



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MURANGA**  
**ELC NO 297 OF 2017**

**JULIA NJERI KINUTHIA** - **APPLICANT**

**VS**

**ISAAC WACIURI MBUGUA** - **1<sup>ST</sup> DEFENDANT**

**PAUL MWANGI MBUGUA** - **2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. Vide a plaint filed on the 8/3/17 the Plaintiff sought the following orders;

- a. An order of permanent /mandatory injunction against the 1st and 2<sup>nd</sup> Defendants to vacate the Plaintiffs land known as LOC4/KAGUTHI/110 (suit land) and to demolish all structures erected by them thereon.
- b. Mesne profits
- c. General damages for trespass
- d. Interest on b and c from the date of filing this suit till payments in full
- e. Any other relief deemed for to grant by this honourable Court.

2. The Plaintiff claims that she is the absolute registered owner of the suit land measuring 0.64 ha having purchased the same with her late husband from the late Moses Chege Mbugua with the understanding that the Defendants would remove their structures/dwellings and vacate the suit land to enable vacant possession. Despite demand to do so they have failed to vacate the suit land and the Plaintiff seeks eviction interalia.

3. The Defendants in resisting the Plaintiff's claim have filed a statement of defence together with a Counterclaim on the 17/4/18. It is their case that the Plaintiff acquired land that was encumbered with a customary trust in their favour. That their brother Moses Chege held the land in trust for them and were not consulted at the time of the alleged sale. They conceded to having refused to vacate the land which they have lived for long and is a source of their livelihoods. In the Counterclaim they sought the following orders;

- a. A declaration that the Plaintiff holds the suit land in trust for the Defendants
- b. The trust be determined and title to the suit land be cancelled.
- c. The title to the suit land be issued under the names of the Defendants.
- d. Costs of the defence and Counterclaim.
- e. Any other relief this Court deems fit.

**The evidence of the Plaintiff**

4. The Plaintiff testified and relied on her Witness Statement dated the 7/5/2016 and the supplementary Witness Statement dated the 17/4/18.
5. She stated that her late husband was approached by Moses Chege to buy the land. Upon inspection they liked the land and decided to purchase it. That on visiting the land they found a small house which the seller informed them belonged to his brothers to whom he would ensure they vacated the suit land on completion. That she did not engage the occupants of the houses at that time prior to entering the agreement of sale because of the assurance from the owner of the land that they would be removed from the land.
6. That an agreement of sale was entered on the 17/7/1996 between the Plaintiff and Moses Chege Mbugua. A Land Control board consent was obtained. Para 6 of the agreement provided for vacant possession upon completion.
7. She testified that the seller informed her that the title to the suit land was lost. He did not show her any evidence of loss of title.
8. She informed the Court that Moses Chege did not live on the suit land.
9. At the time of the purchase the Defendants were farming on the land with the permission of the seller. The said Moses Chege died before handing over vacant possession of the land. In her evidence she informed the Court that she has never taken possession of the land.
10. It is the Plaintiff's testimony that she became registered as owner of the suit land on 13/9/96 when Moses Chege was still alive. She produced the original title of the suit land. That there was no trust denoted on the title. Moses Chege owned the suit land in absolute terms.
11. The witness stated that the suit land was given to the seller by his grandmother who did not sire a son. That the Defendants did not raise any objection to the sale of the land by their brother, Moses Chege.
12. That the Defendants refused to vacate the suit land and she filed a case at the Land Dispute Tribunal CMCC No 599 of 1997 whose decisions was overruled on appeal on account of want of jurisdiction.
13. PW2 – Peter Gikonyo Muraya testified that he introduced Moses Chege to Samuel Kinuthia (Plaintiff's late husband) both of whom he personally knew. That he also knew the grandmother of the seller of the land, Nduta Muraya. His grandmother had two daughters; Monica Wairu and Mary Mukonyo. Moses Chege was Mukonyo's son. He also knew that Moses Chege had been given land by his grandmother because she had not sired any sons.
14. That he was present when the land sale took place in which meeting Moses Chege informed the Plaintiff and her husband that he would remove the Defendants from the land on completion as they were occupying the land with his permission. He also stated that the title and his ID were lost. Moses Chege later died before removing the Defendants from the suit land and handing vacant possession.
15. The witness added that the seller had not constructed a house on the suit land as he lived in Mombasa. He stated that the Defendants lived on the land as early as 1966.

#### **The evidence of the Defendants**

16. DW1- Isaac Waciuri Mbugua testified that he is the brother of Moses Chege and the 2<sup>nd</sup> Defendant. The suit land belonged to Nduta Wa Muraya who had two daughters; Mary and Monica, who were the beneficiaries of the estate of Nduta Muraya. That Mary Mukonyo was their mother. That Moses Chege was registered as the owner of the land to hold in trust for the children of Mary Mukonyo. Moses Chege was not married.
17. He explained that they started cultivating the land since 1960 and in 1979 were permitted by their mother to construct their houses on the said land in the presence and knowledge of Moses Chege. That Moses Chege had no right to sell the suit land without their consent. That Moses was not buried on the suit land because the land was never his, was only holding it in trust for them. On cross examination he states that he did not know why Moses was not buried on the land but it was not in recognition of any sale of the suit land.
18. The witness produced the original title in the name of Moses Chege in Court and wondered how the transfer was done without surrendering the original title which has been in their custody.
19. The witness testified in cross examination that his mother inherited the land from their grandmother although he admitted that he did not produce any documents in respect to succession. He stated that his grandmother was buried on the suit land. He stated that the land was registered in the name of Moses Chege because he was the eldest of the 7 siblings in their family.
20. DW2- Alice Bitengo Gisemba, the land Registrar at Muranga stated that according to the records maintained at the Lands office, the registered owner of the suit land is the Plaintiff having been so registered on the 13/9/96. Prior to that, the registered owner was Moses Chege. She testified that on the record are transfer documents dated the 13/9/96 and Land Control Board consent. She however informed the Court that there are receipts for stamp duty however the declared amount on the transfer was Kshs 100,000/- and the transfer was duly franked with the proportionate stamp duty.
21. She explained that there is no surrender of the old title that Moses Chege held prior to the transfer of the title to the Plaintiff. There is a photocopy of an affidavit on record by Moses Chege stating that the title is lost. There is no evidence of a gazette notice on the record. She testified that it is unprocedural to issue a title without surrender of original title, gazette notice of lost title and issuance of provisional title.
22. DW3 – Andrew Kamau Mbugua testified and stated that he is the elder brother of the Defendants and the late Moses Chege Mbugua.

The gist of his testimony is that the suit land belonged to his grandmother who had two daughters and no son. He stated that his grandmother gave the land to her two daughters before she died. Upon her death her two daughters petitioned for succession in respect to her estate and named Moses Chege as the sole beneficiary and a title was issued in his name as a trustee.

23. The witness gave testimony and averred that he is not aware how the Plaintiff acquired the suit land. That it is after the death of Moses that the Plaintiff claimed that she had purchased the suit land. He stated that the land was sold without the family's knowledge.

24. On cross examination he informed the Court that Moses Chege was his younger brother and their mother was married to one Mbugua Njoroge who had land at Kaguthi, which was separate from the suit land. He testified that it is their mother who gave the land to the Defendants when they were young in class 7. That the title was registered in the name of Moses Chege after the death of his grandmother. He added that the Defendants live on the suit land and for that reason their consent should have been sought before the land was sold to the Plaintiff.

25. On the 13/11/18 the parties with the concurrence of the Court elected to file Written Submissions. The Plaintiff and the Defendants filed their Written Submissions on the 24/1/2019 and 5/2/19 respectively.

26. I have carefully read and considered the Written Submissions of the parties and the issues that fall for determination are as follows;

- a. Whether the Defendants have proved a claim in customary trust
- b. Whether the title of the Plaintiff is vitiated.
- c. Whether the Plaintiff is entitled to the prayers sought.
- d. Who shall bear the costs of the suit?

27. There are common issues which are not in dispute in this case. The Plaintiff holds a title registered on the 13/9/96 in her name. The Defendants produced the original title to the Court in the name of Moses Chege in respect to the title issued to him on the 16/4/78. It is commonly acknowledged and accepted that the Defendants are in occupation of the suit land. The Plaintiff has admitted that she has never taken possession of the suit land. The Defendants are the brothers of the seller of the land, Moses Chege Mbugua.

28. The Defendants have in their Written Submissions invited the Court to find that the suit is resjudicata on account of some ruling dated the 26/9/11. The application, the basis of the ruling was not annexed for the Court to peruse. I have read the ruling and to my mind the issue of eviction was not entertained. Indeed the honourable Magistrate restated that no orders would ensue from the decision of Kandara Land Dispute Tribunal because the same was overturned at the Appeal stage. In the view of the Court the suit is not resjudicata.

#### **Whether the Defendants have proved a claim in customary trust**

29. The concept of customary trust is one of the ways of acquiring land in Kenya. Section 28 (b) of the Land Registration Act provide that unless the contrary is expressed in the register, all registered land is subject to overriding interest which though subsists on the land without being noted on the register. One of them is trusts including customary trusts. Under section 25 (2) the said law states that nothing shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

30. I will not reinvent the wheel on the issue of customary trust. I rely on the case of **Isack Kieba M'Inanga Vs Isaaya Theuri M'Lintari & Another SCoK No 10 of 2015** where the Supreme Court Justices held that;

“.....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 is 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:- (a) The land in question was before registration, family, clan or group land; (b) The claimant belongs to such family, clan, or group; (c) 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; (c) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and, (d) The claim is directed against the registered proprietor who is a member of the family, clan or group.

31. The Defendants' claim in the Counterclaim is that the suit land was family land. They led evidence that the land was owned by their grandmother Nduta Wa Muraya who had two daughters; Mary Mukonyo and Monica. Mary was the mother of the seller and the Defendants. It is not clear from the evidence on record how the land was handled post the demise of the grandmother. There are allegations from amongst the Defendants and their witnesses that the land was succeeded by the two daughters of Nduta. DW1 stated that the successors caused the title to be registered in the name of Moses Chege to hold in trust for them. No evidence was led on the succession of the estate of Nduta Muraya. DW3 who stated that he is the elder brother in the family and informed the Court that his grandmother gifted the suit land to the daughters during her life time and upon his death, their mother caused the title to be registered in the name of Moses to hold in trust.

32. Going by the Supreme Court of Kenya case aforesaid, there are two critical tests that a claimant must interalia surmount in a claim for customary trust; firstly, is the nature of the holding of the title and secondly the intention of the parties.

33. It is trite that a trust can never be implied by the Court unless there was intention to create a trust in the first place. **In Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR** where the Court held;

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

34. From the evidence on record and looking at the root of the title, the nature of the holding of the suit land by Nduta is not clear. No evidence was led to show how Nduta acquired the land, was it family or clan land? It is also not clear the holding of the land held by Moses Chege. No evidence was led to show whether the land was a gift from the grandmother or his own mother, whether he succeeded the land from the grandmother or the mother. No evidence was led by the Defendants to support the intention of the parties to create a trust. The Defendants and their witness have stated that the registration of the land in the name of Moses Chege was in trust. What were the intervening circumstances that may have led Moses Chege to hold the land and for which a customary trust may legally be presumed? It was not explained.

35. The Defendants attempted to persuade the Court that the said Moses was the eldest in the family however this evidence was destroyed by the DW3 who stated that he is the eldest son in the family. I have perused the Land Dispute Tribunal proceedings where Moses was stated to be the 4<sup>th</sup> born/son in the family. This line of evidence leads the Court to believe that there were no intervening circumstances given by the Defendants that warranted the said Moses Chege to be registered as trustee of the suit land.

36. In addition, the Court did not receive any evidence to demonstrate the suit land was ancestral land. The Defendants stated that the land was given to Moses to hold in trust by their mother and Aunt. No credible evidence was led to support these averments.

37. Further the DW3 led evidence that their father Njoroge Mbugua owned land at Kaguthi. Could this be the family land? This line of evidence dims the evidence of the Defendants that they live on the suit land because they do not have any land of their own.

38. In *Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] EKLK* the Court also held that

“ . . . It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because: -

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

39. The totality of the evidence is that the Defendants have not discharged the burden of proof on a balance of probabilities and therefore their claim of customary trust is moot.

#### **Whether the title of the Plaintiff is vitiated.**

40. The Plaintiff’s claim is anchored on the fact that she is a bonafide purchaser for value. She led evidence that she entered into an agreement for sale for the purchase of the suit land from the registered owner Moses Chege. She carried out due diligence to ensure the suit land belongs to the seller, obtained land Control Board Consent, paid for the land and got registered as the owner of the land. She informed the Court that during the course of negotiations the said Moses informed her that the original title was lost. This evidence is consistent with the evidence of PW2 who informed the Court that he was the one who introduced Moses Chege to the Plaintiff and her husband. He stated during the negotiations for which he was present, Moses Chege informed the buyers that he had lost the original title and the identity card.

41. The Land Registrar led evidence that the parcel file contains a copy of an undated affidavit sworn by Moses Chege averring that the title of the suit land is lost. She testified that the original title in the name of Moses Chege was not surrendered to the Registrar for destruction, the loss of the title was not gazetted, the provisional title was not issued and it is unclear how the title was registered in the name of the Plaintiff. It is her evidence that in the face of the absence of the documents stated therein the title in the name of the Plaintiff cannot be said to have been procured in accordance with the procedure set in law.

42. Section 35 of the Registration of Lands Act, Cap 300 provides as follows;

“1) If a title deed or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a new title deed or certificate, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous title deed or certificate.

(2) The Registrar may require a statutory declaration that the certificate has been lost or destroyed.

(3) The Registrar, if satisfied with the evidence as to the destruction or loss of the certificate, and after the publication of such notice as he may think fit, may issue a new certificate.

(4) When a lost certificate is found, it shall be delivered to the Registrar for cancellation”.

43. The above provision is similar to the provisions of Section 33 in the Land Registration Act, 2012 which I shall reproduce here for purposes of emphasis;

“ (1) Where a certificate of title or certificate of lease is lost or destroyed,

the proprietor may apply to the Registrar for the issue of a replacement certificate of title or certificate of lease, and shall

produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title or certificate of lease.

(2) The Registrar shall require a statutory declaration to be made by all the registered proprietors, and in the case of a company, the director, where property has been charged, the chargee that the certificate of title or a certificate of lease has been lost or destroyed.

(3) If the Registrar is satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the *Gazette* and in any two local newspapers of nationwide circulation, the Registrar may issue a replacement certificate of title or certificate of lease upon the expiry of sixty days from the date of publication in the *Gazette* or circulation of such newspapers; whichever is first.

(4) If a lost certificate of title or certificate of lease is found, it shall be delivered to the Registrar for cancellation.

(5) The Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquiries as may be necessary and after giving due notice of sixty days in the *Gazette*.

(6) Upon the issue of a replacement certificate no further dealings shall be carried out using the replaced certificate

44. The Plaintiff in her submissions stated that the issue whether Moses Chege had the original title deed was cleared by the Land Registrar who indicated that there was an affidavit for the loss of the title which according to her was not legible. The Plaintiff invited the Court to examine the said affidavit of loss of title to determine its veracity.

45. Going by the provisions of the law set out in para 42 and 43 above it is clear that the process does not end with the affidavit of loss of title. This is the application stage and if the Registrar is satisfied of the circumstances that led to the loss, he proceeds to issue a notice in the Kenya Gazette along with two newspapers of wide circulation and after 60 days' notice issue a replacement title. There is no evidence that this legal process was followed.

46. It is the evidence of the Defendants that they have custody of the original title which they produced in Court. The Land Registrar confirmed that there is no evidence that the original title registered in the name of Moses Chege was surrendered as provided for the by law.

47. In the case of **Esther Ndegi Njiru & Another vs= Leonard Gatei [2014] eKLR** the Court held that :

“the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which a person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme”.

48. It is not in dispute that the Plaintiff is registered as owner of the suit land. Section 26 of the Land Registration Act states that a certificate of title issued to a proprietor shall be taken as prima facie evidence that the named proprietor is the absolute and indefeasible owner subject to such encumbrances easements restrictions and conditions endorsed on the title. The Act provides two ways in which such title may be challenged; on grounds of fraud and misrepresentation which the person is proved to be a party and secondly where the title has been acquired illegally unprocedurally and through a corrupt scheme.

49. Having perused the parcel file on record and taking into consideration the evidence adduced by the parties and particularly the Plaintiff , the Defendants and the Land Registrar in respect to how the title of the Plaintiff was registered, the Court is of the view that this title is not capable of protection by the law on the basis that its acquisition was done contrary to statute, that is to say without any gazette for lost title for a period of 60 days and the issuance of a provisional title prior to registering the Plaintiff as the proprietor of the land.

50. The upshot is the Counterclaim is dismissed and the Plaintiffs suit fails on account of the title having been acquired unprocedurally and or illegally contrary to the statute.

#### **51. Final orders;**

a. The Plaintiffs claim is dismissed.

b. The title held by the Plaintiff is hereby ordered cancelled.

c. The Land Registrar is ordered to rectify the Register of LOC4/KAGUTHI/110 and revert the suit land to the original owner Moses Chege Mbugua.

d. The Counterclaim is dismissed.

e. I direct that each party to bear their own costs of the suit.

#### **Orders accordingly**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 25<sup>TH</sup> DAY OF MARCH, 2019.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Makori HB for Nderitu for the Plaintiff

Opiyo HB for Mbiyu Kamau for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

Irene and Njeri, Court Assistants