



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C NO. 85 OF 2017**

**SIMON NDICHU NJOROGE.....PLAINTIFF**

**VERSUS**

**RAHAB WANJIRU MBOGO**

**(sued as the administrator of the**

**estate of Mbogo Njoroge alias Samuel**

**Mbogo).....DEFENDANT**

**JUDGMENT**

1. The Plaintiff is the brother in law of the Defendant. The Defendant is the wife of the Plaintiff's brother the late Mbogo Njoroge. The Plaintiff and the Defendant are joint administrators of the estate of Mbogo Njoroge.

2. On 25<sup>th</sup> August 2016, the Plaintiff filed a suit by way of a plaint dated the 25/8/16 seeking *inter-alia* the following orders against the Defendant; -

a) A declaration that the Defendant's deceased husband Mbogo Njoroge alias Samuel Mbogo held land parcel Number LOC16/MBUGITI/1008 (suit land) in trust for himself and the Plaintiff and his other siblings.

c) The costs of this suit be borne by the Defendant.

c) Any other relief that the Honourable Court may deem just to offer.

3. The Plaintiff's case is anchored on customary trust. That the Defendant's husband Mbogo Njoroge held the suit land in trust for the Plaintiff and his other siblings.

4. The Defendant denied the Plaintiff's claim and states that her husband owned the suit land absolutely and held no trust on behalf of the Plaintiff and his siblings.

5. The Plaintiff led evidence that during the demarcation of the land, the Defendant's husband became registered as a trustee of the family land on behalf of the larger family which comprised of his siblings and their uncles; Muhoro Boboti and Samuel Muigai. That the subject suit lands are to be shared by 4 siblings, the Defendant's late husband included.

6. In 1979 the children of Muhoro Boboti and Samuel Muigai sued the defendant's husband in HCCC No 990 of 1978 where the Court held that the land was encumbered by a trust and ordered that subdivision and transfer of the half share of parcel 117 to the kin of Muhoro Boboti and Samuel Muigai.

7. The subdivisions of parcel 117 yielded two equal plots; parcel 1007 and 1008. Parcel 1007 went to the kin of the Plaintiffs uncles; Muhoro Boboti and Samuel Muigai. While parcel No. 1008 was registered in the name of Mbogo Njoroge in 1992. By then the said Mbogo Njoroge had died in 1979. He died before sharing the land with his siblings.

8. Following the death of Mbogo Njoroge the Plaintiff filed a succession cause No 99 of 1988 at Thika but before the grant was confirmed the Defendant filed her own succession cause No 72 of 1994 at Muranga which grant was confirmed in 1995 and the land shared amongst the children of the Defendant and to the exclusion of the Plaintiff and his siblings.

9. The grant issued in Succ cause No 72 of 1994 was revoked vide Succ cause HCCC No 1023 of 1996. The Court directed both parties to this suit to be appointed as joint administrators and the issue of trust to be determined before the grant is confirmed.

10. PW2- Muhoro Boboti stated that he filed a suit against Mbogo Njoroge in 1978 which case determined that the parcel 117 was encumbered with customary trust and ordered that the land be subdivided into 1007 and 1008. The latter was registered in the name of Mbogo Njoroge after his demise to hold in trust for himself and siblings.

11. PW3- William Mbogo Thuo stated that Njoroge and Boboti were brothers and shared the land equally. He informed the Court that the land was family land.

12. The Defendant testified and stated that she got married to Mbogo Njoroge in 1964 at Mumias and together had 6 children. Her husband died in 1979 and that is the time she came to Mbugithi village for the first time. On arrival she was showed the larger land 117 by Muhoro Njoroge, the elder brother of her late husband. She claims in her evidence that she was told the land belonged to her husband. It is her evidence that she later learned of the Court case in which the land was subdivided into two parcels.

13. She led evidence that she and the plaintiff's sister Grace Wamaitha lived on the suit land until her demise two years ago. She stated that even the Plaintiff had built a house on the suit land before but now lives elsewhere. She claims that her husband told her that the land at Mbugithi was his. Further she informed that Court that she cannot tell whether the suit lands was purchased or was inherited/family land. She came on the land after the demise of her husband which she learned later after he was long buried.

14. She confirmed that Muhoro Boboti and her husband were cousins. Their fathers were brothers.

15. I have read and considered the pleadings the evidence and the Written Submissions not the parties and the key issues for determination are;

a. Whether the Plaintiff has proved trust on the suit land.

b. Who meets the costs of the suit?

16. 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).

17. In the case of **Peter Gitonga Vs Francis Maingi M'Ikiara Meru HC.CC NO. 146 OF 2000**- it was stated that:-

“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).

18. From decided case law, the history and the root of the title, the relationship of the parties, the intention of the parties to create a trust, the nature of the holding, that is to say a holding for the benefit of the family members as a unit are critical strictures that a Court of satisfies itself in determining the absence or otherwise of a customary trust.

19. In this case the following obtains;

20. As to the nature of the holding of the suit land, it was the Plaintiff 's testimony that the suit land was excised from the original parcel number 117 which was initially registered in the name of the Defendant's husband to hold in trust for himself, his siblings including the Plaintiff and one of his uncle named Boboti Muhoro. The Plaintiff contended that the registration of parcel number 117 was done in the name of the Defendant's husband during demarcation and the reasons for registering it in his name was because their father and uncle had already died. This position was unchallenged by the Defendant who claimed to not know how her husband acquired the suit land and was only shown the land by one of her brothers-in law when she returned from Mumias. That evidence of the Plaintiff indicates that there was intention to create a trust over the suit land from the onset at registration. The Kins of Boboti Muhoro thereafter successfully petitioned the Court for the transfer of their father's share as per the existing trust. The Court determined that there was a trust on the suit land. This trust was rooted in the title for parcel 117 and consequently in the resultant subdivisions 1007 and 1008. There is no evidence that the judgement of the Court was appealed, set aside and or vacated.

21. In the case **Mwangi & Another –v – Mwangi, (1986) KLR 328**, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights and the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust. It therefore follows that the suit land was encumbered by a trust that continued to bind the land.

22. As to whether the land was clan, communal or family land before registration, evidence was led that the suit land was family, that the suit land was registered in the name of the Defendant for him, his siblings and his uncle's family. That shows family ties over the suit land.

23. As to whether the land was inherited or passed down from the family lineage of the defendant? The suit land was registered in the name of the Defendant when registration of land in the area commenced. The Plaintiff claims that it was done so because their father and uncle were already dead when the registration commenced, that shows that the land belonged to their parents but was not registered in their names during their lifetime as the same had not begun.

24. It is in evidence that the sister of the Plaintiff lived on the suit land until her death two years ago. The Plaintiff also lived on the suit land at some point where it is said that he had constructed a house. This evidence show that the land was family land utilized by the rest of the family and therefore was not exclusively owned by the Defendant's husband.

25. It is on record that the family patriarch Njoroge had 3 sons; Boboti Muhoro, Samuel Muigai and Njoroge Muhoro. Parcel 117 was adjudged to be subject to trust and transferred to the family of Boboti Muhoro and Samuel Muigai. The one for the family of Njoroge Muhoro, the father of the Plaintiff and the Defendant was registered in the name of the Defendant's husband. The conclusion is that the parties are close family members with close family lineages and the suit land has been passed down through one family patriarch to the current generations.

26. In the case of **Mbui vs Mukangu vs Gerald Mutwiri Mbui C.A No. 281 of 2000** the Court of appeal stated that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. ..... If land was passed down from the family member to another, the presumption of trust subject to evidence is high (emphasis is mine).

27. Going by the root of the title of this parcel of land the Court is of the firm conclusion that the land is encumbered by a customary trust.

28. The upshot is that Plaintiffs claim is allowed.

29. Parties being related, each to bear their own costs of the suit.

**Orders accordingly**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11<sup>TH</sup> DAY OF APRIL 2019.**

**J. G. KEMEI**

**JUDGE**

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

Plaintiff present in person

Maina HB for Macharia for the Defendant

Kuiyaki and Njeri, Court Assistants