected.

Section 2(2) of the *Law of Succession Act* defines the application of the *Law of Succession Act* with respect to persons who died before the said Act commenced on 1st July 1981. The provision is categorical that the substantive provisions of the said Act are not applicable to the estates of persons who died before the said Act commenced. The substantive provisions of the Act are those governing devolution or distribution of the estate of the dead person, whether such person died testate or intestate. These provisions are to be found in Parts II, III, IV, V and VI of the *Law of Succession Act*. The substantive law of succession for estates of the persons who died before 1st July 1981 is not to be found in Parts II, III, IV, V and VI of the *Law of Succession Act*, but in the written laws and customs that applied at the date of the death of the person in question.

18. The second part of Section 2(2) of the *Law of Succession Act* states that the administration of the estates of persons who died before 1st July 1981 should commence or proceed so far as possible in accordance with the provisions of the *Law of Succession Act*.
19. In other words, the procedure with respect to administration of estates of such persons is to be governed, not by the law as at the time of death, but by the procedures set out in the *Law of Succession Act*. The said provisions in the *Law of Succession Act* governing procedures and processes in administration of estates are to be found in Part VII. Part VII of the *Law of Succession Act* applies universally to the estates of persons dying either before or after the commencement of the Act.
20. It is not in dispute that the deceased person the subject of these proceedings died before the *Law of Succession Act* came into force. Consequently, the substantive law governing devolution to his estate is that stated in Section 2(2) of the *Law of Succession Act* – that is the written laws and customs in force as at the time of his death.



21. In the further considered view of this Honourable Court there is further guidance from the authority of *Re Estate of M'murungi M'bwiria* (2019)eKLR where the Court observed that :

“According to Eugene Cotran, *Restatement of African Law: 2 Kenya – Law of Succession* (Sweet & Maxwell, 1969) at page 30, the estate of a deceased Meru and Tharaka community land was divided among the sons. The daughters and widows received no share from the estate.”

22. In spite of not being registered on the title deeds bearing the names of the 1st Defendant, the surviving widow (Rael) nonetheless had a life interest in the 2 parcels of land since she was in active occupation of the same during the life of her husband and even afterwards. It was common to both sides of the contest that the subject parcels 186 and 762 were originally registered in the name of the now deceased M'ithinyai Mwitia who was the husband of RAEL and both the deceased M'Ithinyai and his wife Rael were in occupation of the subject lands. It was never registered in the clan or group name at any point in time. M'ithinyai had the freedom to select anyone to be his heir.
23. Furthermore, it was established that when the said M'ithinyai was alive, he made a bequest of the land to the 1st Defendant since he was childless with RAEL. In the realization of this bequest, the land was transferred to the 1st Defendant only. As a widow of the deceased M'ithinyai who was in active occupation of the subject lands, RAEL had a widow's overriding interest for her lifetime on the titles of the 2 parcels 186 and 762. It was not necessary for RAEL's name to be registered on the title because her right of occupation of the lands gave her a widow's life interest in the properties. This life interest automatically lapses with the demise of the widow when her time to leave this world comes.
24. This position is well supported by the law because at that time (1970s) the subject lands were governed by the now repealed Registered *Land Act* cap 300 which came into force on 16th September, 1963. This was discussed in the authority of *Daniel K. Cheraisi & 2 Others V Kipkoech Kangogo & Another* (2018) eKLR cited with approval in *Marituai Karingithe (Suing As The Legal Representative of The Estate Of Karkise Ole Mosiro) & 2 others v Simon Ndungu Supeyo & another* [2019] eKLR where the learned Judges held as follows:

“The provisions of sections 27 and 28 of the Registered *Land Act* Cap. 300, Laws of Kenya (repealed) stated that the rights of a registered proprietor of land registered under the Act were absolute and indefeasible and were only subject to rights and encumbrances noted on the register or overriding interests which were set out in section 30 of the Act.” (underlining mine)Section 30 thereof was the most relevant section:

The overriding interests referred to in section 30 aforesaid relevant to this case are reproduced hereunder:

30. Overriding interests

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

- (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 person and the rights are not disclosed;



25. The Plaintiffs had no overriding interests as they were not in actual possession and this reason their claim collapses. It is therefore the considered finding of this Honourable Court that only Rael had a life interest in the subject parcels when it was registered in the names of the 1st Defendant. As long as RAEL is living and occupies the subject parcels 186 and 762, the 1st Defendant may not deal with the two parcels of land in any manner adverse to the rights of RAEL to occupy and utilize the land as a widow of the deceased M’ithinyai. Any other claimants, notwithstanding their clan relationship with the deceased M’ithinyai, were pretenders to the throne and must be excluded. The Court finds that the Plaintiffs have no protectable interest whatsoever, whether legal or beneficial, in the 2 parcels of land. The plaintiffs’ claim fail.

B. AS against the 2nd Defendant on Parcel 750

26. From the green card in court, Abothuguchi/Githongo/750 was first registered in 1963 in the name of the 2nd Defendant. This registration was made even while Matiri Mwitia was alive. The 2nd Defendant admits in his statement adopted as his testimony that this land was from the clan. It is noteworthy that the clan registered the land in the 2nd defendant’s name while his father (Matiri Mwitia) and brothers were alive. This state of affairs remained so up to 1973 when the said Matiri Mwitia died while the name on the title deed was still that of the 2nd Defendant.
27. In the result, the court accepts the Plaintiffs’ claim in this respect that the 2nd Defendant’s registration was done by the clan in 1966 so that he could hold the parcel on behalf of the family including his then living father who was occupying and utilizing the land. The court finds as a fact that the 2nd Defendant held Abothuguchi/Githongo/750 in trust for this then living Father, Mother and Brothers who are now the plaintiffs. The Plaintiffs therefore succeed as against the 2nd Defendant only. The court was guided in this regard by the Defendants’ cited authority of Isack M’Inanga Kiebia –v- Isaaya Theuri M’Lintari & Another (2018)eKLR as well as that of Njenga Chokera (both supra) where it was held that where the land before the registration was a family or clan or group land and the claimant could not have been entitled to the registration of the land due to intervening circumstances – in this case the dictates of their clan – the declaration of trust would be the proper order to be made and this Honourable Court makes the declaration of trust.

C. Conclusion: Final Orders

1. In result, there is no merit in the suit by the plaintiffs against the 1st Defendant only. The related consequence is that respective counterclaim by the 1st Defendant only is successful and the same is upheld and allowed as prayed with costs to the 1st defendants/1st counterclaimant.
2. The plaintiffs are permanently enjoined from interfering with the 1st defendant’s ownership and use of the subject lands 186 and 762.
3. As for the 2nd Defendant, the court makes the declaration that the 2nd defendant holds Abothuguchi/Githongo/750 in trust for himself and his siblings who are the surviving children of Matiri Mwitia.
4. Rectification of the register of the suit lands L.R. No. Abothuguchi/Githongo/750 including the resultant subdivisions thereof so that in place thereof there is a registration of both plaintiffs and defendants herein as lawful co-owners of the said parcels in equal shares.
5. Costs to the 1st Defendant in respect of the Counterclaim and costs to Plaintiffs in respect of the claim against the 2nd Defendant.

Right of appeal is 30 days.



DATED, READ AND SIGNED AT GITHONGO LAW COURTS THIS 28TH DAY OF MARCH, 2024

HON. T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE - GITHONGO LAW COURTS

PRESENT

WILSON NDUBI MATIRI (ID Card seen)

RONNY and BRIAN Court ASSISTANTS

Hon. T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

Wilson: Pray for certified copy of judgement

Court: certified copy of judgement will be provided at the parties costs.

Hon. T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

