



**REPUBLIC OF KENYA**

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

**ELC NO 263 OF 2017 (OS)**

**FELISTER WANJIKU MINAI (The administratrix of the**

**estate of Minai Njuguna).....APPLICANT /PLAINTIFF**

**VS**

**WANDITI NJUGUNA.....RESPONDENT/DEFENDANT**

**JUDGMENT**

1. Vide an amended Originating Summons dated and the 22/4/16 the Plaintiff sought the determination of the following issues:

- a. Whether the Defendant holds 1.355 ha out of L.R LOC.18/ GACHOCHO/708 (suit land) in trust for the Plaintiff.
- b. Whether the defunct Land Dispute Tribunal had jurisdiction to determine ownership of the suit land.
- c. Whether orders can be issued to the Land registrar Murang'a to cancel registration of L.R LOC.18/ GACHOCHO/ 708 and issue new titles in the name of Wanditi Njuguna and the Plaintiff to reflect the Plaintiff is entitled to 1.355ha

2. The suit is based on the supporting affidavit of Felister Wanjiku Minai who deposed that she is the administratrix of the estate of the late Minai Njuguna who is the Defendant's brother. The father of the deceased and the Defendant owned the suit land which land was registered in the name of the Defendant in trust for himself and his 3 brothers, two of whom died unmarried. She is pursuing the share that belonged to her husband Minai Njuguna.

3. The Plaintiff avers that the Defendant filed suit in 1998 at Kigumo Land Dispute Tribunal and obtained an eviction order against the late Njuguna Minai. Aggrieved by the decision, the deceased filed an appeal with the defunct Provincial Land Dispute Tribunal. That vide a Notice of Motion dated the 27/7/2005 in Muranga PMCC No 231 of 1990 Defendant sought to evict the respondents then (the late Njuguna Minai) without disclosing to the Court that they were deceased and that an appeal was pending at the defunct Provincial Land Dispute Tribunal. The deceased died on 11/1/2003 during the pendency of the appeal and since the tribunals were abolished, she asserts that the only recourse lies with this Court for relief. The Defendant claimed to have purchased the land. She stated that she and her children are entitled to the suit land (1.355ha) since they have been living thereon since she got married.

4. The Defendant opposed the summons through his replying affidavit filed on the 9/5/16 and sworn on the 6/5/16 in which he deposed that he is the sole proprietor of the suit land and denied any trust in favour of the Plaintiff. Terming the claim time barred he was of the view that the suit herein is frivolous vexatious and incompetent and only meant to embarrass the Defendant. He stated that the decision of the Land Dispute tribunal was final as it was made with a body empowered by law to do so.

5. Despite service of hearing notice being effected on the Defendant he absented himself from Court several times forcing his then counsel on record to cease from acting for want of instructions. Further service as shown in the affidavit of service dated 26/2/19 and filed in Court on 27/2/19. Having been satisfied that proper service of the hearing proceeded was made the hearing to proceeded exparte.

6. PW1- Felister Wanjiku Minai testified and stated that she is the administrator of the estate of Minai Njuguna and also his wife. She relied on the contents of her supporting affidavit filed on the 22/4/16. She also produced documents marked as PEX N0 1-9 in support of her claim. She stated that the suit land belonged to the deceased father who had inherited it from his grandfather It was her evidence that the Defendant held the land in trust for himself 3 brothers; Gachao, Thome and Minai. That Gachao, Minai and Thome are deceased. The 3 and their late mother Hannah Wangari are buried on the land. That her son lives on the suit land. That she utilizes the portion that belonged to 2 deceased brothers. The Defendant too lives on the land and each of the two portions are well demarcated on the ground.

7. PW2 – James Muthee Gitau explained to the Court that he knew the parties to the suit as brother and sister in law to his wife Jane. That they are his relatives by marriage. He testified that he lived in the same village with the parties and had been a village elder for 20 years. He

explained that the father of the parties namely Njuguna Karu had 4 wives and the parties hail from the 4<sup>th</sup> house that of Hannah Wangari. The 4<sup>th</sup> house had 3 daughters and 4 sons. He stated that he knew all the 4 wives. That the land originally belonged to their deceased father which was demarcated in the 1957/58 and registered in the names of the sons of each house. That their fathers land was shared out amongst the 4 houses of his 4 wives and the suit land is the portion for the 4<sup>th</sup> house. The land was registered in the name of the Defendant as the other brothers were still young and he was the only one who was married then. Later the clan convened a meeting to share the land amongst the 4 brothers which was done and soon after Thome Njuguna planted coffee and the Defendant built a house on his side of the land. He stated that Minai Njuguna had a separate land LOC8/GACHOCHO/772, that he bought and where he lived with his mother but still cultivated his portion of the suit (family) land. He explained that at some point his wife was cultivating some part of the land but the Defendant stopped her. Disputes arose in 1970s when the Defendant started claiming that the land was his to the exclusion of the other 3 brothers. This culminated in the Defendant suing Minai Njuguna at the Land Dispute Tribunal for eviction and thereafter Minai appealed at the Provincial Land Dispute Tribunal. He informed the Court that Thome and Gichao were buried on their designated portions. Their mother too was buried on the land.

8. PW3 – Nelson Kariuki Thome testified that he was the grandson of the late Njuguna Karu who had 4 wives. He explained that the Plaintiff's husband had two parcels of land; a portion of the suit land and parcel LOC.18/GACHOCHO/722 which he bought. He explained that the suit land is family/ancestral land. That he is a neighbor to the parties as his land is parcel No LOC.18/GACHOCHO/761.

9. That the suit land belonged to the house of the 4<sup>th</sup> wife, Hannah Wangari to be shared between her 4 sons. That Gachao and Thome died unmarried leaving no beneficiaries but were buried on the said land. He stated that the suit land was registered in the name of the Defendant because he was considered the eldest as at the time he was the only one who was married unlike the rest. He was therefore seen as the best custodian (Muramati) of the land at the time. He was registered to hold for himself and his family.

10. He stated that the parties have had running disputes in respect of the suit land with the Defendant being indecisive in sharing the suit land. That at one time he admitted that the land is family and another that he would give 2 acres to the son of the Plaintiff however he has not taken any steps to fulfill any of them. He informed the Court that the two parties occupy the suit land in equal shares and the Plaintiff has planted tea and coffee on her portion of the land. The Defendant too has his coffee that he planted in 1970s on his part of the land. The Plaintiff's son lives on the portion of the land belonging to her family and two portions are clearly marked and demarcated.

11. The Plaintiff filed written submissions which I have read and considered.

12. The issues for determination are;

- a. Whether the Land Dispute Tribunal had jurisdiction to determine ownership?
- b. Whether the Plaintiff has proven the existence of a customary trust?
- c. Who pays for costs?

13. It is not in dispute that the parties in this matter had sued each other in the Land Dispute Tribunal at Kigumo which rendered a decision to the effect that the Plaintiff's husband be evicted from the suit land. Being aggrieved the Plaintiffs husband proffered an appeal to the Provincial Land Dispute Tribunal but two things happened that brought the progress of the suit to a cropper; the Plaintiffs husband died in 2003 and the land tribunals were disbanded. The Defendant in his replying affidavit has argued that the decision of the Land Dispute Tribunal was final and this Court cannot upset it. The Plaintiff asked the Court to determine that these proceedings were a nullity on grounds of want of jurisdiction.

14. The operations of the Land Dispute Tribunal Act set out its mandates under section 3 as follows;

“(1) Subject to this Act, all cases of a civil nature involving a dispute as to— (a) the division of, or the determination of boundaries to land, including land held in common; (b) a claim to occupy or work land; or (c) trespass to land, shall be heard and determined by a Tribunal established under section 4”

15. It is also trite that the Land Dispute Tribunal under the said Act was not clothed with jurisdiction to determine title to land but had limited jurisdiction within the said Act. It is also trite that matters dealing with registered land were better determined under Sec 159 of the Registered Land Act and not the tribunal. section 159 of the now repealed Registered Land Act which stated:-

“*Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty-five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of section 3 (1) of the Land disputes Tribunals Act, in accordance with that Act.*”

16. In the case of **Joseph Malakwen Lelei & Another vs Rift Valley land disputes appeals committee & others c.a civil appeal no. 82 of 2006 (2014 e k.l.r)**, the Court of Appeal made it clear that the jurisdiction of a Tribunal established under the **repealed Land Disputes Tribunals Act** did not extend to determining issues of trust. Res-judicata cannot therefore be sustained as a bar to this suit because the issue of trust was never “*heard and finally decided*” by the Tribunal which was also not “*a Court competent*” to determine such a dispute and which is a pre-requisite for res-judicata to apply as provided under Section 7 of the Civil Procedure Act. The plea of res-judicata is therefore not well founded and must be rejected.

17. In the case of **Republic....Vs...Kajiado North District Ngong Land Disputes Tribunal, Senior Resident Magistrate Kadjiado**, where the

Court held that:-

*“If the said Tribunal had no jurisdiction to entertain the matter, whatever proceedings flowed from its decision would be null and void since decision made by a tribunal which has no jurisdiction to entertain the dispute before it must of necessity be null and void”. Land Disputes Tribunal had no jurisdiction to interfere with title to a registered land”.*

a. The law is well settled that a decision which is arrived at without jurisdiction is a nullity. In the case of **Sir Ali Bin Salim Vs. Shariff Mohamed Shatry Civil Appeal No. 29 1940** it was stated that;

*“If a Court has no jurisdiction over the subject matter of the litigation, its judgments and orders however precisely certain and technically correct are mere nullities and not only voidable; they are void and have no effect either as estoppel or otherwise and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a Court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction”.*

18. This Court holds that the Land Dispute Tribunal acted in excess of its powers and the decision is a mere nullity.

#### **Has the Plaintiff proven the existence of customary trust?**

19. Section 23, 24 & 26 provides that a registered proprietor with title issued by the land registrar has prima facie evidence of title and such person is deemed as the absolute owner with all rights and privileges appurtenant thereto. The documents availed to this Court confirm that the Defendant is the registered owner of the suit property. Section 28 of the repealed Act, Cap 300 provided that “The rights of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of Court shall not be liable to be defeated except as provided in this Act and shall be liable by the proprietor together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever but subject to-

a. To leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register; and

b. Unless the contrary is expressed in the register to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is a subject as a trustee.

20. Section 28 of the Land Registered 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.

21. 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.

22. Customary trust therefore 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).*

23. 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).*

24. Going by the SCOCK case above the following are critical to prove of 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.”

25. In this case, the Plaintiff’s evidence was not challenged and further establishes that the land belonged to the Defendants father who had 4 wives. The parties hailed from the house of Hannah Wangari who was the mother of the Defendant, the Plaintiffs husband and 5 others. The evidence of PW2, the village elder and relative of the parties and PW3 the grandson of Njuguna Karu was credible. They explained to the Court that the land was family land. That each wife was given land and the suit land belonged to the house of Wangari. The grandson stated that he lives on land that was initially registered in the name of Thome Njuguna, his father. He hailed from the house of Miriam Wanjiru Njuguna. The Court heard in evidence that the reason the land was registered in the name of the Defendant was because he was taken as the eldest having been married at the time and the most responsible and capable “muramati” on behalf of his siblings. This explains the intervening circumstances as to why the Defendant was registered as owner of family land.

26. It is also in evidence as recorded in the Land Dispute Tribunal that the mother of the Defendant had an interest in the land and there had been an endless battle to acquire her property as per caution registered against title claiming beneficial interest registered on the 19/9/1990. There is also a letter from the office of the President to the local District administration directing them to resolve the dispute on behalf of the said Hannah Wangari. In both scenarios their mother was pursuing an interest in ancestral and family land.

27. It is clear from the evidence of PW1 and collaborated by the other witnesses that the two portions of land are demarcated and identifiable on the ground with each carrying out farming activities. This lends credence to the evidence of PW2, the local elder that the boundaries were set by the clan which boundaries have been respected on the ground save for incessant harassment by the Defendant to remove the Plaintiff from her portion of the land. This epitomizes the intention of the parties to create a trust when with the help of the elders the land was demarcated according to the siblings. Save for the Land Dispute Tribunal case there is no evidence that the Defendant protested the demarcation.

28. The upshot of the Courts findings is that the land is family land having devolved from the parties grandfather, to their father and now themselves. The parties are related, that is to say they belong to one family and clan. The reasons for registering the land in the name of the Defendant was because he was taken as the eldest and the best suited to be a “Muramati” to the family. The boundaries of each party on the ground are set and known.

29. The Plaintiffs claim succeeds and the Court makes the final orders as follows;

- a. The Defendant holds 1.355 ha out of L.R LOC.18/ GACHOCHO/708 (suit land) in trust for the Plaintiff.
- b. The trust thereto be and is hereby dissolved and the Defendant is ordered to subdivide the land and transfer 1.355 Ha out of L.R LOC.18/ GACHOCHO/708 to the Plaintiff within a period of 45 days from the date of this judgment.
- c. The subdivision shall follow the set boundaries as much as possible to preserve each party’s portion on the ground.
- d. In default of b) the Deputy Registrar of this Court is mandated to execute all the requisite documents necessary to effect the subdivision and the transfer of 1.355 has to the Plaintiff.
- e. I make no orders as to costs.

**Orders accordingly.**

**DELIVERED, DATED AND SIGNED AT MURANG’A THIS 27<sup>TH</sup> DAY OF JUNE 2019.**

**J. G. KEMEI**

**JUDGE**

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

Mshila for the Plaintiff

Defendant: Absent

Kuiyaki and Njeri, Court Assistants