

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 170 OF 2014**

**LEMMY GACHECHE MIANO ..... 1<sup>ST</sup> PLAINTIFF**  
**FRANCIS KIBE MAINO ..... 2<sup>ND</sup> PLAINTIFF**  
**PURITY NYAGUTHII NJOGU ..... 3<sup>RD</sup> PLAINTIFF**  
**FAITH MUCHIRU THEURI ..... 4<sup>TH</sup> PLAINTIFF**  
**JOYCE WAKUTHII NGIRI ..... 5<sup>TH</sup> PLAINTIFF**

**VERSUS**

**LYDIA NYACHANIA MAKORI NEE MIANO..... 1<sup>ST</sup> DEFENDANT**  
**PATRICK MIANO MAKORI ..... 2<sup>ND</sup> DEFENDANT**  
**DUNCAN MIANO WAMBUGU ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. By a Plaint dated 25<sup>th</sup> July 2014 as amended on 9<sup>th</sup> April 2015 and Re-amended on 18<sup>th</sup> May 2015, the five (5) Plaintiffs pray for judgment against the Defendants jointly and severally for:
  - a) **A declaration that the sub-division of land parcel No. Kirimukuyu/Thiu/58 by the Defendants and subsequent registration of land parcel No. Kirimukuyu/Thiu/819 in the joint names of the 1st**

**and 2<sup>nd</sup> Defendants was unlawful fraudulent, malicious, dishonest thus null and void;**

- b) An order that Title Deeds to the resultant land parcels Nos. Kirimukuyu/Thiu/817, 818, 819 and 820 be cancelled and reconsolidated back into the original land parcel No. Kirimukuyu/ Thiu/58 under the name of Jerioth Waruguru Miano to hold in trust for Francis Kibe Miano, Lemmy Gacheche Miano and Duncan Miano Wambugu Junior as well as the 1<sup>st</sup> Defendant Lydia Nyachania Makori Nee Miano and Purity Nyaguthii Njogu and Faith Muchiri Theuri;**
- c) An order that an equal share with that of the Claimants be carved out of the parent land parcel No. Kirimukuyu/Thiu/58 and the same be declared to be lawfully entitled (sic) to the Estate of Patrick Muthungu Miano (deceased) and be registered in the name of Vicky Waruguru Miano;**
- d) Costs of this suit plus interest to be borne jointly and severally by the Defendants; and**
- e) Any other further alternative or better relief that this Honourable Court may deem fit and just to grant.**

2. It is the Plaintiffs' case that at all times material, land parcel No. Kirimukuyu/Thiu/58 was family land which belonged to Duncan Miano Wambugu (deceased) who was the father to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs as well as the 1<sup>st</sup> Defendant. The deceased was the grandfather to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The Plaintiffs aver that during land demarcation and consolidation, the parent parcel was registered in the name of Francis Kibe Miano to hold in trust for himself and his brothers Railton Wambugu Miano (deceased), Patrick Muthungu Miano (Deceased) and Lemmy Gacheche Miano (the 1<sup>st</sup> Plaintiff).
3. The Plaintiffs aver that before the said trust could be determined, Railton Wambugu Miano and Patrick Muthungu Miano passed away. They assert that around the year 2002, the said trust was determined and devolved to Jerioth Wambugu Miano who is the mother of the 1<sup>st</sup> to 4<sup>th</sup> Plaintiff as well as the 1<sup>st</sup> Defendant herein to hold in trust for the other family members.
4. It is further the Plaintiff's case that around the year 2006, the Defendants jointly, unlawfully and fraudulently conspired and

connived to have the parent parcel of land subdivided into four portions, the same being Nos. Kirimukuyu/Thiu/817, 818, 819 and 820. Parcel No. 819 was thereafter registered in the joint names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with the intent of dispossessing the rightful beneficiaries. The Plaintiffs aver that the conduct of the Defendants was *ipso facto* malicious, fraudulent and criminal in nature thus rendering the same voidable.

5. Lydia Nyachania Makori Nee Miano and Patrick Miano Makori (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants) are opposed to the claim. In their joint Statement of Defence dated 29<sup>th</sup> May 2015 as filed herein on 3<sup>rd</sup> June 2015, the said Defendants deny that the parent land was registered in the name of Francis Kibe Miano to hold in trust for himself and his brothers. On the contrary the two aver that the parent land was registered in the name of Francis for the benefit of the family of the late Duncan Miano Wambugu. It is their case that following a mutual agreement by the family, the trust was determined and the land was devolved to Jerioth Waruguru Miano who was to hold same absolutely.

6. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants further aver that later Jerioth Waruguru Miano sub-divided the land into four (4) portions openly with the knowledge of all the family members. The parcel Nos. 817, 818 and 820 were shared by the three (3) surviving sons and the remaining parcel No. 819 was to be registered in the name of Jerioth Waruguru Miano who later transferred her portion to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to hold jointly with the knowledge and consent of the other daughters of the deceased.
7. By way of their Counterclaim, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants accused the Plaintiff of occupying a house which lies on their portion of land. Accordingly, the two pray for orders:
- a) That the Plaintiffs' suit be dismissed;**
  - b) That the 1<sup>st</sup> Plaintiff be ordered to remove his house lying on the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's parcel of land - Kirimukuyu/Thiu/819; and**
  - c) The costs of the suit**
8. Duncan Miano Wambugu (the 3<sup>rd</sup> Defendant) is equally opposed to the suit. In his Statement of Defence dated 16<sup>th</sup> June 2015,

the 3<sup>rd</sup> Defendant avers that Land Parcel No. Kirimukuyu/Thiu/58 was registered in his grandmother - Jerioth Waruguru Miano's name as the absolute owner. The 3<sup>rd</sup> Defendant avers that his grandmother appeared before the Mathira Land Control Board seeking for consent to sub-divide land parcel No. 58 in the presence of and with the concurrence of the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs. He avers that he was issued with a title deed for land parcel No. 820 which he occupies.

### **Analysis and Determination**

9. At the trial herein, the Plaintiffs called four (4) witnesses who testified in support of their case. The Defendants equally called four (4) witnesses in support of their case.
10. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.
11. The suit herein was initially instituted solely by the 1<sup>st</sup> Plaintiff against his sister - the 1<sup>st</sup> Defendant together with her son- the

2<sup>nd</sup> Defendant. Later other members of the family of Duncan Miano Wambugu joined the dispute on either side.

12. The genesis of the dispute was the registration of Lydia Nyachania Miano (the 1<sup>st</sup> Defendant) and her son Patrick Miano Makori (the 2<sup>nd</sup> Defendant) as the registered proprietors of the parcel of land known as Kirimukuyu/Thiu/819 measuring approximately 0.315 Ha on 21<sup>st</sup> March 2010. From the material placed before the court, there was no dispute that the said parcel of land was the result of a sub-division of a larger parcel of land known as parcel No. Kirimukuyu/Thiu/58.
13. According to the Plaintiffs, the said original parcel of land - Kirimukuyu/Thiu/58 was previously around the year 2002 registered in the name of Jerioth Waruguru Miano to hold in trust for herself and her children who were the 1<sup>st</sup> to 4<sup>th</sup> Plaintiffs as well as the 1<sup>st</sup> Defendant herein. It was the Plaintiffs' case that sometime around the year 2006, the Defendants herein had jointly, unlawfully and fraudulently conspired to have the original parcel of land sub-divided into four (4) different parcels, the same being parcel Nos. Kirimukuyu/Thiu/817, 818, 819 and 820 and in the process

unlawful and fraudulently caused parcel No. 819 to be registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants while parcel No. 820 was registered in the name of the 3<sup>rd</sup> Defendant.

14. The Defendants did not deny that LR. Nos. Kirimukuyu/Thiu/817, 818, 819 and 820 were the resultant subdivisions of LR. No. Kirimukuyu/Thiu/58. On the contrary, it was their case that the original parcel of land was in the year 2002 registered in the name of the said Jerioth Waruguru Miano as the absolute proprietor thereof and it was the said Jerioth as the absolute proprietor who had sub-divided the mother title and transferred the same to the Defendants in accordance with her wishes.

15. As it were, there was no dispute that LR. No. Kirimukuyu/Thiu/58 was family land. From a perusal of the Green Card produced herein by the parties, the said parcel of land was first registered on 30<sup>th</sup> September 1959 in the name of one Warui S/o Wambugu. The second entry thereof shows that on 11<sup>th</sup> April 1963, it was registered in the name of Francis Kibe S/o Warui and that the entry was corrected on 10<sup>th</sup> August 1971 as entry No. 3 to read Francis Kibe S/o Miano (the 2<sup>nd</sup>

Plaintiff herein). Under entry No. 7, the said Jerioth Waruguru Miano (DW1) was registered as the proprietor of the mother title on 21<sup>st</sup> March 2002 by way of gift from the 2<sup>nd</sup> Plaintiff. The title was eventually closed on sub-division on 11<sup>th</sup> April 2006 when the resultant sub-divisions were created.

16. From both sides of the divide, the reasons for the changes in proprietorship of the mother title were generally agreed and common. It was apparent that as at the time of land demarcation and consolidation in 1959, Francis Kibe Miano (the 2<sup>nd</sup> Plaintiff) who was Jerioth's second born son and the eldest at the time was away undergoing studies in Makerere, Uganda. As a result, and as Duncan Miano Wambugu had passed on earlier, the land was registered in the name of Duncan's brother Warui S/o Wambugu to hold in trust for the family of Duncan and Jerioth.
17. Upon the 2<sup>nd</sup> Defendant's return, the title was passed to him and hence his registration as the proprietor on 11<sup>th</sup> April 1963. From a perusal of an Affidavit sworn by Jerioth on 18<sup>th</sup> March 2005, it was evident that at one point in time, the 2<sup>nd</sup> Plaintiff started treating the parent title as his own and not in trust for

the family. At paragraphs 1 to 6 of the Affidavit, Jerioth recalls the circumstances under which she came to be registered as the proprietor of the mother title as follows:

- “1. That I am the registered owner of LR. No. Kirimukuyu/Thiu/58 measuring 1.26 Hectares;**
- 2. That the previously (sic) the said parcel of land had since the time of demarcation been registered in the name of my son Francis Kibe Miano to hold as trustee on behalf of himself and the other family members of Duncan Miano Wambugu (my Deceased Husband);**
- 3. That later I caused the said land to be registered in my name as my son Francis Kibe Miano intended to abuse the trust by charging the said parcel of land without the knowledge and/or consent of the other family members of the late Duncan Miano Wambugu including myself;**
- 4. That on 11<sup>th</sup> November 1983, while the land was still in the name of my son, I had to caution the said parcel of land to protect the interest of the other family members;**

**5. That it is during that time that I had reported the matter to CID-Nyeri as my said son had attempted to remove the caution by forging a letter which he had addressed to the Land Registrar to have the caution removed purporting that the letter had been signed by herself; and**

**6. That the matter was later in the year 2002 resolved when my said son agreed to have the said parcel of land transferred and registered in my name.”**

18. From a further perusal of the copy of the Green Card for the mother title produced herein, it was apparent that the 2<sup>nd</sup> Plaintiff had on 4<sup>th</sup> August 1975 charged the property to Barclays Bank to secure a loan and that the said charge was discharged on 21<sup>st</sup> September 1989. It was also clear that thereafter on 20<sup>th</sup> January 2000, the 2<sup>nd</sup> Plaintiff attempted to use the title to secure another loan in the sum of Kshs. 269,000/= from the Agricultural Finance Corporation. That must have been what prompted Jerioth as the family matriarch to demand that the title be registered in her name to secure it for the benefit of the family.

19. As it turned out, Jerioth was fairly of advanced age as at the time these proceedings commenced. Her evidence was taken by the court *de bene esse* on application by the Defendants on 7<sup>th</sup> March 2016. It was apparent from a perusal of the record of the proceedings that she had no much recollection of what had transpired. She told the court she was not aware that some of her children had sued her other children in this matter. She could not remember clearly in whose name the title was previously and had difficulty recalling whether or not she had given a portion of the land to her daughter, the 1<sup>st</sup> Defendant herein.
20. Considering the totality of her testimony as recorded before the Honourable Lady Justice L.N. Waithaka, it was clear that so much had changed from the time she swore the clear and cogent Affidavit on 18<sup>th</sup> March 2005 and the 7<sup>th</sup> March 2016 when she gave her testimony in court. As Jerioth had rightfully conceded in the Affidavit, the title to the mother title had been passed to her to hold in trust for herself and her other family members. Those family members included her daughters Purity Nyaguthii Njogu (the 3<sup>rd</sup> Plaintiff), Faith Muchiri Theuri

(the 4<sup>th</sup> Plaintiff) and Lydia Nyachania Miano (the 1<sup>st</sup> Defendant).

21. While the title Jerioth held did not indicate that she held the land in trust, the history of the title right from the time it was held by the brother to her husband and when it moved to her son Francis Kibe Miano clearly demonstrated that the land was held in trust for the entire family of Duncan Miano Wambugu. She had wrestled the title from the son on the basis that it was held in trust and she could not therefore deal with the same as the absolute owner merely because the word “customary trust” did not appear in her title.

22. In that respect Section 28 of the Land Registration Act, Cap 300 of the Laws of Kenya provides as follows:

**“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—**

**(a)....;**

**(b)Trusts including customary trusts.”**

23. Considering the issue of customary trust in the case of *Isaack M'Inanga Kiebia -vs- Isaya Theuri M'Lintari & Another (2018) eKLR*, the Supreme Court of Kenya had this to say:

**“52. Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.”**

24. In the matter herein, the registered proprietor of the mother title had not only acknowledged that the land was registered in the name of her brother-in-law during the first registration in trust for her family but also that she had the title transferred from the name of one of her sons to her own name when she realised that the son intended to abuse the trust that had been bestowed on the suit property.
25. Arising from the foregoing and in the absence of any demonstration that there was a mutual family decision and consent for the sub-division to be done, the said sub-division and the subsequent registration of parcel No. Kirimukuyu/Thiu/819 in the joint names of the 1<sup>st</sup> Defendant and her son were irregular and meant to unlawfully dispossess and disinherit the other rightful beneficiaries of the trust. The same position applies to LR. No. Kirimukuyu/Thiu/820 which was registered in the name of the 3<sup>rd</sup> Defendant.
26. Thus while the subdivision appeared to take the interest of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs into account, it was clear that the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs who are their sisters had not been given any share of the land.

27. In the premises, I am persuaded that the Plaintiffs have proved their case on a balance of probabilities. Accordingly, I hereby enter judgment for the Plaintiffs and make orders as follows:

**(a) A declaration is hereby made that the sub-division of land parcel No. Kirimukuyu/Thiu/58 by the Defendants and the subsequent registration of land parcel No. Kirimukuyu/Thiu/819 in the joint names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the registration of LR. No. Kirimukuyu/Thiu/820 into the name of the 3<sup>rd</sup> Defendant were unlawful, irregular, null and void.**

**(b) An order is hereby made that the resultant land parcels No. Kirimukuyu/Thiu/817, 818, 819 and 820 be and are hereby cancelled and that the same be reconsolidated back to the original land parcel No. Kirimukuyu/Thiu/58 under the name of Jerioth Waruguru Miano to hold in trust for Francis Kibe Miano, Lemmy Gacheche Miano, Duncan Wambugu Junior, Lydia Nyachania Makori Nee Miano, Purity Nyaguthii Njogu and Faith Muchiri Theuri.**

**(c) An order is hereby made that a portion of land equal in share to that of the Claimants be carved out of the said parcel No. Kirimukuyu/Thiu/58 and**

**the same to be registered in the name of Vicky Waruguru Miano the same being the lawful entitlement to the estate of Patrick Muthungu Miano (Deceased).**

**(d) This being a family matter each party shall bear their own costs.**

**Judgment dated, signed and delivered in open court and virtually at Mombasa this 4<sup>th</sup> day of December, 2025**

.....  
**J.O. LOLA  
JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) The Plaintiffs present in person
- c) Mr. Muchiri Wa Gathoni Advocate for the Defendants