



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 77 OF 2014

(FORMERLY KERUGOYA ELC NO. 208 OF 2008)

CIVIL SUIT NO. 21 OF 2008 (ORIGINATING SUMMONS)

CHARITY MACHAKI KAUGI.....1ST PLAINTIFF

BERNARD NGARI KAUGI.....2ND PLAINTIFF

VERSUS

DICKSON NYAGA KAUGI.....DEFENDANT

JUDGEMENT

1. By a plaint dated 22nd June 2011 and filed on 1st July, 2011, the Plaintiffs sued the Defendant seeking the following reliefs;

a. The subdivision of the suit land and any subsequent transfer be annulled and or cancelled and the suit land be restored to its original number Gaturi/Githimu/16. (sic)

b. The suit land being parcel number Gaturi/Kithimu/16 be subdivided and shared out as proposed under paragraph seven herein above.

c. Costs and interest.

2. The Plaintiffs pleaded that sometime in 1961, the Defendant, who was then a toddler, was given parcel No. *Gaturi/Githimu/16* (hereinafter known as the “suit property”) measuring approximately 10 acres by Iruma clan by virtue of being the first born son in the family to hold it in trust for the rest of his family members. It was pleaded that the Defendant’s father died before land demarcation was undertaken.

3. The Plaintiffs further pleaded that the 1st Plaintiff who is the mother of the Defendant gave birth to two (2) other sons besides the Defendant who at all material times resided on the suit property. The 1st Plaintiff, therefore, wanted the court to make a declaration of trust and to order distribution of the suit property so that she gets one (1) acre while his 3 sons get three (3) acres each.

4. The Defendant filed a written statement of defence dated 22nd August 2011 in which he denied the Plaintiffs’ claim in its entirety. It was pleaded that the issue of customary trust as pleaded was not actionable and that the doctrine of trust did not exist or apply in the particular circumstances of the case.

5. The Defendant further pleaded that the suit property was absolutely his and that his title thereto was absolute and indefeasible. The Defendant, therefore, contended that the Plaintiffs had no valid cause of action against him capable of being enforced and warned the Plaintiffs that he would apply for the suit to be struck out at the earliest opportunity.

6. The record of proceedings shows that the suit was fully heard before the Hon Justice Momanyi Bwonwonga between 30th October 2014 and 22nd April 2015 when the matter was fixed for judgement on February June 2015. However, due to circumstances beyond his control, the judgement was never delivered.

7. When the suit was mentioned before me on 4th October 2017 both Mr Joe Kathungu Advocate for the Plaintiffs and Mr Guantai Advocate for the Defendant informed the court that they had filed their submissions in 2015 and that they desired the court to pronounce judgement on the basis of the evidence and submissions on record once the proceedings are typed. The court, therefore, fixed the suit for judgement on 15th March 2018.

8. The court has perused the entire court file and there is no indication of the parties having agreed on the issues for determination herein. There is also no indication of the parties having filed separate issues for determination. The record shows that some two relatives of the parties herein were joined as interested parties even though they neither filed pleadings nor submissions herein.

9. The court has considered the evidence tendered on behalf of the Plaintiffs. They called four (4) witnesses in total, that is, the two Plaintiffs themselves and some 2 elders. The evidence of the 1st Plaintiff (PW 1) indicates that she is the mother of the 2nd Plaintiff and the Defendant. The 1st Plaintiff also had a third son known as Gaitano Njue who was deceased.

10. The 1st Plaintiff testified that she was married to one Mr Kaugi who died before 1963 and before land demarcation. She further testified that at the material time women could not be allocated clan land under the customs of the Aembu tribe hence she had to forward the name of his first-born son, the Defendant, to the clan elders so that he could be registered. She also stated that her late husband did not have a brother who could be registered on their behalf. Her further evidence was that the Defendant was a toddler who was still breast-feeding at the time he was allocated the suit property measuring about 10 acres.

11. It was her further evidence that she, together with her other sons, daughters and grandchildren have all along lived on and cultivated the suit property. Some permanent houses had also been erected thereon by the Plaintiffs and they continued to live thereon. She did not, therefore, understand why the Defendant did not want to share the suit property equally with his brothers. She also wanted one (1) acre for herself out of the suit property.

12. The 2nd Plaintiff's witness was Nguuri M'riua (PW 2) who testified that he was a clan elder at the time of land demarcation. He stated that it is PW 1 who took the name of the Defendant before the elders for him to be allocated land. His further evidence was that women could not be registered as land owners at the material time. The elder confirmed that he knew the litigants in the suit well and he knew where they lived.

13. The 3rd witness for the Plaintiffs was Mutero Mugane (PW 3). He stated that he knew the parties herein well. He was a member of Iruma clan to which all the parties herein belong. He stated that the Defendant was registered as proprietor of the suit property in place of his mother who could not be registered due to restrictive customs. Unlike PW 2, his evidence was not challenged through cross-examination.

14. The 2nd Plaintiff was the 4th witness to testify. His evidence was similar in various respects to that of PW 1. He confirmed that he, his wife and children had settled on part of the suit property for many years. He had built a permanent house for his family and a permanent one for his mother. He contended that the suit property was family land and that all his brothers and sisters were born and brought up thereon.

15. The 2nd Plaintiff conceded that the Defendant had given his son, Kennedy Mugambi, a portion of 1 ½ acres out of the suit property as a gift. However, he wanted to get three (3) acres which he considered to be his rightful share of the suit property.

16. The Defendant is the only witness who testified on his behalf. He testified that he was about 3 years old when he was allocated the suit property by Iruma Clan. He asserted that the suit land was meant to be his absolutely and that he was not registered on behalf of his family members. He denied that the customs of the Aembu tribe prohibited the registration of women as land owners at the material time. He cited an example of the wife of a chief who had been allocated some land.

17. It was the Defendant's evidence that he had out of goodwill given 1 ½ acres each to the families of the 2nd Plaintiff and his late brother Gaitano Njue as a gift out of the suit property. According to him, that was merely a charitable and philanthropic gesture which he had no legal obligation to do.

18. During cross-examination, the Defendant conceded that it was his mother (PW 1) who gave his name to the clan elders for allocation of the suit property. He also conceded that it was his mother who took him before a committee of the clan elders for verification of his name and identity. He also conceded that PW 1 gave his name because he was the son of Kaugi.

19. The Defendant also confirmed during cross-examination that the Plaintiffs have developed and settled on parts of the suit property. He conceded that the 2nd Plaintiff had erected a permanent house on part of suit property which portion he gifted to the 2nd Plaintiff's son, Kennedy Mugambi. He was aware of the construction at all material times but he did not stop the 2nd Plaintiff from constructing the houses. He stated that he allowed the 2nd Plaintiff to construct the houses as a means of "empowering" him.

20. Having considered the pleadings, documents and evidence on record, I am of the view that the following issues fall for determination;

- a. Whether the Defendant was registered as proprietor of the suit property in absolute or on his own behalf and in trust for the Plaintiffs.
- b. Whether the Plaintiffs are entitled to the reliefs sought in the plaint.
- c. Who shall bear the costs of the suit.

21. In my view, the evidence on the first issue is manifestly clear. The 1st Plaintiff's husband died before land demarcation was done. The Defendant was the eldest son in the family. It was the 1st Plaintiff who handed the name of the Defendant, who was a toddler, to the clan elders for the purpose of allocation of clan land on behalf of the family of the late Kaugi. The Defendant conceded that it was his mother who gave his name to the elders and that she was the one who took him to a committee of elders for verification.

22. Even though the Defendant contended that he was registered as owner in absolute terms and not on behalf of his family, the evidence on record and the circumstances of the case make such contention untenable. There would be no logical reason why a mother would cause registration of clan land in the name of one child with the intention that it should belong to him absolutely to the exclusion of the rest of the family members. The Defendant's mother gave a good reason why the Defendant was registered as proprietor during the land adjudication and demarcation exercise. She had no intention of disinheriting the rest of her children.

23. There is ample evidence on record that the Plaintiffs and other family members have resided on the suit property since 1960s without any objection by the Defendant. There was no evidence on record that the Defendant ever sought to evict the rest of the family members from the suit property. No legal proceedings were ever undertaken for their eviction for overstaying their welcome. In fact, the evidence on record shows that both Plaintiffs have permanent houses on the suit property. They were constructed with full knowledge of the Defendant who never stopped them from doing so.

24. In my opinion, the conduct of the Defendant shows that all along he was aware that the suit property was family land and that he was registered on his own behalf and on behalf of the rest of the family members. I do not think the Defendant could seriously contend that even if his father had been alive at the material time, he (the Defendant) would have been registered, or insisted on being registered as proprietor to the exclusion of his father and siblings. I do not think a 2 or 3 year old baby could have pulled such a move.

25. The court has, therefore, no hesitation in finding and holding that the Defendant was registered as proprietor of the suit property on his own behalf and on behalf of his family members. The existence of such trust is evident from the material on record. It does not matter whether the existence of the trust came about as a result of a restrictive custom or otherwise. It does not matter that such trust may have its origin in customary law. What is important is that the existence of a trust has been established.

26. In the case of *Mbui Mukangu Vs Gerald Mutwiri Mbui, Nyeri Civil Appeal No. 281 of 2000 [2004 eKLR]* which was cited by the Plaintiffs' counsel, the Court of Appeal gave approval to the following passage by Hon Justice Khamoni in *Gathiba Vs Gathiba Nairobi HCCC No 1647 of 1984; 2001 2EA 342 at 368*.

“The position as I see it is therefore as follows: Correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interest under section 30 of the Registered Land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to section 28 and section 126 (1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has that piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Act because, according to the proviso to section 28 of the Registered Land Act such registration does not “relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

27. The court fully agrees with the learned opinion cited above. The law under which the Defendant was registered as proprietor conferred an indefeasible title on him. However, the same law recognized the existence of trusts and, most importantly, it did not relieve the Defendant from any duty or obligation to which he was subject as trustee. The Defendant's duty as trustee arose from the moment his name was entered in the adjudication register on behalf of the family of his late father. By the time his name was being entered in the land register on 6th December 1961, he was already a trustee.

28. The second issue is whether the Plaintiffs are entitled to the reliefs sought in the plaint. The Plaintiffs want the subdivision of the suit property cancelled so that the 1st Plaintiff is given one acre whereas the 3 sons share the remaining 9 acres equally as proposed in paragraph 7 of the plaint. The court is aware that 1 ½ acres was given to each of the interested parties. The interested parties testified at the trial that they supported the action taken by the 1st Plaintiff and the proposed equitable sharing of the suit property.

29. The court is of the view that given that the Defendant is a trustee, he is in no position to doll out small portions of the suit property as he may please to the beneficiaries. The suit property should be shared equitably as sought by the Plaintiffs. The court, therefore, holds that the Plaintiffs are entitled to the remedies sought in the plaint. The fact that the Defendant had already subdivided the suit property and gifted 1 ½ acres to each of the interested parties cannot relieve the Defendant of his duty as trustee. The court shall therefore grant the reliefs sought by the Plaintiffs.

30. The third and final issue relates to costs of the suit. The law on costs in Kenya is fairly well settled. Under section 27 of the Civil Procedure Act (Cap 21), the costs of an action shall follow the event, unless, for good reason, the court decides otherwise. Although the Plaintiffs are the successful parties herein, the court is aware that all the parties are close family members. It may not be helpful for the court to condemn the Defendant to pay the Plaintiffs' costs of the suit. In my opinion, each party should bear own costs.

31. The following is the summary of the court's findings and holdings on the issues for determination;

- a. Although the Defendant is the registered proprietor of the suit property, his registration was not absolute but on his own behalf and in trust for the Plaintiffs and other family members.
- b. The Plaintiffs are entitled to the reliefs sought in the plaint.
- c. Each party to the suit shall bear own costs.

32. The upshot of the foregoing is that the court finds that the Plaintiffs have proved their case on a balance of probabilities and judgement is

hereby entered in their favour in the following terms;

a. The subdivision of Title No. GATURI/GITHIMU/16 and any subsequent transfers and resultant titles are hereby annulled and or cancelled and the land restored to its original number.

b. The suit property i.e. GATURI/KITHIMU/16 shall be sub-divided and distributed as follows;

i. Charity Machaki Kaugi - 1 acre

ii. Bernard Ngari Kaugi - 3 acres

iii. Dickson Nyaga Kaugi - 3 acres

iv. Loise Gicuku Njue - 3 acres on behalf of Gaitano Njue.

c. Each party shall bear own costs.

33. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **15th day** of **MARCH 2018**

In the presence of Ms Mwiria for the Plaintiff and Ms Kimotho holding brief for Mr Guantai for the Defendant.

Court clerk Leadys.

Y.M. ANGIMA

JUDGE

15.03.18