



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO. 188 OF 2017

GLADYS NJERI MUHURA

(Suing as the legal Representative of the late

MUHURA KIGANDA deceased).....PLAINTIFF

VERSUS

LISPA WAGATURI MUTHIGURO.....DEFENDANT

(Sued as the legal representative of the late MUTHIGURO KIGANDA - Deceased)

JUDGMENT

1. The Plaintiff and the Defendant are related. They are the wives of the late Muhura Kiganda and Muthiguro Kiganda respectively. Muhura and Muthiguro were step brothers being the sons of Kiganda Muthiguro from his two wives. Muthiguro Kiganda was the eldest son and died in 1971 while Muhura was younger and died in 2003.
2. Lispha Wagaturi Muthiguro died in 2013 where upon her son David Kariuki Muthiguro was substituted as the administrator of the estate of his father vide letters of grant of administration ad litem issued on the 21/6/17. The Defendant hereafter shall be referred to as the administrator of the estate David Kariuki Muthiguro.
3. On the 9/5/12 the Plaintiff filed suit against the Defendants seeking two prayers; declaration that the late Muthiguro Kiganda held $\frac{1}{2}$ share in LOC 8/KARI KARURU/232 in trust for the late Muhura Kiganda; and that the said trust be determined to pave way for the subdivision of the land into two and $\frac{1}{2}$ share be transferred in the name of the Plaintiff.
4. The Plaintiff states that the suit land belonged to her father in law Kiganda Muthiguro and at the time of demarcation, it was registered in the name of the Defendant's husband in trust for himself and his family, her husband included in 1957. The copy of the search filed on record showed the land was registered in the name of the Muthiguro on 24/9/57.
5. She further stated that she has lived on the land before 1957 to date. That she cultivates crops and has built a house.
6. She stated that at the time of registration and demarcation, Muhura was away in detention and so the land was registered in the name of the elder brother who was present, Muthiguro. She asserted that the

family of the Muthiguro also lives on the land and they have so lived peacefully from 1957 – 1971 when Muthiguro was alive and also after his death in 1971 to 2003 when her husband Muhura died. She stated that she filed a Succession Cause against the estate of Muthiguro claiming ½ share of the land held in trust for her husband. The Defendant resisted and on appeal the Court held that the issue of trust be determined before the estate of the late Muthiguro can be distributed hence this suit.

7. The witness denied having any interest in LOC 8/KARI KARURU/170. Her interest is in the suit land where she lives on the eastern part while the Defendant lives on the western part of the land. She informed the Court that she buried her husband and two sons on the suit land with no objection from the Defendant and his family.

8. DWI – stated that his father did not hold the suit land in trust for anyone let alone the Plaintiff's husband and her family. He averred that the land belonged to his father absolutely and that he bought some fragments which were consolidated into the suit land. He denied that Muhura was not in detention at demarcation and that instead he was running a shop in Nairobi. He opined that the Plaintiff should seek a share of the land in parcel No LOC.8/KARI-KARURU/170 as that land is registered in the name of WATATI KIGANDA who was the mother in law of the Plaintiff. That she and her family are the rightful beneficiaries of that land. He however confirmed that parcel LOC.8/KARI-KARURU/170 belonged to his grandfather. But was registered in the name of his grandmother WATATI KIGANDA.

9. The witness further stated that his father gave his brother Muhura a place on the land to settle with his family around 1959 and that they have lived there to date. Muhura and his two sons are buried on the land. He admitted that ever since there has not been any dispute relating to the suit land until the succession cause was filed. That the two families lived peacefully. That Muthiguro was the eldest in his family.

10. Finally, the witness stated in evidence that the Plaintiff occupies around 1.5 acres of the total 4 acre piece of land. He conceded that the Plaintiff s can be given the area where the graves of her family members have been interred.

11. The parties elected to file Written Submissions which I have read and considered in writing this judgement.

12. The central issue for determination is whether the Plaintiff has proved the existence of customary trust in relation to the suit land.

13. Customary trust is a concept through which land may be acquired in Kenya. It is anchored in both the Constitution and statute. It is an overriding interest in land which need not be registered. **Article 60 (1) (a) of the Constitution** terms it intergenerational and intragenerational equity.

14. The statutory underpinnings of customary trust are found both in the repealed Act, CAP 300 and the new Registration of Land Act. The provisions of Section 27 & 28 of Registered Land Act, Cap 300 state that the rights of a registered proprietor of registered land under the Act are absolute and indefeasible and only subject to rights and encumbrances noted on the register or overriding interests which are set out under section 30 of the Act. The provisions of 27 & 28 are similar to the provisions set out in section 24, 25 26 & 28 of the Land Registration Act, 2012.

15. Section **28 (b) of Land Registration Act** provides as follows;

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

ii. (a).....

iii. (b) trusts including customary trusts;

16. In the case of **Kanyi Vs Muthiora 1984 KLR 712 CA**, the Court held that the registration of land in the name of a proprietor under the Land Registration Act did not extinguish rights under Kikuyu Customary law and neither did it relieve the proprietor of the duties or obligations as trustee.

17. A customary trust need not be registered on the title. It is an overriding interest that subsists on the land. It is binding on the land.

18. 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).

19. In the instant case parties are in agreement that the land was registered in the name of Muthiguro in 1957. The Defendant attempted to challenge the evidence that the land was family land by stating that his father held the land absolutely to himself and not in trust for the family. That indeed he purchased other fragments that were registered together. He did not lead any evidence to show which fragments he purchased, from whom and at what cost. The Plaintiff and the Defendant agree that Muthiguro was the eldest son in the family. In Kikuyu customs it was common for the land to be registered in the name of a male member and more so the eldest son in the family. The Defendant stated that Muhura was not in detention at the time of demarcation. From his own account he was only six years old during demarcation and naturally he may not of his knowledge know the history of the land. His evidence is therefore not very reliable in this case on that account.

20. Despite the veracity of his evidence, the Court notes that even if it is to be believed that Muhura was in Nairobi operating his shop at Ngara as averred by the Defendant, the fact of the matter is that he was away during demarcation and it fell on the eldest son to be registered as owner on behalf of the family.

21. They both led evidence that the two families have lived on the suit land for over 60 years and trouble only started when the Plaintiff sought her half share of the land which she claimed was held by Muthiguro and his family. Evidence was led by the Plaintiff which evidence was not challenged that she lives on the eastern side while the Defendant lives on the western side of the land. The evidence in relation to burial of her husband and sons on the land was not challenged either.

22. The Defendant has raised the issue of parcel LOC 18/KARI-KARURU/170. That this land belonged to the mother in law of the Plaintiff and that she should be seeking a share in the said land. He also confirmed that the land is occupied by other family members. It was not clear if the land has been administrated and who the administrators are. In any event they were not enjoined in this suit and neither is parcel No LOC 18/KARI-KARURU/170 a subject of the suit. The Court declines the invitation to entertain any claim on parcel LOC 18/KARI-KARURU/170.

23. In the end guided by the evidence on record and the **Isack M’Inanga Kieba case supra**, the Court is satisfied on a balance of probabilities that the Plaintiff has proved the existence of customary trust on the suit land.

24. The Final orders;

- a. It is hereby declared that the late Muthigiro Kiganda held the land parcel LOC8 /KARI - KARURU/232 in trust for the late Muhura Kiganda to the extent of a half share(0.95 acres)
- b. The trust aforesated be and is hereby dissolved and the suit land to be subdivided and a half share to be registered in the name of the Plaintiff as administrator of the estate of Muhura Kigandi.
- c. In respect to costs I have taken into account that the parties herein are close family members and as such I direct that each bears their own costs.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 21ST DAY OF MARCH 2019

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Kinyanjui HB for Mbuthia for the Plaintiff

Peter Muthoni HB for T M Njoroge for the Defendant

Irene and Njeri, Court Assistants