



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 143 OF 2017

LUCY GATHONI KIRERU.....PLAINTIFF/APPLICANT

VERSUS

JAMES KARUKU KIRERU.....DEFENDANT/RESPONDENT

JUDGMENT

1. The Plaintiff and the Defendant are blood relatives, being the children of Kireru Kioria who had 2 wives; Muthoni Kireru and Wanjiru Kireru. The parties are the children of the junior wife; Wanjiku Kireru. Each of the Kireru's wives had 5 children. Kireru Kioria owned parcel No LOC 14/KAIRO/114 (original land) measuring 9.2 acres. Upon his demise on 11/7/1978, the Defendant succeeded him and his stepbrother Kihumba Kireru vide a succession cause at Kangema in 1979. Through transmission, they became registered as owners of half share of the suit land with each getting 4.6 acres. Subsequently, the original land was subdivided to yield LOC14/KAIRO/2218 and LOC14/KAIRO/2219 (suit land) registered in the name of Kihumba Kireru and the Defendant respectively.

2. The Plaintiff's claim is for 1.5 acres from the suit land being registered in the name of the Defendant. Her claim is based on trust for which she has particularized under para 3 of the plaint. She avers that the suit land is family/ancestral land held by her brother in trust.

3. She sought the following orders;

a. A declaration that the Defendant holds 1.5 acres of the land parcel LOC 14/KAIRO/2218 in trust for the plaintiff.

b. An order for the dissolution of the trust and the subdivision and transfer of 1.5 acres out of the suit land.

c. An order of injunction against the Defendant, his servants or agents from entering into, cutting down tea bushes and other crops and trees, demolishing houses and other structures belonging or in possession of the Plaintiff or evicting the Plaintiff from the said land or interfering with her quiet possession of her portion of the land.

d. Payment of Kshs 32,000/- being the cost of replanting the tea bushes.

e. Cost of the 3 suit.

4. The Defendant denied the Plaintiffs claim and states that he is prepared to give the Plaintiff 0.5 acres,

which she has settled on with his permission and no more. He denied that he holds the suit land in trust, least of all, for the Plaintiff.

The Plaintiff's evidence

5. The Plaintiff informed the Court that she was born in 1949. She has lived on the land since birth. She is unmarried but has a family of her own made up of her daughter and grandchildren. That she has lived on the suit land all her life. Her two sisters are married and not interested in the family land.

6. She testified that her other brother John Kioria was given 2.5 acres of land and she is claiming 1.5 acres from the Defendant's land which belonged to their father. That it was their parents wish that the Defendant should transfer 1.5 acres to her and she even filed a case to stop the burial of her mother until she was given her share of the land. That the Defendant agreed to give her the land but after the burial, he reneged, destroyed 800 tea bushes and uprooted nappier grass on 0.3 acres of the portion of land that she occupies. She accused the Defendant of constantly interfering with her quiet possession and threatening her with eviction from the suit land.

Defendant's case

7. The Defendant testified in Court and admitted that he has given the Plaintiff 0.5 acres of land. That he has 10 children who depend on the land as entitlement. At the hearing, he proposed an additional 0.1 points to make it 0.6 acres. He admitted that his father gave the sons land all from the two houses and the Plaintiff was not given any land. That LOC 14/KAIRO/114 was shared between the two houses of his father with him taking the suit land and the share of the 1st house going to his stepbrother Kihumba. He confirmed that John Kioria, his real brother got 2.5 acres from another the family land. He admitted further that the Plaintiff has lived on the suit land since her childhood. That the lands belonged to their father. It is his contention that the Plaintiff should claim land from his fathers' sons who got more land than he did.

8. Parties elected to file Written Submissions, which I have carefully read and considered.

9. Having considered the pleadings, the evidence and the submissions the issues that fall for determination are:-

- a. Whether the Plaintiff has proved trust in her favour over the suit land.
- b. Is the Plaintiff entitled to the sum of Kshs 32,000/- being the cost of replanting the tea bushes?
- c. Who meets the costs of the suit?

10. It has long been held and settled by Courts in Kenya that customary trust is one of the modes of acquisition of land in this country. I will not reinvent the wheel but firmly agree with the decision of the Learned Justices of the Supreme Court of Kenya in the case of **Isack M'Inanga Kieba Vs Isaaya Theuri M'Lintari & Isack Ntongai M'Lintari SCOK Petition 10 of 2015**, where 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).

11. The statutory underpinnings of customary trust are found in both 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.

12. 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;

13. Similarly, in the case of **Peter Gitonga Vs Francis Maingi M’ikiara Meru HC.CC NO. 146 OF 2000-** it was stated that :-

i. A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged”. (emphasis is mine).

14. It is not in dispute that the suit land emanated from the family/ancestral land that was owned by the parties’ father. It is also not in dispute that the Plaintiff has lived on the suit land all her life. This was admitted by the Defendant. It is not in dispute that the Defendant inherited the suit land from his father vide a succession cause in Kangema where he was appointed administrator of the estate of his father on behalf of his mother’s estate and later registered as owner of the suit land.

15. On application of the Plaintiff, the Court stayed the prosecution of this case to allow the Plaintiff to seek a revocation of the said grant issued in 1979 for purposes of being included in the succession of the estate. It is on record that her application was dismissed on 18/7/18.

16. Article 162 (2)(b) of the Constitution read together with Section 13 of the Environment and Land Court Act gives this Court original and appellate jurisdiction to resolve disputes, inter-alia, relating to title to land.

17. Equally, Art. 23(3) of the Constitution donates to the Court the power to grant reliefs, which includes declaration of rights in title to land similar to the prayers in this suit.

18. It is on record that the suit and has been subject of LDT case which decision was set aside by the Appellate Court in Nyeri on grounds of want of jurisdiction of the LDT to deal with title to land.

19. It is also on record that the original land was subdivided and registered into two parcels in the names of the two sons from each house. It then follows that both sons were to hold the land on behalf of their mothers’ houses. This succession followed the Kikuyu way of sharing property that is to say according to the houses and not according to the number of children of the deceased. It is important to note that the estate was succeeded in 1979 before the enactment of the current Succession Act in that came into existence in 1982.

20. In **Eugene Cotran on Restatement of African Law**, it was the custom of the Kikuyu community that inheritance of family land was given to the eldest son of the family. Land was also shared in line with the number of houses the deceased had. I have perused the orders issued in 1979 in respect to the succession of the land, which indicated that by consent of the parties the original land to be subdivided between the Defendant and his stepbrother Kihumba. The sons came from the 1st and 2nd houses respectively. The distribution of the land therefore followed the houses of the deceased. The custom then was the land is given to the eldest sons of the houses for the sake of the lineage of that house. The Plaintiff led uncontroverted evidence that it was the intention of her parents that she be given 1.5 acres of the suit land. That evidence remained unchallenged by the Defendant.

21. The Defendant has led evidence that;

“the land was shared between myself and the son of the first house. The Plaintiff has lived on the land since her childhood. I allowed her to stay on the land.... the land belonged to my father.”

The above is further testament the suit land is indeed family land. It can be traced to their late father. The Defendant did not purchase the land and there is nowhere that he has asserted that the land was purchased by him. Registration of the land in the name of the Defendant in these circumstances does not mean that the Plaintiff ceased to be a Member of the family of her deceased father. The Plaintiff was not registered as owner because the customary practice was that a woman was then not entitled to be registered as owner of land. This is the intervening circumstance referred to in the Supreme Court of Kenya judgment cited in paragraph 10 above.

22. Notwithstanding the foregoing, however, the legal landscape has changed with the enactment of the Constitution, 2010. Art 27 of the Constitution now provides that every person is equal before the law and has a right to equal protection and benefit of the law. Equality includes full and equal enjoyment of all the rights and fundamental freedoms. It further accords women and men the right to equal treatment including the right to equal opportunities in economic and social sphere.

23. Further, Article 19(2) of the Constitution provides that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. Art 20(4)(a) enjoins the Court to interpret the bill of rights in a manner that promotes the values that underlie an open and democratic society based on human dignity, equality, equity and freedom.

24. Article 40 of the Constitution provides that every person has a right to own and acquire property. Customary trust is one of the modes of acquisition of property in this country. Article 24 prohibits any limitations of rights such as the right to own property except where provided by law and to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

25. Art 259 of the Constitution enjoins this Court to interpret the supreme law of the land in a manner that promotes its purposes values and purposes, inter-alia, that is to say in a favourable manner to achieve the furtherance of the aspirations of Kenyans as captured in the preamble of the said Constitution.

26. This Court being both a Court of law and a Court of equity and in the case of **Karuntimi Raiji Vs M'Makinya M'Itunga (2013) EKL**R the court held that it is inconceivable that a Court of equity can leave a party with a genuine claim without a remedy. A Court of equity ought to intervene in fairness to ensure that an Applicant's possible interests are not vitiated.

27. It is not in dispute that the Plaintiff is the daughter of the deceased. The suit land was the portion that belonged to the 2nd house in which the parties are siblings. The Defendant led evidence that he gave the Plaintiff 0.5 acres out of his gratuitous will. The Plaintiff is seeking 1.5 acres leaving the Defendant with 3.1 acres. The principles of equity, human dignity and fairness as enacted in Article 10 of the Constitution binds state organs, officers, and persons in equal measure. The place of equity and social justice has been given prominence in our supreme law. What justice does a daughter find in a home where she has lived

all her life when her own siblings dish tokenisms to her in a home where the law counts her as equal to the other siblings? .The Plaintiff is as equal a child of the deceased as the Defendant is and is entitled to equal treatment as such. She has not pleaded for half the family land but 1.5 acres, which the Court finds in her favour.

28. This Court finds that the Plaintiff has proved customary trust on the land. Going by the root of the title it is undoubtedly true that the land is family/ancestral land, which is encumbered by a customary trust.

29. The Court answers issue No a). in the positive.

30. As to whether the Plaintiff is entitled to the sum of Kshs 32,000/- being the costs of replanting the tea bushes, the Court holds and finds that this claim is unsupported and therefore is declined.

31. Final orders;

a. A declaration that the Defendant holds 1.5 acres of the land parcel LOC 14/KAIRO/2218 in trust for the Plaintiff.

b. An order for the dissolution of the trust and the subdivision and transfer of 1.5 acres out of the suit land be and is hereby issued.

c. The Defendant is ordered to subdivide the suit land and transfer 1.5 acres of the land out of LOC 14/KAIRO/2218 to the Plaintiff within 45 days from the date of this judgment. All the costs related to the transfer shall be borne by the Plaintiff.

d. In default of c) above the Deputy Registrar of this Court is mandated to execute all the documents required to effect order c) above.

e. Equally, the Land Registrar may dispense with the original title or such other documents that may be in the custody of the Defendant.

f. An order of injunction against the Defendant, his servants or agents from entering into, cutting down tea bushes and other crops and trees, demolishing houses and other structures belonging or in possession of the Plaintiff or evicting the Plaintiff from the said land or interfering with her quiet possession of her portion of the land.

g. Payment of Kshs 32,000/- being the cost of replanting the tea bushes is declined.

h. Cost of the suit shall be borne by the Defendant.

Orders accordingly

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 11TH DAY OF APRIL 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Kirui HB for Mbutia for the Plaintiff

Mwangi HB for Mindo for the Defendant

Kuiyaki and Njeri, Court Assistants