



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MERU

ELC NO 307 OF 2014

MARTHA THAIRORA GIKUNDI.....PLAINTIFF

VS

ELIZABETH KANANU.....1ST DEFENDANT

HELLEN NTHIORI M'ITIRI.....2ND DEFENDANT

JUDGMENT

1. By a plaint dated 25/11/13 the Plaintiff claiming a beneficial interest over Parcel no. NYAKI/KITHOKA/3873 “herein referred to as the suit land” sued the Defendants claiming the following reliefs:

- a. A declaration that the 2nd Defendant holds parcel No NYAKI/KITHOKA/3873 in trust for the Plaintiff and her children.
- b. A permanent injunction restraining the Defendants from evicting and/or interfering in whatever manner with the Plaintiff's quiet possession and/or peaceful enjoyment of parcel No. NYAKI/KITOKA/3873.
- c. An order directing the land registrar to register the Plaintiff as co-owner of NYAKI/KITHOKA/3873 and costs of this suit.

2. The Plaintiff's claim is that she is the daughter in law to the 1st Defendant and sister in law to the 2nd Defendant respectively having been the wife of the late Gilbert Gikundi who was son and brother to the 1st and 2nd Defendants respectively. That the Plaintiff and her late husband had spent all their matrimonial life on the suit land and had built their matrimonial home thereon and extensively developed the same. Their union was blessed with seven (7) children some of whom are now grown up and reside elsewhere, leaving behind the Plaintiff and three children on the suit land. That the suit land though registered in the 2nd Defendant's name is ancestral land which was initially registered in the name of 1st Defendant to hold in trust for the Plaintiff and her children. She has listed the particulars of trust that the suit land is ancestral land, that the Plaintiff has always lived on the suit land with the permission of the Defendants and has made substantial developments thereon.

3. She claims that the Defendants have breached the said trust for the following reasons; fraudulently transferring the suit land from the 1st to 2nd Defendant without consent of the Plaintiff, threatening and attempting to evict the Plaintiff from the suit land, issuing notice to the Plaintiff and engaging third parties with intention of disposing of the suit land. She claims that the Defendants have been threatening to evict her and her family which if pursued will render her family destitute.

4. In their defence the Defendants admit the relationship to the Plaintiff but claim that the Plaintiff has disposed of several properties that belonged to her and her late husband including L.R Nos. NYAKI/KITHOKA/2174 -75, 2243, 2344 and 2245 and another one at Nairu (unidentified). That the suit land has always been the property of the 1st Defendant and has nothing to do with family and the Plaintiff. That the Plaintiff has no property on the suit land and has instead forced herself into the 1st Defendant's home after abandoning her matrimonial home upon the death of her husband. They describe the Plaintiff as one who is driven by greed for money and property. They deny that the suit land is trust land/ancestral land. That the Plaintiff's husband was already allocated family land which she is busy alienating and disposing off and trying to grab what belongs to the Defendants. That the Plaintiff has forced herself onto the suit land and has failed to honour notices to cease trespassing on the suit land. By way of counterclaim the Defendants pray for the Plaintiff to be evicted from L.R. No. NYAKI/KITHOKA/3873 and costs and interest of the counterclaim.

5. The 1st Defendant explains that she independently gathered the suit land and relocated to it when they disagreed with her husband and constructed a home. That together with her late husband they subdivided the family land and allocated shares to their children. That her son, the husband of the Plaintiff and the Plaintiff subdivided their land and the Plaintiff later sold them off. That later the 1st Defendant got involved in an accident and was in need of help so the Plaintiff and her husband moved to her house to assist her at that time the Plaintiff. The 1st Defendant then required the Plaintiff to return to her matrimonial home but she refused and turned hostile against her causing the 1st

Defendant to seek refuge at her daughter's home (meaning the home of the 2nd Defendant). That the Plaintiff remained in occupation of the home of the 1st Defendant against her will and has continued to remain thereon failing to heed the eviction notice even with the involvement of local authorities. The 1st Defendant is desirous of moving back to her home which she has extensively developed.

6. The 1st Defendant testified de bene esse. She later passed on 5/6/17 and was substituted by Hellen Nthiori M'itiri, the 2nd Defendant.

7. PW1 – Martha Gikundi stated that she got married 30 years ago and has always lived on the suit land. She denied ever living at Kaithe but admitted that she has land there that she cultivates. She claims that the 1st Defendant never lived at Kithoka and avers that the land was given to 1st Defendant by her father therefore thus it is family land. Her two witnesses reiterated and corroborated the evidence of the Plaintiff and I find no useful need for repetition.

8. DW1 Hellen Nthiori testified that all his siblings were given land at Kaithe but only him and his daughter were given land at Kithoka. That the Plaintiff and her husband moved from Kaithe to Kithoka in 2003 and her husband died in 2004 in a road accident. That their mother moved from Kithoka to Kaithe in 2005 due to hostility from the Plaintiff as a result of which the Plaintiff was fined for assaulting their mother by the elders.

9. DW2 Samuel Ndingu Nteere, the area chief for Kithoka testified that he found the Plaintiff in Kithoka when he was appointed and presided over a dispute in 2001 when the Plaintiff's husband refused to vacate Kithoka land. That he later presided over the dispute in respect to the burial of Plaintiff's husband after which the Plaintiff's husband's remains were interred at Kaithe. He also was aware that the land at Kithoka was gifted to 2nd Defendant and his daughter Doreen and that land at Kithoka is more fertile.

10. The Plaintiff submits that she has lived on suit land since she was married. She pleads hostility against her from in-laws after demise of her husband. That all the siblings of her husband have land at Kithoka and Kaithe except the Plaintiff. That the land at Kithoka was allocated to her husband's siblings except her husband. That it was common ground that the suit land belonged to their mother, she therefore believes it constitutes family land and since the Plaintiff is in occupation of the same there is existence of trust which is recognized in law and prays for orders to issue as prayed in the plaint.

11. In a nutshell the Plaintiff claims that she has been in occupation of the suit land which belonged to her mother in-law since the time she was married nearly 30years ago to date. In the premises she believes that a trust arose over the suit land due to her prolonged stay thereon with consent of the Plaintiff. That her mother in law in breach of the said trust gifted the suit land to the 2nd Defendant and her daughter in exclusion of the Plaintiff and transferred the suit land to the 2nd Defendant and his daughter respectively. She claims that the suit land is family land as it was apparently inherited by 1st Defendant from her late father (grandfather of the Plaintiff). She admits that her husband's parents had two different parcels of land one at Kaithe and the other at Kithoka, both registered separately in the names of her father in law and mother in law respectively. And contends that she and her husband were discriminated against by her mother in law as they were not allocated any land at Kithoka which is the more fertile land and which she claims to have always resided at. DW2 testified that he found the Plaintiff on the suit land when he was appointed the area chief. She has pleaded hostility against her in-laws which she says has been propagated by her in laws since the demise of her husband. The Defendants contended that the Plaintiff only entered the suit land in 2003 with invitation from the 1st Defendant who was ill at the time and needed help, that after her recovery the 1st Defendant required the Plaintiff and her family to return to their home in Kaithe but were adamant and refused to leave until the untimely death of the Plaintiff's husband in a road accident in 2004. The 1st Defendant was then forced to leave the suit land due to the hostility visited upon her by the Plaintiff. That the Plaintiff has failed to honour the eviction notices issued to her by the Defendants. That the Plaintiff was allocated portion of land at the family land in Kaithe which she subdivided and sold off and has now forced herself into her mother in laws home, they have labelled her as being greedy. They contend that the Plaintiff's home was always in Kaithe which she abandoned and that she was not married in Kithoka as she claims.

12. The Defendant's submissions summarize the facts of the case and asserts that the suit land was private property of the 1st Defendant(deceased) with no history of inheritance therefore it is not encumbered by trust and the Plaintiff claim cannot be sustained. They insist that the 1st Defendant passed good title to the 2nd Defendant and seeks for eviction orders against the Plaintiff. They tabled documentary evidence of parcels of land allocated to Plaintiff and her husband that they disposed of and that they still hold parcel No 2174 which the Plaintiff cultivates. That it is not true her matrimonial home was on the suit land.

Analysis and Determination

13. Having considered the evidence and the submissions and all the material placed before me, the issues that fall for determination are;

- a. Whether the Plaintiff has proved customary trust.
- b. Whether the Plaintiff is a trespasser and should be evicted.
- c. Who meets the costs of the suit?

14. It is not in dispute that the parties are all related. The 1st Defendant deceased was the mother in law of the Plaintiff and the mother of the 2nd Defendant. It is not in dispute that the suit land was originally parcel No 695 and registered in the name of the deceased 1st Defendant before she subdivided it into two portions; 3873 and 3874. She transferred 3873 and 3874 to the 2nd Defendant and her daughter respectively during her lifetime.

15. The Plaintiff avers that the suit land was ancestral /family land. She claims that it was registered in the name of her mother in law in trust

for her and her late husband. She claimed that she lived with her husband on the suit land until his death having settled there upon her marriage to the family. According to her the suit land was inherited by the mother in law from her own father and therefore it is ancestral land. She admitted that she like the other children of the 1st Defendant have land at Kaithe which she farms. She also admitted that she buried her husband against her wishes at Kaithe instead of Kithoka where they lived. She acknowledged that the suit land belonged to the 1st Defendant.

16. The Defendants have stated in evidence that the suit land belonged to the 1st Defendant having gathered in during demarcation. This evidence is consistent with the evidence tendered by DW2. That after she separated with her husband, she moved out of the family land and settled at Kithoka 695. She left the husband at Kaithe, the family land which was later subdivided amongst her three children; 2 boys and one daughter, each getting 2 acres each. She led evidence that she suffered injuries in a road accident which necessitated the Plaintiff and her husband to move to Kithoka land (suit land) to care for her as she recuperated. That upon fully recuperating she asked the Plaintiff and her husband to go back to their land at Kaithe but they declined but shortly after the Plaintiff's husband died in a road accident in 2005 leaving the Plaintiff on the land. She averred that the Plaintiff became very abusive, both emotionally and physically to her forcing her to stay with the 2nd Defendants house at Kaithe. The Plaintiff died at the age of aver 80 years and the Court allowed her to give her evidence before she died.

17. Has the Plaintiff proved trust? The principles of proving customary trust are clear. In the case of ***Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others [2005] eKLR*** which quoted with approval the holding in the case of ***Muthuita –vs- Muthuita [1982 – 88] 1 KLR 42***, the Court of Appeal held that customary law trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded.

18. In the case of ***Peter Gitonga Vs Francis Maingi M'Ikiara Mmeru HCCC 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”.

19. The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must proof that the suit properties were ancestral clan land; that during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; that the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. In essence one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.

20. In the case of ***Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others [2005] eKLR*** which quoted with approval the holding in the case of ***Muthuita –vs- Muthuita [1982 – 88] 1 KLR 42***, the Court of Appeal held that customary law trust is proved by leading evidence. Trust is a question of fact which must be proved by whoever is claiming a right under customary trust.

21. In the case of ***Isack Kieba M'Inanga Vs Isaaya Theuri M'Lintari & Another SCoK No 10 of 2015*** the Supreme Court Justices held that;

“.....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 is 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:- (a) The land in question was before registration, family, clan or group land; (b) The claimant belongs to such family, clan, or group; (c) 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; (d) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and, (d) The claim is directed against the registered proprietor who is a member of the family, clan or group”.

22. A trust can never be implied by the Court unless there was intention to create a trust in the first place. In ***Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR*** where the Court held,

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

23. In the case of ***Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] EKLR*** the Court also held that It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because: -

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

24. From the above case law, it is the duty of the Plaintiff to adduce evidence to proof customary trust. My analysis of the evidence does not show any intention of the parties to create a trust. It is in evidence that the dispute relating to the suit land had started even when the husband of the Plaintiff was alive when the mother in law asked them to return to their land at Kaithe, they refused. It is in evidence that the Plaintiff was fined a goat equivalent of Kshs 3000/- to atone the physical and emotional abuse she visited on the 1st Defendant while they lived at Kithoka on the suit land. There is also evidence that the Plaintiff's husband was buried on the land at Kaithe. If indeed there was any

intention that the suit land was held in trust, then there would be no objection in burying the Plaintiff's husband on the suit land.

25. The Plaintiff has not dislodged the evidence of the 1st Defendant that the land was not encumbered with trust. She did not lead evidence to show that the suit land was family land. That evidence would have been in form of either documentary or oral evidence to show that the land was family/clan land. The 1st Defendant gave evidence that she acquired the land through gathering it for herself during demarcation. The Chief (DW1) confirmed that the land was given to the ex – Mau Mau fighters as a gift by the Kenyatta administration, for which the 1st Defendant was one of them.

26. I have examined the green cards and the titles on record and it is evident that the titles for parcel No.s 3873 and 3874 were transferred to the 2nd Defendant and her daughter during the lifetime of the 1st Defendant's gifts *inter vivos*. The 2nd Defendant alluded to the fact that she took care of the 1st Defendant at her senior years compared to the Plaintiff who mistreated her. For whatever the reason may have been, what is important to note is that the 1st Defendant dealt with the disposition of the suit land during her lifetime and being the absolute owner of the land there was nothing to prevent her from dealing with the land as she wished. In any event all her children had been provided for in terms of allocating them land at Kaithe.

27. Weighing the evidence on record the Court finds that on a balance of probability, the suit land was not family and or ancestral land. The Court determines the 1st issue in the negative.

28. In determining the 2nd issue, the Court will be determining the claim of the Defendants in the counterclaim which is whether the Plaintiff should be evicted from the suit land. Section 26 of the Registration of Land Act mandates Courts to take a certified extract of title as *prima facie* evidence that the person named in the title as owner subject to restriction stated in the Act. One of them is trusts including customary trusts contemplated under section 28 (b) of the Land Registration Act. Having determined that the Plaintiff failed to prove customary trust, the 2nd Defendant has produced a certified copy of the title in her name. She led evidence that the title was transferred to her by her mother the 1st Defendant in her lifetime as a gift *inter vivos*. The Plaintiff has not tabled any evidence to challenge this disposition and the Court finds that she is the registered owner of the land for which the law affords protection under the Act as shown in section 24, 25 and 26 thereon.

29. The Court does not find a justifiable reason why the Plaintiff should continue being on the land. She must be evicted.

30. Final orders;

- a. The Plaintiff's claim fails and is dismissed.
- b. The counterclaim succeeds.
- c. The Plaintiff is ordered to vacate the suit land within a period of 6 months. She should be allowed to harvest all her crops on the land, if any.
- d. In default eviction shall ensue in strict adherence to the provisions of section 152 G of the Land Act.
- e. Parties being related each party to meet their own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MERU THIS DAY OF 8TH DAY OF APRIL 2019.

J. G. KEMEI

JUDGE

In presence of;

C/A Mutwiri

Ms. Mbijiwe holding brief for Mwanzia

Muchiri for 1st and 2nd Defendant