



## REPUBLIC OF KENYA

### ENVIRONMENT AND LAND COURT AT KISII

#### CASE NO. 132 OF 2002

NYANKABARIA ISABOKE..... 1<sup>ST</sup> PLAINTIFF

ORENGO ISABOKE.....2<sup>ND</sup> PLAINTIFF

VERSUS

MASIRA ISABOKE..... DEFENDANT

#### J U D G M E N T

1. The plaintiffs filed this suit against the defendant on 12<sup>th</sup> June 2002. They claim that during the land adjudication and registration process within Nyamaiya Adjudication Section, the defendant who is their elder brother was registered as the owner of land parcels no. **Nyamaiya / 1169** and **1886** whose full description is **West Mugirango/ Nyamaiya/1169** and **1886** (hereinafter referred to as **“the suit properties”**). The plaintiffs pleaded that the suit properties are ancestral lands and were to be held by the defendant in trust for himself and the plaintiffs. It is the plaintiff’s case that after making several futile demands upon the defendant to subdivide the land equally and instituting proceedings against him in the Land Disputes Tribunal, they were constrained to file this suit, having been so directed by the Tribunal.

2. The defendant in his defence dated 16<sup>th</sup> July 2002 denied he held the suit properties in trust and averred that their ancestral lands were located in Nyangoko and Gesurura and that they had been duly shared out between the plaintiffs and the defendant. He asserted that the suit properties were his absolutely and the plaintiffs had no legal right over them.

3. On 10<sup>th</sup> March 2004, both plaintiffs gave evidence in support of their claim before Bauni, J. and closed their case. The defendant in spite of being afforded the opportunity to give evidence and the defence hearing being adjourned severally, the defendant ultimately determined to offer no evidence.

4. The 1<sup>st</sup> plaintiff testified that the defendant, who was their eldest brother, had been registered as the owner of the suit properties on 15<sup>th</sup> October 1973 during the demarcation process. He told the court that none of them had been living on the suit properties and that the parties lived on separate, adjacent parcels of land which had been given to them by the defendant. He contended that since the suit properties were also ancestral land, they ought to have been similarly shared. The 1<sup>st</sup> plaintiff stated they had referred the matter to Nyamira District Land Tribunal vide case no. 3 of 2002 but as the matter touched on title to land they were advised to file suit against the defendant in the High Court to file suit against the defendant. During cross examination, the 1<sup>st</sup> plaintiff admitted that he had been raised by his father’s brother one Mandere but insisted that the land they were claiming belonged to their deceased father. The 2<sup>nd</sup> plaintiff in his testimony adopted the evidence given by the 1<sup>st</sup> plaintiff.

5. The issues that arise for determination in the suit are as follows:

- i. Whether the suit properties were ancestral lands of the plaintiffs and the defendants;
- ii. Whether the Defendant is registered as proprietor of the suit properties and whether he holds the same in trust for himself and the plaintiffs herein;
- iii. Whether the plaintiffs are entitled to any share in the suit properties; and
- iv. What orders/reliefs should the court grant?

6. In asserting their claim that the suit properties were ancestral lands, the plaintiffs told the court that after the demise of their father, they had been brought up by their paternal uncle. The 1<sup>st</sup> plaintiff told the court that the suit properties belonged to their father and that the defendant, being their eldest brother had been registered as proprietor in trust for them. The 1<sup>st</sup> plaintiff produced copies of searches for the

suit properties marked as “**Exhibit P1 (a) and (b)**” which confirm that the defendant was indeed the registered proprietor. A list of documents filed by the plaintiffs on 7<sup>th</sup> March 2018 annexing further copies of searches for the suit properties further affirmed that as of 1<sup>st</sup> March 2018, the defendant was still the registered owner of the suit properties.

7. The evidence that the defendant was registered as the first proprietor of the suit properties pursuant to a land adjudication process has not been contravened. The properties were initially community land and was part of the ancestral land belonging to the plaintiffs and defendant’s family before their conversion to private land in accordance with the Land Adjudication Act. In considering whether such registration of land under the Registered Land Act, Cap 300 Laws (repealed) extinguished any rights obtaining in customary law, the Court of Appeal in the case of **Kanyi Muthiora -vs- Maritha Nyokabi Muthiora Civil Appeal No. 19 of 1982 [1984] eKLR**, stated as follows;

**“The registration of the suit land in the name of Kanyi under the Registered Land Act did not extinguish Nyokabi’s rights under the Kikuyu customary law, Kanyi was not relieved from her duty or obligation to which she was as a trustee to Muthiora’s land: See proviso to section 28, of the Act and Gatimu Kinguru v Muya Gathangi [1976] KLR 253.”**

8. The Supreme Court had occasion to review and consider the application of customary law rights in regard to registered land in the case of **Isack M’nanga Kiebia -vs- Isaaya Theuri M’lintari & another Petition 10 of 2015 [2018]eKLR**, and in an exhaustive discourse pronounced itself in the following terms;

**“[40] ... Given the fluidity and complexity of these rights, it is obvious that, such rights could not find expression in the Register in their totality. Such customary rights as could not be noted on the register would have to be recognized somehow, for they had already been recognized by the Constitution.**

**[41] Thus, the obligations of a registered proprietor upon a first registration, as embodied in Section 28(b) (and the proviso thereto) and Section 30 (g) of the Registered Land Act, could only logically, be traceable to the “rights, interests, or other benefits under African customary law”. How then, given this historical context, and the constitutional and statutory provisions, could it have been so easy to declare that rights under customary law become extinguished for all purposes upon the registration of a person and that none could survive whatsoever**

...

**[54] In the foregoing premises, it follows that we agree with the Court of Appeal’s assertion that “to prove a trust in land; one need not be in actual physical possession and occupation of the land.” A customary trust falls within the ambit of the proviso to Section 28 of the Registered Land Act, while the rights of a person in possession or actual occupation, are overriding interests and fall within the ambit of Section 30(g) of the Registered Land Act.”**

9. In the present case, I am persuaded that the defendant, being the eldest brother of the parties herein was registered as proprietor of the suit properties in a fiduciary capacity as was the norm during land adjudication and consolidation particularly where some siblings were too young and/or away from home. The suit properties which belonged to the family before the adjudication process were registered in the defendant’s name in the expectation that he would hold the same in trust for his brothers whose father had passed away long before they grew up. As pointed out by the Supreme Court in **Isack M’nanga Kiebia -vs- Isaaya Theuri M’lintari (supra)** their occupation of the land was immaterial as their interests were protected in the proviso to **Section 28** of the **Registered Land Act** (repealed) which provided:

**28. The rights of a proprietor, whether acquired on first registration or whether acquired 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:**

**Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.**

10. Section 30(g) of the Act provided as follows:

**30. 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 thier 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 enquiry is made of such person and the rights are not disclosed.**

Sections 28 and 30 of the repealed Registered Land Act were reproduced under Sections 25 and 28 of the Land Registration Act, 2012 albeit with minor alterations. While the previous Act did not expressly acknowledge customary trust unless it was supported by possession and/or occupation as an overriding interest that did not require noting in the register, the new Land Registration Act, 2012 did so under Section 28(b) which provided “**trusts including customary trusts**” are overriding interests that needed not to be noted in the register.

11. The plaintiffs' evidence that the defendant was to hold the suit lands in trust for them was not challenged by any other evidence as the defendant did not tender any evidence. In the circumstances, I find and hold that the plaintiffs have proved their case on a balance of probabilities and are entitled to Judgment.

12. I accordingly enter Judgment in favour of the plaintiffs and against the defendant on the following terms:-

**1. A declaration be and is hereby issued that the defendant holds land parcels West Mugirango/Nyamaiya/1169 and West Mugirango/ Nyamaiya/1886 in trust for himself and the plaintiffs herein.**

**2. The defendant is hereby ordered to cause the land parcels West Mugirango/Nyamaiya/1169 and 1886 to be subdivided into three equal portions each and to transfer two portions to each of the plaintiffs (one portion from each parcel) respectively within a period of 60 days from the date hereof.**

**3. In the event the defendant fails to execute the necessary documents to give effect to this judgment, the Deputy Registrar is hereby authorised to execute any such necessary and appropriate documents on behalf of the defendant.**

**4. The parties to bear their own costs of the suit.**

**JUDGMENT DATED, SIGNED and DELIVERED at KISII this 20<sup>TH</sup> DAY of MARCH 2019.**

**J. M. MUTUNGI**

**JUDGE**

**In the Presence of:**

Mr. Soire for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff

Mr. Bunde for the defendant

Ruth Court Assistant

**J. M. MUTUNGI**

**JUDGE**