



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 317 OF 2017

NJERI NDONG.....1ST PLAINTIFF

GEORGE NJOROGE..... 2ND PLAINTIFF

JONATHAN MURAGURI3RD PLAINTIFF

NESBON GUCHU.....4TH PLAINTIFF

DANCUN NDEGWA.....5TH PLAINTIFF

FRANCIS GACHANGO.....6TH PLAINTIFF

VERSUS

JACKSON NJOROGE NDONGI.....1ST DEFENDANT

EMILY NJERI NDONGI.....2ND DEFENDANT

JUDGMENT

1. The 1st Plaintiff is the mother of the 2nd - 6th Plaintiffs. Her husband namely Ndongi Njoroge had two wives; Wanjiku and Njeri Ndongi. Wanjiku was the 1st wife while Njeri was the second. The 1st Defendant is the son of Wanjiku and step son and step brother of the 1st Plaintiff and the 2nd - 6th Plaintiffs respectively. The family Patriarch Ndongi Njoroge owned the original parcel of land to wit; LOC 5/KABATI/59, registered in his name on 17/9/62. Upon his death in 1959, the 1st Defendant was appointed the administrator of the estate of the late Ndongi Njoroge. Vide succession cause No 7 of 1969 at Kandara; he became registered as owner of the land on 11/11/69. Later the 1st Defendant subdivided the original land into LOC 5/KABATI/616 and LOC 5/KABATI/617 and caused them to be registered in his name on 18/12/78. On the 17/3/79 parcel, LOC 5/KABATI/617 became registered in the name of the 2nd Defendant. It is these two parcels of land that are the subject of this suit that has been pending in our Courts for the last over two decades.

2. The Applicants (turned Plaintiffs) brought originating summons against the Respondents (now Defendant(s)) on the 2/8/96. By leave of the Court the Originating Summons were later amended to include the 2nd Defendant, wife to the 1st Defendant. In the Originating Summons the Plaintiffs sought the determination of the following questions;

- a. A declaration that the 1st and 2nd Defendants hold parcels Numbers LOC 5/KABATI/616 and LOC 5/KABATI/617 respectively in trust for themselves and for the Plaintiffs by virtue of the 1st Defendant being the administrator of the estate of Ndongi Njoroge (deceased) and that such trust be determined.
- b. An order that the two land parcels aforesaid be consolidated and thereafter subdivided into two equal portions amongst the two households of the deceased.
- c. An order that one portion in (b) above be registered in the names of the 1st Plaintiff by the Land Registrar, Murang'a.
- d. Costs of the suit be provided for and such other further or relief as this Honourable Court may deem just.

3. In support of her Originating Summons the 1st Plaintiff reiterated the history of the suit land as stated in Para 1 above. She deponed that she and the other Plaintiffs have been living on the suit land since demarcation and consolidation. She averred that the 1st Defendant was to hold the suit land in trust for the two houses and was registered as such. However, in breach of the said trust the 1st Defendant in 1978 with

the intent to deprive and defraud the Plaintiff's their share of the family land secretly subdivided the original suit land into two portions and transferred LOC 5/KABATI/617 to the 2nd Defendant his wife.

4. She pleaded the particulars of fraud under para 10(a) – (e) to wit; subdividing the suit land without the consent and authority and or knowledge of the Plaintiffs; transferring one of the portions of the land to his wife; failing to give a portion of the suit land to the Defendants; disregarding the interest of the Plaintiffs in the suit lands; refusing to obtain consent from Kandara Land Control Board consent to enable him effect the transfer of the portion of the suit land to the Plaintiffs.

5. Further that the 1st Defendant has on several occasions declared that the Plaintiffs have no rights over the suit land and at some point, wanted them to move and settle in Mwambu, Makuyu area on a piece of land that is less productive. That as a family, they agreed to have the land registered in the name of the 1st Defendant and the same be subdivided later into 2 equal portions amongst the two wives of Ndongi Njoroge. That the 1st Defendant has refused neglected and failed to adhere to the agreement rendering them trespassers in their own land.

6. The 1st Defendant opposed the Plaintiffs' claim vide a replying affidavit filed on the 19/9/1996. He averred that he acquired the original suit land LOC 5/KABATI/59 comprising of 5.3 acres out of which his father bought 4 acres and 1.3 acres. Further, he stated that he subdivided the original suit land into two portions pursuant to the agreement reached by the clan and the family meeting where it was decided that he was entitled to 1.3 acres and the two houses of Wanjiku and Njeri would get 2 acres each. Given that in the house of Wanjiku there were two sons, he would get one acre and added to the 1.3 acres that he bought his share would be 2.3 acres. He stated that he has always been willing and ready to transfer to the Plaintiffs their two acres and to the estate of his younger brother one acre. That his portion of 2.3 acres is registered in the name of his wife, the 2nd Defendant. He denied fraud and or breach of trust or asking the Plaintiffs to vacate their two acres of land and move to Makuyu. He denied any agreement to share the suit land into two equal portions amongst the two houses of Wanjiku and Njeri, as that would affect his own portion that he bought.

7. At the hearing, the 1st Plaintiff testified and informed the Court that she is the 2nd wife of Ndongi Njoroge. She has 5 sons with him. The 1st wife Wanjiku had 2 sons, the 1st Defendant and John Karigu (deceased). Ndongi Njoroge owned LOC 5/KABATI/59. At the time of his death, all members of his family lived on the said land. During the succession case, No 69 of 1969 at Kandara the 1st Defendant was appointed the administrator of the estate of her late husband. Though they have many children, the 1st Defendant was registered as proprietor of the land because he was the eldest son of the two houses. This was supported by both wives including the uncle (Ndongi Njoroge's brother) of the 1st Defendant who was alive then. The 1st Defendant subdivided the land and registered LOC 5/KABATI/617 in the name of his wife without their consent. She informed the Court that the 1st Defendant did purchase any portion of the land on his own, least of all 1.3 acres. She testified that the 1st Defendant did not raise the question of 1.3 acres at the succession Court in Kandara. At that time, her co-wife was alive. That the 1st Defendant kept altering the boundaries of the land without consulting her and her children. She stated that her entitlement is ½ share of the 5.3 acres. That the dispute was one time referred to the elders for arbitration. Some of the elders present were a Mr Wambura and Njoroge Wa Gacuca, now deceased.

8. In cross-examination by Mr Njau for the Defendant, the witness stated that she could not remember when her husband died but he was alive during land consolidation and demarcation. Her children were young then but the 1st Defendant was a teacher. That Ndongi purchased the land and a cow was given as part of the purchase price. The cow was part of the dowry for the 1st Defendants sister. Ndongi Njoroge bought the land from Njoroge Ndathi and Karigi, after which both pieces were consolidated. She stated that she was not there when the lands were being purchased and would not know the sizes from each seller nor the purchase price. That both sellers would come for their payment and they would be paid sometimes by the 1st Defendant or sometimes by herself through the 1st Defendant. Though she was a house-wife, she paid part of the purchase price from the proceeds of her maize crop.

9. At the succession Court in Kandara, she testified that they agreed that the land be registered in the name of the 1st Defendant to hold in trust for himself and the rest of the family members. However, the 1st Defendant dealt with the land unilaterally by way of subdivision and transfer of one of the parcels to his wife without the Plaintiff's consent. That he changed the boundary of the two houses into zigzag shape. She stated that the elders did not determine the dispute at all. That there was a time the 1st Defendant prepared forms for transfer of the land but he has never given the Plaintiffs their rightful share of the trust land to date.

10. Finally, she testified that Njoroge Ndathi and Karigi were selling land to her late husband and not the 1st Defendant.

11. PW2 – Jonathan Muraguri testified that he is the son of the 1st Plaintiff and the stepbrother of the 1st Defendant. He reiterated the evidence as given by the PW1 and added that he was not a party to the succession cause but learnt from the mother and the proceedings that the suit land was registered in the name of the Plaintiff to hold it as a guardian of the younger siblings, he included. That the 1st Plaintiff did not consult them when he subdivided the suit land into two portions and transferred one portion to his wife, the 2nd Defendant without their consent. That the 1st Defendant has not transferred ½ share of the land duly entitled under the trust to them. They live on the portion registered under the 2nd Defendant, which is parcel No 616. He informed the Court that attempts were made to arbitrate the matter with the elders in 1977 and 1988 in vain. The reason being that the elders took sides with the 1st Defendant. In respect to whether the 1st Defendant obtained consent of the Land Control Board to subdivide and or transfer parcel 616, he stated that he did not know how the subdivision was procured. He informed the Court that the 1st Defendant in breach of trust transferred one portion of the land to his wife.

12. The witness informed the Court on cross-examination that his mother also contributed to the purchase of the suit land. That he was present at the law Courts in Kandara during the succession proceedings and the 1st Defendant did not inform the Court that he owned 1.3 acres as of right. That the 1st Defendant has recovered the contributions that he made towards the acquisition of the land through coffee proceeds from 1964 when he planted coffee on the farm to date. That he and his brothers offered labour on the farm in the belief that they were planting and tending the coffee for the family. He denied that the 1st Defendant paid for his school fees while schooling. He added that during the elders meetings the 1st Defendant did not give evidence on the 1.3 acres that he claimed to have purchased on his own.

13. PW3 – Nelson Ngucu Ndongi informed the Court that he is the 4th Defendant and the stepbrother of the 1st Defendant. His mother is the 1st Plaintiff. His father died when he was a year old. He testified that the suit land is family land that was left under the care of the 1st Defendant to hold in trust for the two families. That the land has now been subdivided on the ground into 3 portions; the sister occupies one in law (wife of John Karingu) of the 1st Defendant, the 1st Defendant and another by the Plaintiffs. Trees and tunnels mark the boundaries. He also informed the Court that the original title has been subdivided into two portions (suit lands). That the elders informed that that they would be given 2 acres for which they declined as they are entitled to ½ share of the land. He informed the Court that he was aware that the 1st Defendant bought another piece of land outside the 5.3 acres from neighbours, which land is not family land. In subdividing and transferring the family land to himself and his wife, the 1st Defendant did not observe his obligations under the trust. He urged the Court to determine the trust so that the land may be distributed to the two houses of Ndongi Njoroge.

14. In cross-examination, the witness informed the Court that he learned from his mother that his father bought the suit land. That he did not know if the 1st Defendant contributed part of the purchase price for the land, as he was young when the transaction took place.

15. The 1st Defendant informed the Court that his father who originally was landless bought land from 3 persons namely; Njoroge Ndathe, Karigi Mbote and Watuku Gichuhi. By the time he died he had paid the vendors as follows; Ndathe Kshs 600/- balance was Kshs. 500; Mbote Kshs 300 leaving a balance of Kshs 700/- and Gichuhi Kshs 200/- leaving a balance of 750/-. In total, he paid Kshs 1100/- leaving a balance of Ksh 1950. The witness states that this amount was paid to the vendors by; 1st Defendant- Kshs 850/-; 1st Defendants Mother - Kshs 980/- and the 1st Plaintiff Kshs 120/-. That during the land consolidation and demarcation, the fragments were consolidated into one and registered as LOC 5/KABATI/59 in the name of Ndongi Njoroge, his father. That the land was bought with money from the dowry paid for two of his sisters except Kshs 850/- and Kshs.120/- paid by him and the 1st Plaintiff respectively. That it was agreed that once he completes his college studies at Tumu Tumu Teachers College, he would pay the balance and be compensated with land for the money he had paid towards the purchase of the land. This was to forestall the vendors from taking back the land on account of default in payments.

16. That upon the death of his father the family petitioned for succession of the estate in 1969 wherein the original suit land was registered in his name to hold in trust for the family.

17. On completion of the payments, he states that he called a meeting of the elders in 1977 and after deliberations concluded that, he is entitled to 1.3 acres as the money he had paid towards the completion of the purchase price of the land. The remaining 4 acres were to be shared between the two houses of Wanjiku and Njeri Ndongi each taking 2 acres each. Since they are two sons in the house of Wanjiku, their mother then he would share the land each getting 1 acre each with the estate of his deceased brother.

18. The witness stated that in 1978 with the agreement of everybody in the family he subdivided the land into two portions (LOC 5/KABATI/616 and LOC5/KABATI/617) and registered a portion of 2.3 acres in the name of his wife and the remainder in his name awaiting to transfer to the rest of the beneficiaries that is to say the house of Njeri Ndongi -2 acres and the estate of his late brother 1 acre). He stated that the reason why he got more land is because he was being compensated for paying for the purchase price of the land. He testified that after ten years in 1988, his stepbrother called the elders and wanted the decision to be reversed but the elders declined.

19. In 1993, his brother's wife and stepmother asked for their share and he sought and obtained consent for the subdivisions and transfer of the two parcels however, they did not have money to process the titles and that explains why the land has not been transferred to them to date.

20. At the hearing, the witness stated that the reason why he subdivided the land into two portions was because he was going through a divorce from his previous wife who wanted a share of ½ the land comprised in LOC 5/KABATI/59. He informed the Court that he consulted the family and elders who agreed. He however stated that there are no minutes of the family to show they agreed with the subdivision. He insisted it was agreed verbally. That he wanted to protect the family land from his divorce and eventual consequences. He informed the Court that he has not refused to transfer the 3 acres he is holding to the Plaintiffs and the wife of his brother.

21. DW2- Stanley Ndungu Njoroge testified and stated that in 1966 he came across a note book that belonged to his father and discovered that his father was owed Kshs 360/- by the 1st Defendants father Ndongi Njoroge being the outstanding purchase price for the land he had sold to him. He stated that he received Kshs 360/- from the 1st Defendant towards the settlement of the said debt. He however stated in cross-examination that he did not know the location of the subject land nor the size as he recorded his statement in 2018 and only came to know the 1st Defendant around 2003, 15 years ago. He was young at the time the transaction is alleged to have taken place.

22. DW3 – Jacinta Mugechi stated that she is the wife of the elder brother of 1st Defendant. Her husband John Karingu is deceased. The 1st Defendant is therefore his brother in law. That she got married in 1972. She stated that in 1977 the family and the clan elders agreed on how the original land would be divided. That it was agreed that the 1st Defendant would be given land commensurate with the money he paid as purchase price for the land after the demise of their father. This was settled at 1.3 acres. The remaining 4 acres was to be shared equally between the house of Njeri and Wanjiku each taking two acres.

23. Further she testified that in 1979 Njeri's family demanded their land and a letter from the chief was procured for purposes of land board consent however they declined to attend the Land Control Board meeting. Later in 1994, the 4th Plaintiff attended the land board and together they filled the consent application forms and returned to the District Officer's office. That later Njeri, the 4th Plaintiff and herself attended the land control board where consent to subdivide was given. In 1995 they went to the surveyor's office who asked for survey fees and the house of Njeri paid Kshs 1000/-. The land LOC 5/KABATI/617 was partitioned into two portions and boundaries were set. However, the 3rd Plaintiff removed the said boundaries and thereafter filed this case in Court. Further, the witness informed the Court that her husband died in 1983.

24. The parties elected to file written submissions, which I have read and carefully considered.

25. The Plaintiffs submitted that there was a trust created when the original land LOC 5/KABATI/59 was registered in the name of the 1st Defendant. That the 1st Defendant did not raise the issue of 1.3 acres in the succession cause in 1969 neither his mother Wanjiku who was present and alive then. The family was in agreement that the land be registered in his name as the guardian of the younger siblings.

26. Further, they submitted that the 1st Defendant did not produce any evidence to show that he purchased 1.3 acres. Neither of his two witnesses gave concrete evidence to support the claim by the 1st Defendant. DW1 did not know the land, size and the amount of the purchase price allegedly paid by the 1st Defendant while DW3 could not confirm how the 1st Defendant purchased the additional land he staked ownership. They submitted that the 1st Defendant never purchased any land to entitle him a different share from the estate of his father.

27. They submitted that the 1st Defendant did not show any evidence that he sought and obtained the consent of the other family members in subdividing the LOC5/KABATI/59 into two portions, one of which was registered in the name of his wife. The Plaintiffs contended that since the deceased Ndongi Njoroge died before the current succession Act, the original suit land should be divided equally among the two houses of his estate so that each house would share their entitlements to their respective sons. They relied on the case of **Mukangu Vs Mbui CA 281 of 2000** where the Court of Appeal judges held that registration of any land does not relieve a proprietor from any duty or obligations to which he is subject as a trustee. That the 1st Defendant being a trustee must ensure that the suit land is shared equally among the deceased father's two houses.

28. The Defendants submitted that the 1st Defendant received 1.3 acres more being compensation for the purchase price he paid for the land. This in addition to his share of 1 acre from his mother's house making 2.3 acres. The remaining 4 acres to be shared equally between the two houses of his father with each getting two acres. It is the 1st Defendants submissions that the whole family agreed this arrangement with the concurrence of the elders and that he did not secretly subdivide the suit land into two portions contrary to the evidence of the Plaintiffs. That the Plaintiffs agreed and gave their blessings. Further, that the 1st Defendant proceeded to make an application for subdivision of LOC 5/KABATI/617 with the consent of the 1st Plaintiff and DW3 both of whom signed the land control board application form. Contending that no other mode of distribution could be more equitable, the 1st Defendant urged the Court to dismiss the suit with costs.

29. Having heard the case, considered the pleadings, the evidence, the submissions and all the material placed before me the following issues fall for determination; Whether the original suit land was held under trust by the 1st Defendant; whether the 1st Defendant held 1.3 acres out of 5.3 acres comprised in the title as of his own right; whether the 1st Defendant subdivided and transferred portions of the suit land fraudulently and or in breach of trust; whether the titles of the suit land should be cancelled and reverted to its original title; whether the two land parcels should be subdivided into two equal portions amongst the two households of the deceased and one portion registered in the names of the 1st Plaintiff; Who meets the costs of the suit.

30. Was the suit land subject to trust? It is not in dispute that the original land LOC5/KABATI/59 was registered in the name of Ndongi Njoroge. I have already captured the relationships of the parties at the onset of the judgment and there is no reason to repeat it here.

31. In the case of **Isack M'Inanga Kieba Vs Isaaya Theuri M'Lintari & Isack Ntongai M'Lintari SCOK Petition 10 of 2015**, the Supreme Court held as follows;

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding were 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 are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are: the land in question was before registration, family, clan or group land; the claimant belongs to such family, clan, or group; the relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; the claim is directed against the registered proprietor who is a member of the family, clan or group”. (emphasis mine).

32. In the instant case, evidence has been led by the Plaintiff and her witnesses that the original suit land was owned by the family patriarch Ndongi Njoroge. That Ndongi Njoroge bought the same from 3 sellers. That during the demarcation the suit land was registered in the name of Ndongi Njoroge and after his death the family agreed during the succession proceedings of 1969 to have the suit land registered in the name of the 1st Defendant. According to the 1st Plaintiff the reason for registering the land in the 1st Defendants name was because he was the eldest son in both houses. Her sons were still young and it is instructive to note that the judgment of the Court in Succession Cause No 7 of 1996 read as follows;

“Both the senior and junior wives of the deceased have agreed that though they have many children this piece of land should be succeeded by their oldest son. This arrangement is also supported by the brother of the deceased PW2 and PW4, the relatives. In view of them being of no objection from any quarter, I have concluded that the said piece of land be succeeded by Jackson Njoroge Ndongi the elders son. He is as well as guardian for the rest of his younger brothers.”

It is in evidence that all the family members including the brothers of the deceased Ndongi Njoroge supported this arrangement. The second reason from the evidence was that at this time, the father had passed on in 1959 and there had to be a male family member to step into his shoes at a time when women were hardly registered as proprietors of family land. It is clear that there was a common intention by the family members that the registration of the land in the name of the 1st Defendant was to hold in trust for himself and the rest of the family.

33. The 1st Defendant has duly admitted in his evidence that he indeed held the suit land in his name in trust for the family. He stated;

“the whole land LOC 5/KABATI/59 was registered in my name to hold in trust for my whole family”.

34. I have perused the green card for title of LOC 5/KABATI/59 produced before the Court in evidence and I note that the land was registered in the name of Ndongi Njoroge as a first registration on 17/9/62 and on the 11/11/69; it devolved to the 1st Defendant following the orders issued in the succession Court.

35. The Court is of the view that the suit land was encumbered by a family trust and the 1st Defendant was a trustee for himself and the rest of the members of his family. The question that the Court must examine is whether the trust covered 5.3 acres or 4 acres?

36. This brings me to the next issue, which is whether the 1st Defendant owned 1.3 acres as of right. According to the 1st Defendant's evidence on record LOC 5 /KABATI/59 was purchased by his father from three vendors; Njoroge Ndathi, Karigi Mbote and Watuku Gichuhi. That at the time of the death of his father in 1959 he had paid Kshs 1100 for the 3 parcels leaving a balance of Kshs 1950. He explained that upon the death of his father the vendors wanted to reduce the size of the land due to non-payment but a negotiation with the sellers saved the land. At that time, he was in college and had agreed that he would pay off the purchase price once he started working. According to his evidence the balance of the monies was paid by himself (Kshs 850/-), his mother (Kshs 980/-) and the 1st Plaintiff paid Kshs 120/-. It was his evidence that the land was purchased using monies received as bride price for her two sisters except the money he and the 1st Plaintiff paid. The Plaintiff gave evidence that she paid some monies which evidence is consistent with that of the 1st Defendant.

37. It is his evidence that after completing the payment, the elders and the family agreed that he be compensated with 1.3 acres of land. I have perused the booklet produced in evidence, which captured some of the payments for the 3 fragments, and note that the purchase price was paid through cash and livestock. It however does not show from whom the monies came from. The Court has been shown the unsigned minutes of the Acaciku Clan of Gikunga family which according to the 1st Defendant decided the mode of sharing the suit land. In it is stated that the 1st Defendant to get 1.3 acres that he bought himself with Kshs 830/- and the remaining to be shared with the two houses of Njeri and Wanjiku each getting two acres. The document is not signed and neither the original was produced in Court. No certificate of translation was annexed and produced in Court either. The document was therefore found to be of no evidential value in the case. Further, none of the clan elders was called as a witness in the case. The sum claimed to be the purchase price in the minutes differ from the sum that the 1st Defendant claims to have paid. It is not clear to the Court why the 1st Defendant was being considered for compensation of land in terms of 1.3 acres and yet the mothers contributed to the redemption of the family land. The Court was not given any plausible reason for this.

38. The evidence of PW2 that the 1st Defendant paid him Kshs 360/- towards the purchase price his father is not credible. He could not tell where the land was and how much the whole purchase price was. He claimed to have known the 1st Defendant 15 years ago that is to say 2003 and if the transaction was paid for in the 1960s how could he have been paid 15 years ago? He stated that he was young when he recorded his witness statement and yet the said statement shows that it was recorded in 2018. That evidence is neither credible nor believable.

39. What is more curious is that fact that the said 1st Defendant did not raise his claim of 1.3 acres in 1969. This was the opportune time so that his 1.3 acres would be removed from the family land. Was it an afterthought that it was raised in 1977 at the elders meeting? In any event, the 1st Defendant has not presented any documentary evidence in form of agreement for sale or payments to show that he purchased 1.3 acres on his own. It is to be noted that the 1st Defendant averred under para 5 of his replying affidavit dated 22/8/96 that the LOC 5/KABATI/59 comprised of 5.3 acres, 4 acres which had been bought by his father while he had bought 1.3 acres. In his evidence in chief, he claimed that the 1.3 acres was compensation for the monies he contributed towards the purchase price. This is a contradiction that leads the Court to disbelief the evidence of the 1st Defendant.

40. Section 107 of the evidence Act states as follows;

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

The burden of prove lies with the 1st Defendant to show that indeed he was entitled to 1.3 acres as of right. The 1st Defendant did not discharge this duty.

41. It is the view of the Court that the land was redeemed by the three members of the family as trustees and beneficiaries and there is no evidence to lead this Court that any one of them would be compensated higher than the other. If that was to happen then the 1st Defendants mother, who paid more should have been given more land than any of the three. If the 1st Defendants formula was to be taken into consideration, then he will end up getting more land than all the rest. This in my view would not be equitable.

42. Have the Plaintiffs proved fraud and or breach of trust? Under para 10 of the affidavit in support the Plaintiffs have particularized fraud as follows;

- a) “Causing Land Parcel LOC 5/KABATI/59 to be subdivided into land parcels LOC 5/KABATI/616 and LOC 5/KABATI/617 without the consent, authority and or knowledge of the Plaintiffs.
- b) Transferring and causing to be registered land parcel LOC 5/KABATI/617 in favour of his wife the second Defendant.
- c) Failing to transfer and or cause to register any portion or parcel of land from original LOC 5/KABATI/59 in favour of the Plaintiffs or at all.

d) Holding himself out as the sole proprietor of the land parcels LOC 5/KABATI/616 and LOC 5/KABATI/617 in complete disregard to the interests of the Plaintiffs herein and presenting himself as such to all Land authorities to perpetuate his fraud.

e) Adamantly refusing to appear before the Kandara Land Control Board and obtain consent to enable him effectively transfer the due share of the deceased's estate to the Plaintiffs."

43. Fraud must be pleaded and proved to the required standard by anyone who alleges fraud in a case. The former Court of Appeal for Eastern Africa in **R.G. Patel versus Lalji Makanji (1957) EA 314** stated as follows:

"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."

44. The 1st Defendant has admitted that he subdivided the land into two portions and transferred one portion into the name of his wife. In his witness statement, he claims that he did it with the consent of the family members and with the approval of the clan elders in a meeting in 1977. In his evidence in chief, he claimed that he sub-divided the suit land to protect the suit land from the divorce he was going through with his 1st wife. The Plaintiffs led evidence that the 1st Defendant subdivided and transferred the suit land without their consent and authority.

45. The 1st Defendant held the position of both legal representative/administrator of the estate of his late father as well as a trustee and beneficiary to the trust asset comprised in LOC 5/KABATI/59. Section 83 (a-i) of the Law of Succession Act stipulates the duties of the personal representative of an estate or administrator as; administer the estate as provided by law, *inter alia*; provide an accurate and full account of the assets of the deceased estate; subject to obtaining confirmation of grants distribute the estate among the beneficiaries; duty not to convert the trust asset into his own; duty to safeguard and not to waste the estate of the deceased.

46. The acts of subdividing and transferring the suit land into the name of his wife are not acts of accountability expected of a trustee/administrator of the deceased estate. These acts amount to breach of trust. The acts of the 1st Defendant are also fraudulent so much so that the trust asset was dislodged to a party that is not a beneficiary of the trust whilst excluding the beneficiaries of the trust.

47. Section 25 of the Land Registration Act states as follows;

"(1)The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

- a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- b) to such liabilities, rights and interests as affect the same and are declared by [section 28](#) not to require noting on the register, unless the contrary is expressed in the register

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee".

It is settled that even though the 1st Defendant was registered as owner of the suit land, nothing relieved him of the duties of a trustee that he so held. This would only end after he accounts and distributes the estate of the deceased to the rightful beneficiaries. The Court comes to the irresistible conclusion that the suit lands are trust assets and the act of subdividing and transferring to the 1st and 2nd Defendants were in breach of the trusts bestowed on the 1st Defendant.

48. It is clear from the evidence that the parties had not agreed on the mode of distribution of the trust land among themselves or the two houses of the estate of the late Ndongi Njoroge. The mother title was subdivided before the respondent could obtain a confirmed grant. The process of subdivision and transfer of the trust asset was irregular and that the 1st Defendant was aware that he held the main title in trust and/or on behalf for the family, he appropriated the trust asset to his advantage by retaining a larger share and further dislodging it from the trust to his wife .The conduct of the 1st Defendant is wanting and amounts to defrauding the Plaintiffs who have waited for a share of their fathers land for close to 50 years now.

49. The Court finds and holds that the acts of the 1st Defendant amounted to defrauding the Plaintiffs of their share of the trust. Similarly the 1st Defendant's actions amounted to breach of trust.

50. Whether the titles of the suit land should be cancelled and reverted to its original title? Section 80 of the Land Registration Act gives the Court power to rectify the register by directing that any registration be cancelled or amended if it is satisfied that the same was obtained made or omitted by fraud or mistake. In this case the 1st Defendant not only had knowledge that he was a trustee and personal representative of the deceased father but acted in breach of trust by causing the subdivision and transfer of the family land to himself and his wife; representing to the Land Registrar that he is the sole registered owner of the land when he knew that he held the same in trust for his family members; appropriating to himself 1.3 acres without the consent and authority of the rest of the beneficiaries and severally refusing to distribute the family land to the beneficiaries. The 1st Defendant had no title to convey to himself and the 2nd Defendant. The Court is of the considered view that the titles LOC 5 KABATI/616 and 617 were not validly issued and the same are hereby cancelled and the land to revert to LOC 5/KABATI/59.

51. Whether the two land parcels should be subdivided into two equal portions amongst the two households of the deceased and one portion registered in the names of the 1st Plaintiff? The Court has noted that no evidence was produced before it to show that letters of confirmation of grant in respect of the estate have been issued. This Court declines the invite by the Plaintiffs to distribute the suit land on account of want of jurisdiction. The jurisdiction of this Court as enacted under Art 162(2) and section 13 of the Environment and Land Act does not confer the mandate to determine matters succession. The parties retain the liberty to approach the right forum to adjudicate the issues thereof.

52. It is on record that the 2nd Defendant passed away. However, neither party produced any evidence by way of a copy of the death certificate for perusal by the Court. Neither parties substituted the 2nd Defendant and the Court is unable to verify the authenticity of the averments.

53. Finally, costs follow the event. The Plaintiffs case partially succeeds and the costs shall be met by the Defendants.

54. Final orders;

a. A declaration that the 1st and 2nd Defendants hold parcel Numbers LOC 5/KABATI/616 and LOC 5/KABATI/617 respectively in trust for themselves and for the Plaintiffs by virtue of the 1st Defendant being the administrator of the estate of Ndongi Njoroge (deceased).

b. It is ordered that parcel Numbers LOC 5/KABATI/616 and LOC 5/KABATI/617 be and are hereby cancelled and the titles revert to LOC5/KABATI/59 in the name of the 1st Defendant.

c. The Land Registrar is ordered to rectify the title and the register accordingly forthwith.

d. The Plaintiffs shall have the costs of the suit.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 14TH DAY OF FEBRUARY, 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Njoka HB for Kugwa for the 1st – 5th Plaintiffs

Defendant – Present in person. My Advocate is not present.

Irene and Njeri, Court Assistants