



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 33 OF 2015**

**(FORMERLY KERUGOYA ELC CASE NO. 406 OF 2013)**

**NJERU MUNYARI.....1<sup>ST</sup> PLAINTIFF**

**PETER NJUE ITURO.....2<sup>ND</sup> PLAINTIFF**

**{Suing as Administrators of the Estate of Ituro Korugari (DECEASED)}**

**VERSUS**

**NTHIGA MUNYARI.....DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 9<sup>th</sup> November 1988 the original Plaintiff, Ituro Korugari, who was the Defendant's father, sued the Defendant claiming ownership of *Title No. Gaturi/Githimu/421* (hereinafter *the suit property*).
2. It was pleaded in the plaint that during the land demarcation process in 1961 or thereabouts, the original plaintiff was allocated the suit property but had it registered in the Defendant's name to hold in trust for the rest of the family members. It was further pleaded that when the Defendant became of age, he asserted absolute ownership of the suit property and threatened to chase away and evict his siblings from the suit property in consequence of which the instant suit was filed.
3. The Defendant filed a defence in which he denied the Plaintiff's claim in its entirety. He asserted that the instant suit was an abuse of the court process since the Plaintiff (hereinafter *the deceased*) had filed a similar suit before the Magistrate's Court over the same cause of action. The Defendant asserted that he was allocated the suit property in his own right hence he was the absolute owner thereof. He also pleaded that the deceased was allocated his own clan land which he sold to third parties.
4. It would appear that during the pendency of the suit the deceased died on 30<sup>th</sup> September 2009 in consequence of which his sons Peter Njue Ituro and Njeru Munyari were given a limited grant *ad litem* for the purpose of conducting the suit on behalf of the deceased. Those two administrators were later joined in the proceedings as Plaintiffs.
5. When the suit eventually came up for hearing on 19<sup>th</sup> June 2018 only the Plaintiff testified. The Defendant did not attend court for hearing and the application for adjournment by his advocate was rejected.
6. At the trial hereof, Mr Njeru Munyari testified as the PW 1. He testified that the deceased was his

father and that the Defendant was his elder brother. His evidence was to the effect that even though the Defendant was the current registered proprietor of the suit property, he was so registered at the instance of the deceased in trust for the entire family and not as absolute owner.

7. It was the evidence of PW 1 that since the deceased had some other land, he wanted the Defendant to retain eleven (11) acres and give back six (6) acres to be given to PW 1. It was the case of PW 1 that he was still in occupation of part of the suit property which the deceased wanted him to get. He stated that he has been residing on that portion of the suit property since 1976. He further testified that he had developed that portion of the suit property by erecting thereon a house and planting various crops, including coffee and bananas.

8. The second witness was Peter Njue Ituro who testified as PW 2. His evidence basically supported the version of events as given by PW 1. He stated that at some point the suit property was subdivided in such manner that PW 1 was given 6 acres whereas the Defendant retained eleven (11) acres. He, however, conceded that the suit property was currently registered in the name of the Defendant.

9. Upon conclusion of the hearing on 19<sup>th</sup> June 2018, the Plaintiffs were given 30 days within which to file and serve their written submissions whereas the Defendant was granted 30 days upon service to file his submissions. However, by the time of preparation of the judgement, none of the parties had filed submissions.

10. The court has considered the pleadings, evidence and documents on record. The court is of the opinion that the following issues arise for determination herein;

- a. Whether the Defendant was registered as absolute owner of the suit property or in trust for other family members as well.
- b. Whether the instant suit is an abuse of the court process.
- c. Whether the Plaintiffs are entitled to the reliefs sought in the plaint.
- d. Who shall bear costs of the suit.

11. The court has considered the evidence on record on the 1<sup>st</sup> issue. Although the Defendant claimed in his defence that he was registered as absolute proprietor and that he had no trust obligation towards any of his family members, the court is unable to agree with that contention. The court is satisfied that the Defendant being the eldest son of the deceased was registered as proprietor of the suit property on his own behalf and in trust of the rest of the family members. The mere fact that the deceased had some alternative land could not preclude the existence of a trust.

12. There is some evidence on record arising from previous proceedings between the parties that the Defendant was a minor of tender years at the time he was allocated clan land in 1961. There is also some evidence that the deceased, who was the Defendant's father, was the chairman in charge of allocations on behalf of his Igamuturi clan. The mere fact that the Defendant was registered as proprietor under the provisions of the **Land Registered Act (Cap 300)**(now repealed) did not relieve the Defendant of his trust obligation.

13. The court is satisfied that the Defendant's registration as proprietor of the suit property in 1961 was subject to a trust under customary law as the eldest son of the deceased. At the time of his registration, the deceased had two sons. There was no reason why he would allocate one son 17 acres of land and leave the second son totally landless. The conduct and actions of the deceased in seeking to recover part of the suit property so that it could be shared with his other son supports this court's view that the registration of the Defendant was not intended to confer absolute ownership upon him. The court is further of the opinion that the fact that the 1<sup>st</sup> Plaintiff has since 1976 settled upon and developed a portion of the suit property is indicative of the existence of a trust.

14. The mystery of the doctrine of absolute proprietorship of titles issued under the provisions of the repealed **Registered Land Act (Cap 300)** was rooted in the famous cases of **Esiroyo Vs Esiroyo [1973] EA 388** and **Obiero Vs Opiyo [1972] EA 227**. Those decisions decreed that the registration of land under the said Act extinguished all claims under customary law and made the registered owner the absolute proprietor thereof subject only to the interests noted in the register and overriding interests which were not required to be noted in the register. It was held by the Supreme Court of Kenya in **M'inanga Kiebia Vs Isaaya Theuri M'Lintari & Another [2001] eKLR** that those two cases were no longer good law.

15. In the said case, the Supreme Court held, *inter alia*, that;

**“A customary trust, as long as it could be proved to subsist, upon a first registration, was one of the trusts to which registered law was subject under the proviso to section 28 of the Registered Land Act (repealed). Under that legal regime, the content of such a trust could take several forms...**

**The categories of a customary trust were, therefore, not closed. It was for the court to make a determination on the basis of evidence as to which category of such a trust subsisted as to bind the registered proprietor.”**

16. The Supreme Court further held in the said case that;

**“Each case had to be determined on its own merits and quality of evidence. It was not every claim of a right to land that would qualify as a customary trust. In that regard, what was essential was the nature of the holding of the land and the intention of the parties. If the holding was 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 were in possession of actual occupation of the land...” (Emphasis added).**

17. The 2<sup>nd</sup> issue is whether the instant suit is an abuse of the court process. The Defendant contended in his defence that there were previous proceedings between the parties before the Land Disputes Tribunal and the Magistrates Courts over the same subject matter. The Defendant did not, however, attend court to shed light on the previous proceedings and their effect, if any, on the instant suit. The court has seen a copy of the award of the LDT with respect to the suit property. Although the deceased appeared to have succeeded, it is doubtful if the Tribunal had jurisdiction under **section 3 of the Land Disputes Tribunals Act, 1990** to adjudicate over the matter. The court, therefore, finds no evidence on record to support the view that the instant suit is an abuse of the court process.

18. The 3<sup>rd</sup> issue is whether the Plaintiffs are entitled to the reliefs sought in the plaint. Since the court has found and held that the Plaintiffs have established the existence of trust and that the Defendant was not registered as absolute proprietor in his own right, it would follow that the Plaintiffs are entitled to the reliefs sought in the suit.

19. The 4<sup>th</sup> and last issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. **See section 27 of the Civil Procedure Act (Cap 21)**. A successful litigant should be awarded costs of an action unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsch Overseas Trading Co Ltd [1967] EA 287**. The court has noted that the parties herein are siblings. The court is of the view that each party should bear his own costs.

20. The upshot of the foregoing is that the court finds merit in the Plaintiffs' suit. The court finds that they have proved their case to the required standard. They are entitled to the reliefs sought in the plaint. Accordingly, judgement is hereby entered for the Plaintiffs against the Defendant in the following terms.

a. It is hereby declared that the Defendant is holding *Title No. Gaturi/Kithimu/421* or any subdivisions thereof on his own behalf and in trust for his siblings.

b. That the Defendant shall cause a portion of 6 acres to be excised from the suit property and transferred to his younger brother, Njeru Munyari. The excision shall, so far as practicable, take into account the portion of land currently occupied and developed by Njeru Munyari.

c. That in default of the Defendant's compliance, the Deputy Registrar of the court shall sign and execute all forms, mutations, and documents to facilitate the transfer of 6 acres out of the suit property to Njeru Munyari.

d. Each party shall bear his own costs.

21. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 21<sup>st</sup> day of FEBRUARY, 2019.**

In the presence of the Plaintiff in person and the Defendant in person and in the absence of their advocates.

Court clerk Mr. Muinde.

**Y.M. ANGIMA**

**JUDGE**

**21.02.19**