



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 276 OF 2017

ELIJAH NJUGUNA NJOKIPLAINTIFF

VERSUS

PETER MURIU NJUGUNA.....1ST DEFENDANT

STANLEY KARANJA NJOKI.....2ND DEFENDANT

GLADYS WANGUI NJOKI3RD DEFENDANT

REBECCA NYAMBURA NJOKI.....4TH DEFENDANT

AGNES NJERI KIRAGU.....5TH DEFENDANT

JUDGMENT

1. The parties herein are related being the children of Munjiru Harun (deceased), the daughter of the late Harun Njuguna.
2. The Plaintiff filed suit against the Defendants on the 17/1/14 seeking the following orders;
 - a. An order requiring the Defendants, their families, servants and agents to vacate from the Plaintiff's suit LOC2/GACHARAGE/1129 together with all their properties thereon.
 - b. That in default of prayer a) above the Defendants, their families, servants and agents be forcibly evicted from the Plaintiff's suit land LOC2/GACHARAGE/1129 together with all their properties thereon.
 - c. Costs of the suit and that of eviction if any be awarded to the Plaintiff.
 - d. Any other further and better relief the honourable Court may deem fit to grant.
3. The Plaintiff avers that he is the registered owner of the suit land and the Defendants who live on the land are merely his licensees.
4. The 1st and 2nd Defendants admit the fact of the registration of title in the name of the Plaintiff but contend that he holds the suit land in trust for himself and all the Defendants. They have filed a Counterclaim seeking orders for the trust to be determined and dissolved to allow each of the parties to own their own share of the land. In their Counterclaim they sought the orders interalia;
 - a. That the Plaintiff's suit be dismissed.
 - b. For a declaration that the Plaintiff holds the suit land in trust in equal shares for himself and the Defendants.
 - c. For an order dissolving the said trust and for the subdivision and transfer of the said land so that the Plaintiff and the Defendants get an equal share of each land parcel so that the Plaintiff and the Defendants get an equal share each of the land parcel LOC2/KINYONA/1129.
 - d. Costs of the suit and the Counterclaim.
5. The Plaintiff withdrew the case against the 5th Defendant.

6. The 3rd and 4th Defendants did not file any response to the Plaintiff's claim and the case proceeded for hearing *ex parte* as against them.
7. At the hearing, the Plaintiff testified and informed the Court that the Defendants are his brothers and sisters. That he acquired the suit land by way of a gift from his grandfather and became registered owner on 10/1/64 during land demarcation and consolidation. He was born in 1958 and was about 7 years when the land was registered in his name. He produced a copy of the green card and a title issued to him on the 4/4/12. That his grandfather died on 26/12/1972 and their mother died in 2000.
8. His mother Njoki Harun was not married and was treated as a son by her father. Contending that he was gifted the land because of the assistance he gave his grandfather in grazing his animals, he stated that he allowed his mother and siblings to settle on the suit land on the understanding that they would vacate once the other family lands belonging to their grandfather become available after completion of succession proceedings. That on the 20/5/14 he served notice on the Defendants to vacate the suit land by 31/12/13, which notice, went unheeded.
9. The witness further stated that his late mother has entitlements in the following lands; LOC2/GACHARAGE/312- registered the name of his grandfather- (4 acres); LOC 2/GACHARAGE/1128 -land was registered in their grandmother's name and succession complete- (3 acres); and LOC18/GACHOCHO/56- registered in name of his grandfather-(0.9 acres). He contends that the Defendants should vacate his land and settle on these lands, which are their entitlements by succession. He produced a certificate of grant in the estate of his mother dated the 29/11/2004 in which LOC2/GACHARAGE/1128 was to be shared as follows; Kiragu Harun Njuguna (2 acres); Selpha Wangechi Njuguna (2 acres) and the remainder to the survivors of Njoki Harun. It is his evidence that the remainder is 3 acres. He claimed that he has no interest in parcel Nos LOC 2/GACHARAGE/312, 1128 and 56.
10. He informed the Court that he sued his mother in LDT No 39 of 2000 for removal of caution and the elders' decision was that the land be subdivided into two portions, each taking 3 acres. On appeal, the Provincial Tribunal advised them to file succession so that their rights would be determined.
11. The witness denied that his mother bought the suit land from his grandfather and got it registered in his name. He denied holding the suit land in trust for his siblings. He confirmed that he, the 1st, 2nd and 3rd Defendants live on the suit land. Indeed the 3rd Defendant lives in the house that belonged to their mother. Some siblings also cultivate parcel LOC 2/GACHARAGE/1128 while others live there. That they have lived there since 1967/68 and there are no boundaries on the land to identify the distinct portions of the land on the ground. However, he explained that each one of them have distinct portions that they farm and live. They have lived peacefully on the land until 2001 when he served the demand on the Defendants to vacate the suit land.
12. He explained that in the 1960s, women too could be registered as owners of land and there was nothing to prevent his mother from being registered the said land if indeed she bought the land from her father.
13. DWI- Stanley Karanja Njoki testified that the Plaintiff is registered as trustee of equal shares of the suit land. He denied that they are licensees on the land and insisted that they are there as of right. He stated that he and his siblings live on the suit land. He stated that they do not have shares in parcel Nos LOC 2/GACHARAGE/312 and 56 as they belong to his uncle however, his mother had a share of 3 acres in LOC 2/GACHARAGE/1128. He confirmed that he grows tea on LOC 2/GACHARAGE/1128.
14. He informed the Court that he was born in 1972 and does not know much about the history of the land. He informed the Court that he does not have any personal knowledge of how the Plaintiff became registered as owner of the land. Further that since most of the eye witnesses are dead he sought to rely on the proceedings in LDT No 39 of 2000. In those proceedings, their mother claimed that he bought the land from her father and had it registered in the name of the Plaintiff with the expectation that it could be retransferred to her later. The Plaintiff on the other hand insisted the land was a gift to him by his grandfather during his lifetime and therefore he owned it absolutely and demanded the removal of a caution lodged by the mother. The elders ordered the land be divided into two equal parts between the Plaintiff and his mother, a decision that was overturned by the Provincial Appeals Board that held that they did not have jurisdiction to determine the matter and advised the parties to file succession.
15. The witness showed the Court how the land is being occupied and used for residence and cultivation. He confirmed that the Plaintiff, 1st, 2nd and 3rd Defendant live on the suit land. The portions are identified and separated by boundaries made of trenches and Napier grass.
16. The Plaintiff submitted that his grandfather bequeathed him land and he does not hold it in trust for the Defendants. He submitted that the Defendants are licensees who were granted permission to settle on the land which licence was withdrawn on being served with the demand to vacate in 2001.
17. Relying on the case of **Ruth Wamucii Kamau Vs Monica Mirae Kamau (1984) ECLR** where the Court held that a licence or dispensation unless coupled with a grant does not bind the assignors and assignees because it does not pass any interest in land. A licence not coupled with interest in land is revocable unless the contract for it contains express or implied terms that it has not be revoked. That the licence of the Plaintiff to the Defendants did not give rise to any interest in the suit land in their favour.
18. Further, the Plaintiff relied on the case of **Muchungu Vs Muchungu (1984) KLR 202** where the Court of Appeal held that there was no evidence to support a finding of trust held by the appellant in favour of the Respondent. Further that the 1st and 2nd Defendants did not adduce evidence on Kikuyu Customary law in accordance with section 51(1) of the Evidence Act which states that when the Court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence of such custom or right of persons who would be likely to know of its existence if it existed are admissible. In this regard, the Defendants did not adduce evidence as to whether the property bequeathed to a person by his grandfather can be deemed to be held in trust to his siblings. Further that the Defendants did not adduce evidence that unmarried women could not own property as alleged by the Defendants. He submitted that unmarried women were legible to own property and therefore the land registered in the Plaintiff's name was not as a trustee.

19. Lastly, the Plaintiff submitted that the LDT proceedings referred to LOC 2/KINYONA/1129 while the suit land was LOC2/GACHARAGE/1129 and therefore the proceedings are not relevant to the dispute at hand.

20. The Defendants submitted that the Plaintiff was the 1st born male child of his unmarried mother and it is probable that he was registered as owner of the suit land at the age of 3-7 years to hold in trust for his family. That in the case of **Kimani Gituanja Vs Jane Njoki Gituanja (1983) ECLR**, it was held that it was an established custom in Kikuyu law that a woman had no rights over land and therefore it was probable that the land could not be registered in the name of his mother necessitating the registration of the land in the name of the minor, the Plaintiff then. That the Plaintiff is a Muramati who held the land for his mother and the Defendants. That in any event the title does not show that land was transferred as a gift. That as a trustee he lacks the capacity to effect the rights of title such as eviction of the Defendants.

21. They submitted that the parties live on the suit land and carry out various activities on their designated portions identified by boundaries of trenches and nappier grass. That this evidence is in agreement with the evidence of Njoki Harun at the LDT proceedings when she informed the tribunal that the suit land is subdivided on the ground into 6 portions for herself and her children, the Plaintiff and Defendants included. It is the submission of the Defendants that the Plaintiff did not complain about the possession of the land until 2000. The Plaintiff's mother is buried on the suit land. The Plaintiff has admitted that he is equally entitled to the other family lands just like the Defendants. This lends credence that the land is part of the wider family land and does not absorb the Plaintiff from the customary trust under which he held the suit land.

22. The Defendants urged the Court to determine the suit in their favour.

23. Having analysed the pleadings the evidence on record and the submissions the issue for determination are

- a) Whether the Defendants have proved trust in the suit land.
- b) Should the Defendants be evicted?
- c) Who meets the costs of the suit?

24. It is not in dispute that the suit land is registered in the name of the Plaintiff. According to the copy of the green card tendered in evidence, the Plaintiff was first registered as owner on 10/1/64. It would appear that title was not issued until 13/3/2012 when a change of name from Njuguna Njoki to Elijah Njuguna Njoki was registered. According to the title on record he was issued with the title on the 4/4/12. It appears that this issuance was not recorded in the green card.

25. It is also not in dispute that the parties have lived on the suit land since 1967/68 peacefully until the Plaintiff served the Defendants with a notice to vacate in 2001 following the death of their mother Njoki Harun who also resided on the suit land. The Plaintiff has explained that the reason why he did not take action earlier was because he did not want to evict his mother. Both the Plaintiff and DW1 gave the Court a sketch of how the land is being used on the ground and it is not in dispute that 4 persons that is the Plaintiff, 1st, 2nd and 3rd Defendants reside on the suit land and some of the Defendants live on parcel LOC 2/GACHARAGE/1128 and cultivate LOC 2/GACHARAGE/ 1129.

26. Section 28 of the Land Registration Act states that unless the contrary is expressed in the register, all registered land shall be subject to such overriding interest as may for the time being subsist and affect the land without the necessity of the overriding interests being noted thereon. Customary trust is such overriding interest in registered land. In the case of **Isack M'Inanga Kieba Vs Isaaya Theuri M'Lintari & Isack Ntongai M'Lintari SCOK Petition 10 of 2015**, the apex Court stated that occupation and possession are no necessary for a trust to be established.

27. The **Kieba** case supra 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).

28. Going by the **SCOCK** case above the following are critical in proving the existence of a trust ;

- 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.

e) The claim is directed against the registered proprietor who is a member of the family, clan or group.”

29. Customary trust are rights that attach to the land and move or subsist on the land. 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).

30. I have examined the title of the suit land as registered in 1962 and it does not state that registration was on account of a gift. It is silent. The Plaintiff has not led evidence to show why the suit land could have been registered as a gift. He explained that he was assisting the grandfather in daily chores and it is doubtful what a child of tender age would do. It is highly probable that the suit land was registered in the name of the Plaintiff because at that time women were seldomly registered as owners of land. This must have been the reason why the mother allowed the suit land to be registered in the name of the Plaintiff otherwise the same would have been registered in her name if not for the limitation. It is not in dispute that he is the eldest son of the mother and certainly the other siblings having been young and unborn there was sufficient intervening reason to register the land in his name to hold in trust for the family. This land having flowed from their grandfather is family and or clan land. The parties are brothers and their relationship cannot be termed as an idle or wildly adventurous relationship. The Plaintiff is their elder brother and as demonstrated on the land they have lived peacefully long enough for all the parties to create prescriptive rights on the suit land.

31. The Plaintiff has lived with the Defendants, his other Brothers and his late Mother on the suit land for as long as 1960s. During the lifetime of his Mother, the Plaintiff did not seek to evict the Defendants, his other Brothers or his mother from the suit land. Reflecting on the demeanor of the Plaintiff when he gave evidence, the Court finds that in all probability his evidence is not entirely truthful.

32. The evidence as contained in Land Dispute Tribunal case is such that the Plaintiffs mother averred that she bought the land through goats given to her father. This evidence was relied by the Defendants and not challenged by the Plaintiff. It is highly probable that that is how the land became registered in the name of the Plaintiff as the mother could not be registered at that time. The Defendants long stay on the land taken together with the evidence in Land Dispute Tribunal raises a reasonable legitimate expectation that the land is theirs given that the Plaintiff did not seek to evict them or disturb their stay for over 3 decades.

33. In the upshot, the Court makes the following orders:-

(a) The Plaintiff’s suit be and is hereby dismissed.

(b) A declaration that the Plaintiff holds the suit land in trust for himself, the Defendants and his other Brothers in equal shares.

(c) The customary trust in respect of the suit land be and is hereby determined.

(d) That if the Plaintiff within 30 days from the date of this order does not sign all the documents necessary to facilitate sub-division of the suit land as directed in (d) above, the Deputy Registrar of this Honourable Court does execute all the documents necessary to facilitate execution and/or effect of the orders made herein.

(e) The Plaintiff shall pay the Defendants’ costs of this suit.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 2ND DAY OF MAY 2019.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Njuguna HB for Uvyu for the Plaintiff

Ms Mwinzi HB for J N Mbuthia for the 1st – 4th Defendants

Grace and Njeri, Court Assistants