



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.148 OF 2015

MARGRATE NYAMBURA KING'ARA.....1ST PLAINTIFF

JOHN WAITHAKA KING'ARA.....2ND PLAINTIFF

VERSUS

FRANCIS KIMANI NJONGE.....1ST DEFENDANT

GATHIGIRIRI FOUNDATION COMPANY...2ND DEFENDANT

JUDGMENT

(Plaintiffs claiming that suit land which is registered in name of 1st defendant is held in trust; land previously under the registration as shares of 1st defendant's father; plaintiffs claiming that this land was purchased through contribution by family; no evidence of such contribution; no evidence of trust; suit dismissed).

1. This suit was commenced through a plaint which was filed on 21 May 2015. In her pleadings, the 1st plaintiff averred that one Njonge Kingara (deceased) was her uncle and that he held the land parcel Gilgil/Gathigiriri Karunga Block 10/533 (the suit land) in trust for the rest of the family. The deceased was a brother to the 2nd plaintiff. It is pleaded that the 1st plaintiff was born and raised in the suit land. The 1st defendant is son to the deceased and the current registered proprietor of the suit land and the plaintiffs contend that the 1st defendant registered the suit land into his names without involving the rest of the family yet he was aware that his late father held the same in trust for the rest of the family. It is pleaded that the 2nd plaintiff and his mother (now deceased) continuously paid for the land at the 2nd defendant's offices for shares then identified as Plot No. 80 and later registered as the suit land. It is contended that the 1st defendant secretly registered himself as proprietor on 4 July 2011 yet his father, the previous proprietor, died on 21 June 2011. It is stated that the 2nd defendant was an accomplice to the 1st defendant's action. In the suit, the plaintiffs have asked for the following orders :-

(a) The defendants, agents, servants and/or employees be restrained from interfering, subdividing, transferring or meddling in any way with LR No. Gilgil/Gathigiriri Karunga Block 10/533.

(b) permanent injunction against the defendants, servants, agents and/or employees from trespassing, subdividing, disposing and/or interfere in any manner whatsoever with LR No. Gilgil/Gathigiriri Karunga Block 10/533.

(c) The current title deed in the names of the 1st defendant be cancelled as it was obtained fraudulently without following the due process in law, or involving all beneficiaries of the former registered owner at the 2nd defendant's records.

(d) Costs of this suit.

(e) Interest thereon.

(f) Any and/or further relief this Honourable Court might deem fit and just to grant.

3. The 1st defendant filed defence vide which he pleaded that the 1st plaintiff was at all material times married to one Anthony Macharia with whom she had several children and therefore has never lived on the suit land. It is denied that the suit land is held in trust or that the 2nd plaintiff and his mother paid money towards the purchase of the land. He admitted not living on the suit land but averred that neither of the plaintiffs have ever lived on it. He denied any fraud on his part.

4. I have not seen any defence from the 2nd defendant though they are represented by M/s Wambui Ngugi & Company, who also appear for the 1st defendant.

5. PW-1 was the 1st plaintiff. She testified inter alia that the suit land belonged to her late grandmother, one Hannah Wanjiru Kingara, who died in the year 2003, and her children. She stated that the records of the 2nd defendant, bore two names as proprietors, that is the 2nd plaintiff and the deceased father of the 1st defendant, who are her uncles and brother to her mother. The title deed was however issued to the 1st defendant. She asserted that the land is of her grandmother and the whole family and asked the court to order the land to be subdivided so that each person can get their portion. Cross-examined, she testified that her mother, Grace Wakio Kingara, was never married and that she now lives in the United States of America (USA). She averred that she was born in the year 1972 on the suit land and that she has two children. She stated that she was told that family members contributed money to purchase the suit land but those who went to make payments were the 2nd plaintiff (John) and the deceased father of the 1st defendant (Daniel) and that is why the receipts bore their names. She reiterated that the land was however purchased by the whole family, this being comprised of her grandmother and her children, Hannah Wanjiru Kingara, John, Daniel, Grace Wakio Kingara and Mary Wambui Kingara. She however did not know for how much the land was purchased and did not know how much each family member contributed. She also did not know the years that the payments were made. She did not know the acreage of the land but stated that she uses and cultivates about 3 acres of it. She stated that she lives in a house built by her uncle John which was built when she was still young. John built one house for himself and one house for her grandmother. She resides in the house that was built for her grandmother and she stated that she has been living in this house since she was young. She was living with her at the time of her death in the year 2003 alongside two sons of her uncle John. At the time of her grandmother's death, John was living in the USA and was not present at her burial. She stated that when John left for the USA, he left his sons occupying his house on the suit land. At the moment, she lives in a house that she built in the year 2004 after pulling down the two houses. She stated that she now resides there with her children though she did mention that her uncle John cultivates a bit of the land. She did admit that at some point she lived in Gilgil town where she was employed but lived with her grandmother before her death. She did state that his grandfather had 3 wives and his other two houses were elsewhere.

6. PW-2 was the 2nd plaintiff. He testified that his mother had several children but only four survived. Daniel was the eldest, then Grace, then Mary, then himself. He stated that the land in dispute was bought by the family. His mother did not have an ID and he himself did not have an ID as he was young so the land was registered in the name Daniel. He stated that in the 1960s, his mother was employed by a white settler at Kingangop while Daniel settled in Mwea. The 2nd defendant, a land buying company, purchased land in Gilgil and Daniel was employed as its first manager. He then moved his mother from Kinangop to the suit land about the years 1964/1965 and this is where the family lived. He testified that at a point in the years 1966/1967, Daniel called a family meeting and an elder, one Gabriel Wamundu, and disclosed that he was going to settle in Mwea and they should therefore pay for the land in dispute. The payment due was Kshs. 2,500/= for one share which was in his (Daniel's) name. He stated that he built a house where he was shown by his elder brother. At this time, the company was yet to distribute land to its members and one could occupy any portion. Daniel left and a new manager, one Reuben Karari came, and he allowed them to pay for the land in small bits. He asserted that it was his mother, Grace, Mary and himself who paid and Daniel did not though he had made the initial deposit. The land was then distributed to members and they were shown their boundaries although he did not know how many acres was given to them. A second survey was done and they were moved to a new site. Later, they were informed that they are entitled to an extra one acre which fell on land where a neighbour had built, and instead of them demolishing the same, Daniel sold this one acre to the occupant, one Benjamin. He stated that he built a house for himself and his mother "in the 1970s or 1980s." He testified that Daniel wished to rear goats on the uppermost side of the land while they would cultivate on the lower side of it. Every April, he would call his family to meet in his house. He mentioned that he got married here in 1979 and in 1994, he moved to the USA. Later, he bought another parcel of land in Karura. He contended that his brother, in a year that he could not recall, called him for a meeting and informed him that out of the whole land (16 acres) he would take one acre more than them, thus 4 acres, including the one sold to Benjamin, meaning that he would keep 3 acres. He testified that in the year 1996, he went back to the USA and came back in the year 2008 where they met again. After 2010, Daniel informed him that he had sold 2 acres to his nephew, one Geoffrey Macharia Waithaka. Daniel later died and was buried in his farm in Mwea. In the year 2012, when he came back from the USA, he went to check on the status of the land and found that the same was registered in the name of the 1st defendant. He was accompanied by one Kinyanjui Njonge, a son of the 2nd wife of Daniel, and Geoffrey Macharia Waithaka, son of Mary Wambui. He advised them to place a caution on the land. He then went back to the USA, but when he came back in the year 2015, the 1st plaintiff informed him that some people had come to subdivide the land and that she had been told to vacate. He went to the Lands office and found that the title had changed to the name of the 1st defendant. He stated that no succession had been done and that Daniel has 3 wives and more than 10 children.

7. Cross-examined, he testified inter alia that Mary, his sister, died in the 1960s or 1970s and was buried at Kiambu in the land of one of his cousins. Another of his brothers, Amon was buried in the same land in Kiambu. He however did not agree that they were buried here because their family had no land. He testified that most of the payments to the company were made by his mother and that she would pay what they had all contributed together with her own contribution. He did not however have the payment receipts. He claimed that he himself went once to make payment of Kshs. 55/- and he handed over the receipt to his mother. He testified that his mother left working at Kingangop in the years 1963/1964 after independence when he was about 12 years old. He stated that he went to school and partly worked as a golf caddie and did some photography, and thus had some money to pay for the land. He did not know whether as manager, Daniel earned a salary. He refuted that the land was bought by Daniel using his own money. He did not know whether the share certificate for the land was issued to Daniel in the year 1977. He did not go to check on the status of the registration of the land at that time and neither did he complain that the land was for other people as well. He stated that he settled in Karura in 1986 and he lives here with his family. He does not live in Gilgil although when in the country, he may spend a few days here in the house of his niece. He was of opinion that the land that Daniel sold was his portion and therefore they had no objection. He refuted that Geoffrey bought land from Daniel because his mother had no share. He did not believe that Daniel could have transferred the land to the 1st defendant because he had other children. He also thought that Daniel was too ill to have travelled to transfer the land to the 1st defendant. Questioned about their father, he stated that he died in 1992. He had land in Maella where his third wife lived and this is where he was buried. He never lived in Gilgil but would only visit. His second wife lived in Kinangop and this

is where she is buried.

8. PW-3 was one Geoffrey Macharia Waithaka. He adopted his witness statement and on cross-examination, he testified that he purchased 2 acres of the suit land. The sale agreement that he had, showed purchase of 3 acres, but he explained that he could only raise money for 2 acres. He paid Kshs. 200,000/= and could not raise an additional Kshs. 100,000/= for the extra acre. It was noted that the sale agreement that he had, mentioned a plot No. 029, but he said that it was the same land here described as land parcel No. 053 and he believed that they refer to the same land. He stated that this land was owned by the family as he was born and raised in it. He was born in 1972 and his mother died in 1974. His mother was buried in Kiambu.

9. PW-4 was one Muthongo Rugwe. He stated that his mother and the 1st plaintiff's grandfather were siblings and he is now the eldest surviving member of the family. He testified inter alia that it was Daniel who purchased the suit land and who paid for the shares for the land, but the land was like family land because the whole family lived here. He thought that the family ought to have called him in order to resolve the dispute and resolve how to subdivide the land. Cross-examined, he explained that the land in Gilgil was purchased by a group who came from Gathigiriri in Mwea, thus the description Gathigiriri. He testified that Mzee Kingara had 3 wives and they previously lived in a white settler farm in Kingangop. He stated that when Daniel purchased the suit land, Mzee Kingara, had no land of his own and that is why Daniel brought his mother to live in Gilgil. It is later that Mzee Kingara purchased land in Maella and Kinangop where his other wives settled. He acknowledged that it was Daniel who purchased the suit land by virtue of his membership in the society and John and the rest of the family came to live here. He could not tell if they contributed anything towards its purchase. He however thought that the land became family land because Daniel brought his mother and siblings to live here.

10. With the above evidence, the plaintiffs closed their case.

11. DW-1 was the 1st defendant. He testified that he is son to Daniel and the current registered proprietor of the suit land. He stated that his father purchased shares in Gathigiriri Foundation Company in the 1960s or 1970s and paid for the requisite fees and for the shares. After completing payment, he was issued with a share certificate in the year 1977. He was then given land commensurate to his shareholding after the company surveyed the land and was then given a second certificate in 1997 this time bearing the land parcel number 553. He explained how he became registered as proprietor. He stated that his father took him to the company and transferred his share to him on 24 May 2011. He was then issued with a share certificate in his own name on the same day. His father then died on 21 June 2011 and he received the title deed on 4 July 2011 after the register of the farm was taken to the Lands office in Naivasha. He acknowledged that it is the 1st plaintiff living on the land. He stated that she came to live here in 2012 after she left her husband and was desperate and he (DW-1) allowed her to stay on the land while she sorted out her marital issues. He denied that she has always been resident on the land. He also denied that John (the plaintiff) has been living on the land as he is settled in Kiambu. He refuted the claim that John had built a structure on the land and stated that the only structure was built by his father for his grandmother to live in and this is where the 1st plaintiff resides.

12. Cross-examined, he stated that it was his father who started the process of acquiring land in the 1960s. He could not tell how contributions were made as he was young. He could not tell whether any of his uncles or aunts contributed any money although he did mention that he has not seen them having evidence of any payment. He acknowledged that his father died of cancer and he stated that before that, he used to assist him with medication and take him to hospital. He further acknowledged that he is not an only child but stated that before his father died, he called a family meeting and that by the year 2010, his father had already directed that the suit land would be his (DW-1's) share. He stated that the family of his grandmother never lived here but only used to visit as the family home was in Nyandarua. He was aware that his father had sold an acre to Benjamin. On the alleged sale of some land to Geoffrey Waithaka, he stated that what his father sold to him was some land in Plot No. 29 and not the suit land. He pointed out that the numbers in the share certificates are consistent.

13. DW-2 was Francis Daniel Kanyuku. He is a director of Gathigiriri Company Limited, the 2nd defendant. In the year 1985, he served as Secretary before becoming Chairman later the same year. He knew Daniel as among the founder members of the company. Members would get share certificates and Daniel was issued with one for 200 shares with each share being worth Kshs. 20/=. When he was issued with a share certificate in the year 1977, he had not yet fully paid up, but he completed payment in the year 2010, and was issued with a second share certificate which bore the land parcel number. In the same year, he wished to transfer the share to the 1st defendant and he was informed to come together with him which he duly did and they allowed him to transfer the shares to the 1st defendant. The 1st defendant then got title in his name. He stated that the land belonged to Daniel and nobody else but was then transferred to the 1st defendant.

14. Cross-examined, he stated that the company bought the land from a white settler after raising money. He stated that 200 shares entitled one to 13.2 acres but the title that the 1st defendant got was less an acre which had been sold to Benjamin. He stated that during the transfer, there was nothing to do other than for both to sign their register.

15. DW-3 was Margaret Muthoni Njonge, wife to the late Daniel and mother to the 1st defendant. She testified that her husband was a rice farmer and bought this land from proceeds of rice farming. She testified that they moved her husband's mother from Kipipiri to Gilgil as she had been chased away by her co-wife. Of her children, she stated that currently it is only Wakio (mother to the 1st plaintiff) and John (2nd plaintiff) who are alive, though Wakio lives abroad. She affirmed that it is the 1st plaintiff currently living on the land but stated that she moved here after separating from her husband. She stated that at some point, John wished to build a structure on the land but her husband declined. She was aware that her husband has transferred the land to the 1st defendant and she stated that his siblings are also aware of this. They have no problem with the same. She refuted the allegation that John could have contributed towards the purchase of the suit land, as he was young when the land was acquired, and she added that they are even the ones who took him to school.

16. Cross-examined, she stated that her husband had a second wife, with 6 children. She stated that when they brought her mother in law to live in Gilgil, she had 6 young children, and they were all raised here. The 1st plaintiff was also raised here. She denied that his siblings helped her late husband pay for the land. She did not have any payment receipts as she stated that they got burnt. She asserted that her husband would pay for the land from his farming proceeds. She averred that they raised John in Mwea and he could not have money to pay for the land.

17. With the above evidence, the defence closed its case.

18. I invited counsel to submit, and both Mrs. Kerio for the plaintiffs, and Ms. Wambui Ngugi for the defendants, filed written submissions. I have taken these into account before arriving at my decision.

19. The principal question in this suit is whether Daniel held the suit land in trust for his mother and/or his siblings. Whereas the plaintiffs claim that there was a trust, this is refuted by the defendants. The basis upon which the plaintiffs claim that the land is held in trust is based on the allegation that the suit land was not solely purchased by the late Daniel, but that the whole family contributed towards its purchase. Since this is an allegation of the plaintiffs, the onus of proving the same is upon them. Despite claiming that the siblings to Daniel and his late mother contributed towards the purchase of the suit land, no documentary evidence was produced to back up this allegation. It is common knowledge that when one makes payment, one is issued with a receipt, and if the 2nd plaintiff alleges that he did make payment towards the purchase of the land, you would expect that he would have some documentary evidence to back up this claim. None was presented and in the absence of these, I find it difficult to believe the assertion of the plaintiffs that the siblings of the deceased contributed towards the purchase of this land. Even without documentary evidence, it is apparent that the suit land was purchased when the 2nd plaintiff was pretty young. In as much as he tried to claim that he was a caddie in a golf course and also did photography, I was not convinced by his evidence. He was a young boy of 12 or so years and was going to school, and again without something more tangible to back up the oral assertion that he was working part time at that age and contributing money, I am not persuaded by his allegations. It seems to me that the late Daniel was a hard working man who could take care of himself and the rest of the family, and I find it hard to believe that he could ask his 12 year old brother to help him pay for the land, while at the same time educating him. It simply does not add up for me.

20. I am more persuaded by the explanation that Daniel, in order to help his mother and his siblings, and having purchased the suit land for which he had little use of since he lived in Mwea, decided to settle his mother and siblings here so that they may have a place to stay. If this were not the position, you would expect the whole of his siblings to have some sort of base here, but none has. You would also expect that when either of his siblings died, then they would be buried here, if this was family land, but they were not. Neither did his father make Gilgil his home and never constructed a house here, and would only make occasional visits. These are not the type of facts that lead one to the conclusion that the family has bought the land. If they had, you would expect very strong attachment to the same, which to me is considerably lacking.

21. This position is indeed buttressed by PW-4, who was called by the plaintiffs. It will be recalled that he testified inter alia that the suit land was purchased by Daniel. He however held the view that since he helped settle the family here, then the land is family land. That position has absolutely no foundation in law. If one person buys land and decides to help his family by settling them here and giving them a roof, that land does not now belong to the family. It remains the land of the person who purchased it with the occupants being mere licencees. Neither does the fact that one is born and raised in certain land by itself give that person the right to own the land that they were born and raised in.

22. In her submissions, Mrs. Kerio for the plaintiffs, inter alia submitted that the share was registered in the name of Daniel because he was the eldest son and had an ID card. I do not subscribe to that position. I have absolutely no evidence that the family sat down in a meeting and resolved that because Daniel is the eldest son and has an ID then the family would raise money but have the land registered in the name of Daniel. As I have said, I have nothing, save for the mere statements of the plaintiffs, that they contributed to the land, and I have already given reasons why I do not believe these statements. The several authorities which were relied upon by Mrs. Kerio, including the cases of *Justus Maina Muruku vs Jane Waithira Mwangi*, *Kanyi vs Muthiora*, *Gathiba vs Gathiba*, *Mukangu vs Mbui* and *Henry Mwangi vs Charles Mwangi*, cannot help her client because in those cases there was clear proof of a trust which is not the case in this instance.

23. The upshot of the above is that I am not persuaded that the suit land was ever held by Daniel in trust for the rest of the family.

24. The plaintiffs also tried to claim that the registration of the suit land in the name of the 1st defendant was done fraudulently. I see no fraud. The 1st defendant explained how he got registered as proprietor. He mentioned that his father called him and took him to the offices of the 2nd defendant where a transfer of shares was done while he was still alive. The title was processed after the death of his father but by this time, the shares had already been transferred and all that was pending was only documentation. I see absolutely nothing that hints at fraud and I see no problem at all with the title of the 1st defendant. There was mention by the 2nd plaintiff that he had arranged for a caution to be placed on the land but I was shown no evidence of such and I certainly do not believe that any caution had been placed before title was processed in the name of the 1st defendant.

25. I am aware of the evidence of PW-3, that he purchased part of the suit land, but I am not too persuaded, given that his sale agreement bears a different parcel number from the suit land. But let me not dwell too much on that since he is not among the plaintiffs in this case, and there is nothing in this case that tries to enforce that sale agreement.

26. From the evidence, I am persuaded that the 1st plaintiff is a mere licensee on the suit land and being a licensee, her licence to occupy the land can be terminated at any time. She will have to move out of the suit land immediately the same is demanded of her. The 2nd plaintiff, as far as I can see, has absolutely no claim to the land.

27. The upshot of the above is that I am not persuaded that the plaintiffs have proved their case on a balance of probabilities and their case is hereby dismissed with costs.

28. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 27th day of June 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Akoto holding brief for Mrs. Kerio for the plaintiffs.

No appearance on the part of M/s Wambui Ngugi & Co. for the defendants.

Court Assistants: Nelima Janepher/Patrick Kemboi

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU