



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 515 OF 2017

JOSPHAT KAMANDE MACHARIA.....PLAINTIFF

VS

LIVINGSTONE WANYOIKE KING'ARA.....DEFENDANT

JUDGMENT

1. This suit was filed on the 19/7/2010 in Nyeri. The plaint was amended and filed on the 27/7/2010. It was transferred to Muranga ELC on the 14/12/17.

2. The cause of action is founded on customary trust in which the Plaintiff avers that the parcels of land registered in the name of the Defendant are held in trust for him. Consequently, the Plaintiff seeks the following orders;

- a. A declaration that the Defendant is registered in parcel LOC6/KANDANI/1706, LOC6/KANDANI1707 and LOC17/SABASABA/1537 in trust for himself and the Plaintiff to the extent of half share.
- b. Determination of the trust in favour of the Plaintiff and an order that the Plaintiff be registered as owner of his share of the parcels.
- c. Costs of the suit and interests at Court rates.
- d. Any other relief that this honourable Court may deem fit to grant.

3. The Defendant denied the Plaintiffs claim through a statement of defence filed on the 9/8/10 in which he asserted that he is registered as absolute owner of LOC6/KANDANI/1706, LOC6/KANDANI1707 and LOC17/SABASABA/1537 and not in trust for anyone, least of all the Plaintiff.

The Pleadings and evidence of the Plaintiff

4. The Plaintiff stated that he is the younger brother of the Defendant, both being the sons of Macharia Gathu who died around 1952 before the land demarcation, adjudication and consolidation though he owned several fragments which were later consolidated during land adjudication as LOC 6/GIATHANI/1568, LOC 6/KANDANI/1221, LOC 6 GIATHANI/1379 and LOC17/SABASABA/1003. These parcels variously registered in the names of their paternal uncles; Kingara Gathu and Gachuma Gathu alias Nganga Gathu.

5. That on the other hand the Defendant sued his uncle Kingara Gathu in PMCC No 302 of 1992 whereupon the Court ordered that the said Kingara Gathu held 12 acres in trust for the family. The said trust was determined and he became registered as owner as he was the eldest in the family. He admitted that he did not participate in the suit. The Defendant sold two acres leaving 10 acres registered in his name comprised in two titles to wit; LOC6/KANDANI/1706 & 1707 measuring 5 acres each. That the Defendant cultivates 1706 and he cultivates 1707. Parcel 1705 measuring two acres was sold by the Defendant.

6. In addition, the family of Gachuma Gathu ceded LOC 17/SABASABA/1537 measuring 2 acres to them vide succession upon his death. He avers that both parties reside on the suit land. It is his position that the suit lands were their fathers and were registered in the name of the Defendant as a trustee and that he is entitled to half share in all the parcels. He admitted that he was neither a party nor an administrator of the estate of Gichuma Gathu. That he did not seek to revoke the grant issued in the estate of Gichuma Gathu because the land that was succeeded by his brother was family land.

7. In respect to parcel 399, he averred that this parcel was not part of his father's entitlement. He averred that his father's land was parcel LOC6/KANDANI /1221, Kandani. It is his evidence that in 1991 the elders prevailed upon his uncle Kingara Gathu to give him 4 acres. That upon subdivision of the said land he was given 4 acres as a gift that is to say LOC 6 GIATHANI/1384 out of which he sold 2 acres for funding the case between this uncle and the Defendant.

8. He relied on the list of documents dated the 6/2/13 which were produced and marked PEX No 1-22.

9. The Defendant in his statement of defence denied that he is the son of Macharia Gathu and insisted that his paternity can be proved by the names in his national identification card. He denied that Macharia Gathu died in 1952 and sought to put the Plaintiff into strict proof. He denied any knowledge of Macharia Gathu's entitlement to 14 acres and averred that the Plaintiff was not born at the time and that any evidence led in that regard would be mere hearsay. He denied that their uncles Kingara Gathu and Gachuma Gathu held any lands in trust for their father and by extension the Plaintiff. He averred that the Plaintiff was given 4 acres by Kingara Gathu out of LOC6/GIATHAINI /1380 which later became LOC6/GIATHAINI /1384 and not LOC6/GIATHAINI /1568. He denied that he was part of the decision to sell 2 acres out of the 4 acres by the plaintiff. In respect to the 12 acres in parcel 1663, he averred that the land belongs to him absolutely having become registered arising from a Court order in PMCC 302/92. That he sold two acres and later subdivided the land to yield 5 acres each.

10. In his written statement filed on the 27/3/13, the Defendant stated that Macharia Gathu was a brother of Kingara Gathu and Gachuima Gathu. That after his demise in 1950 Parcel No LOC6/GIATHAINI/399 was held in trust by Kingara Gathu.

11. That parcel LOC6/GIATHAINI /399 was subdivided into parcels LOC6/GIATHAINI /1380 and 1379. Arising from the elder's decision arrived at on the 25/6/91 parcel No LOC6/GIATHAINI /1380 measuring 4 acres was registered in the name of the Plaintiff on 27/10/92. The remaining parcel No LOC6/GIATHAINI /1379 became registered in the name of Kingara Gathu. The Plaintiff subdivided LOC6/GIATHAINI /1380 to yield LOC6/GIATHAINI /1384 and 1385. 1385 was sold ostensibly with the agreement of the Defendant and for the purpose of funding the expenses in relation to PMCC No 302 of 1992. LOC6/GIATHAINI /1384 measuring 2 acres was later subdivided into LOC6/GIATHAINI /1568 and 1569 all registered in the name of the Plaintiff on 30/9/04.

12. With the advice of the clan elders he sought 4 acres from Gachuma Gathu which could not be traced forcing him to sue Kingara Gathu in PMCC No 302 of 1992. He won the case and the Court decreed 10 acres in his name from parcel 1221, Kandani. He blames the Plaintiff for failing to lay claim over his father's property despite being aware of the Court proceedings. Consequently parcel LOC 6/KANDANI/ 1221 was subdivided into LOC 6/KANDANI/1662 and 1663 in the name of Kingara Gathu and the Defendant respectively. That he subdivided parcel No LOC.6/KANDANI/1663 into LOC.6 /KANDANI/1705, 1706 and 1707. Parcel No LOC.6/KANDANI/1705 was sold to finance the suit and the costs of registration of the lands in his name.

13. That he got parcel No LOC.17/SABASABA/1537 measuring 2 acres through succession of the estate of Gichuma Gathu alias Nganga Gichuma. He explained that the reason he was given 2 acres was because he was residing on the land.

14. That the Plaintiff filed a case at Maragwa LDT No 196 of 2005 which awarded him 3 acres of parcel LOC.6/KANDANI/1707 but the award was reversed in Judicial Review No 1061 of 2007.

15. At the hearing of the case the Defendant recounted his evidence as set out in the preceding paragraphs. In addition, he produced a list of documents dated the 21/3/13, 1/7/13 and 30/1/15 marked as DEX 1-25.

16. He clarified that it is only Kingara Gathu owed his father 8 acres of land from parcel LOC.6/GIATHAINI/399 at Giathiani which he and his brother the Plaintiff were to get 4 acres each. It is only the Plaintiff who got 4 acres unlike him who did not get any land in Giathiani. Saba saba land was LOC 17/SABASABA/1537 which he succeeded from the estate of Gachuma Gathu. That the 4 acres were finally recovered from Kandani LOC 6/KANDANI/1221 through a Court case Nos 302 of 1992 where he sued Kingara Gathu for 4 acres and he added him another 6 acres because he bore his name in his identification card. He added that it seems he is the son of Kingara Gathu. In addition he stated that the said Kingara Gathu added him another 2 acres in lieu of plots. He informed the Court that he got 12 acres (1663) in total out of which he sold 2 (LOC 6/KANDANI/1705) acres leaving 10 acres (LOC.6/KANDANI/1706 and 1707) measuring 5 acres each. That he cultivates on 1706 while the Plaintiff farms on LOC 6/KANDANI/1707 by force.

17. The parties elected to file written submissions which were filed on 16/4/19 and 8/5/19 respectively.

18. The Plaintiff submitted that the Plaintiff suit lands belonged to the father of both the parties which had been registered in the names of their two paternal uncles under customary trust. The proceedings in the PMCC case No 302 of 1992 shows that the cause of action pursued by the Plaintiff was customary trust which the Court determined in his favour. That each of the parties are holding land that they acquired by virtue of a customary trust and they have not depicted to the Court any evidence of purchase or such other acquisition to remove the lands out of customary trust. Their claim that they hold the lands as gift is a mischievous and crafty way of twisting the truth to suit their interests. The Plaintiffs submitted that the nothing precludes the Defendant from an interest in trust for the Plaintiff even though the title does not indicate it on the title. Quoting the case of **Mbui Mukangu Vs Gerlad Mutwiri Mbui CA No 281 of 2000** and **Justus Maina Muruku Vs Jane Waithira Mwangi (2018) eKLR** where the Court stated that customary trust is a concept on intergenerational equity where land is held by one generation for the benefit of succeeding generations. The Court also held that possession and occupation are key elements in determining the existence of a customary trust.

19. The Plaintiff submitted that the suit lands are ancestral land which devolved from their paternal uncles to the Defendant in trust for the children of Macharia Gathu.

20. The Defendant on the other hand while citing the case of **Isack M'Inanga Kieba Vs Isaya Theuri M'Lintari & Anor (2018) eKLR** submitted that trust is a question of fact. That the Plaintiff pleaded that the late Macharia Gathu owned 14 acres held in trust by his two brothers and therefore cannot submit that the land was 18 acres. The Plaintiff is bound by his pleadings and cannot make submissions not supported by pleadings. The Defendants implored the Court to analyze the minutes of the clan elders held in 1991 as well as the correspondences by Kingara Gathu in deciphering the number and acreage of the land held in trust for the parties by Kingara Gathu.

21. The Defendant submitted that parcel LOC 6/GATHAINI/399 was held in trust by Kingara Gathu and was therefore ancestral land. Out of the ancestral land 4 acres comprised in parcel LOC 6/GIATHAINI/1380 which the Plaintiff sold 2 acres remaining with two acres. He submitted that customary trust that subsisted on parcel LOC 6/GIATHAINI/399 was determined when the parcel LOC 6/GIATHAINI/1380

was transferred to the Plaintiff. He charged that the onus of proving that parcel LOC 6/KANDANI/1663 awarded through orders in PMCC No 302 of 1992 was on the Plaintiff which he has failed to prove. That the Plaintiff has failed to prove which property was encumbered with customary trust and that such property was ancestral land.

22. He sought to persuade the Court that parcel No LOC 6/KANDANI /1706 and 1707 emanated from Kandani LOC 6/KANDANI /1221 which was registered in the name of Kingara Gathu way in 1977 after the land consolidation demarcation and registration was long concluded. That this land was not ancestral land. He submitted that he was constrained to sue Kingara Gathu on LOC 6/KANDANI /1221 after he sold the balance of 2.4 acres in LOC 6/KANDANI/399 for which he was claiming entitlement to 4 acres. That the award in PMCC 302 of 1992 was meant to benefit the Defendant.

23. Further that the Defendant enjoys absolute indefeasible title under sections 23, 24 and 26 of the Registered Land Act and the Plaintiff failed to impeach his titles on account of fraud or corrupt scheme as required by law. That the Plaintiff failed to prove that Kingara Gathu held the land under any customary trust.

24. In respect to parcel 1537 the Defendant submitted that the said land is not held under customary trust as the same was registered in the name of Nganga Gachuma Gathu in 1981 way after the consolidation and registration was concluded. He submitted that he owns 2 acres of the land while the balance is held by Beth Nyambura Wanyoike who is not a party to the proceedings. That the Plaintiff despite being aware of the succession proceedings did not protest the grant and distribution of the land in the state of Gachuma Gathu.

25. Finally, that the Plaintiff has asked the Court to imply trust where no intention existed to create one.

26. The key issue for determination is whether the Plaintiff has proved customary trust on the suit lands. Secondly who pays cost of the suit land?

27. In the case of **Mbui vs Mukangu vs Gerald Mutwiri Mbui C.A No. 281 of 2000** the Court of appeal stated that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. If land was passed down from the family member to another, the presumption of trust subject to evidence is high.

28. Customary trust is a concept through which land may be acquired in Kenya. It finds expression in the Constitution under **Article 60 (1) (a) of the Constitution** and in statute. Land is a scarce resource and yet a critical factor of means of production. The Principles of land policy dictate that land must be held used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with principles set out under Article 60. The principles of equity have now found its place in the Constitution under Article 10 (2) of the Constitution. Customary trust is recognised as one of the overriding interests in land under section 28 of Land Registration Act. These interests also known as intergenerational and intragenerational equities underpin the values of sustainable development as set out in the Constitution. Land is held by one generation for the benefit of future generations.

29. Section **28 (b) of Land Registration Act** provides as follows;

i. 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—

ii. (a).....

iii. (b) trusts including customary trusts;

30. The provisions of Section 27 & 28 of Registered Land Act, Cap 300 (repealed) state that the rights of a registered proprietor of registered land under the Act are absolute and indefeasible and only subject to rights and encumbrances noted on the register or overriding interests which are set out under section 30 of the Act. The provisions of 27 & 28 are similar to the provisions set out in section 24,25 26 & 28 of the Land Registration Act, 2012.

31. Section 30 of the Registered Lands Act provides:

“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 them being noted on the registers:

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g. the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such a person and the rights are not disclosed.

One of the overriding interests under Section 30 (g) is the right of the person in possession or actual occupation of the registered property”.

32. The suit lands have been subject of litigation for close to 3 decades this year with the dispute leading to litigation having commenced in 1991. In the panel of elders meeting held on 25/6/91 the Defendant had lodged a dispute before the Akimuny Clan against Gachuma Gathu and Kingara Gathu. The Defendants claim was his father’s share of the family land. The elders held that Gachuma was to give the Defendant 4 acres from Sabasaba and Kingara was to give 4 acres to the Plaintiff from LOC6 /GIATHAINI. In this meeting it is on record that Kingara stated as follows;

“ Kingara stated that all the pieces of land belonging to Wanyoike’s late father were taken by him and his brother Gachuma”.

Similarly Gachuma stated before the elders that both Kingara and Gachuma shared their father’s (Defendant’s) land. The late father being referred to here is Macharia Gathu. It was stated that Gachuma had given his brother 2 acres and will add another 2 acres to make it 4. The 4 acres was to go to the Defendant. It is clear from the elders meeting that the Plaintiff was to get land in LOC 6 GIATHAINI from Kingara and the Defendant from Gachuma in LOC 17 SABASABA.

33. Following this intervention by the elders and from the green cards and evidence led by the Plaintiff on record, Land parcel LOC 6/GIATHAINI/399 registered in the name of Kingara Gathu on 6/12/65 was subdivided into parcel LOC 6/GIATHAINI/1379 and 1380 which remained in his name and were registered on the 1/10/92. On the 27/10/92 Parcel LOC 6/GIATHAINI/1380 measuring 4 acres was conveyed to the Plaintiff and endorsed as a gift. On the 24/3/93 the Plaintiff subdivided the said LOC 6/GIATHAINI/1380 into parcels Nos. LOC 6/GIATHAINI/1384 and 1385 with the former becoming registered in the name of the Plaintiff on 24/2/93. On 30/4/2004 he further subdivided LOC 6/GATHAINI/1384 into two titles to wit LOC 6/GATHAINI/1568 and 1569. That is so far for the titles emanating from original parcel LOC 6/GATHAINI/399 which was determined by the elders as partly belonging to Macharia Gathu, the father of the parties herein.

34. It would appear that the decision of the elders was not actualized in respect to the Defendant, consequent to which he filed suit against Kingara in 1992 – PMCC No 302 of 1992 seeking 12 acres on account of customary trust. In his evidence in chief the Defendant stated as follows;

“ I am Livingstone Wanyoike Kingara from sabasaba a peasant farmer and a son of the late Macharia Gathu. When I was born, he was already deceased and he had married my mother. My late father had brothers namely Nganga Gathu alias Gachuma Gathu now deceased. Kingara Gathu is the Defendant herein. I am disputing matters of parcel numbers LOC6 /GIATHAINI/1379 and LOC 6/KANDANI /1221 and I want my father’s share from the Defendant since he was the elder brother to my father he consolidated fragments that belonged to my father. During the consolidation had already died having died in the 1950s.” He also led evidence that Josphat Kamande is my young brother and we lived on the land before. In cross examination he stated that “his father was Macharia Gathu and he was named after the Defendant to avoid payment of school fees twice. That Kingara Gathu was his eldest uncle. He is not my father. He stated that they are two brothers”. Kingara Gathu in his evidence stated that he was not the father of the Defendant.

35. The Court in its considered judgement delivered on the 17/11/2000 held that Kingara Gathu held the land 12 acres in trust for the father of the parties in this case.

36. Following the decision of the Court, parcel LOC 6/KANDANI/1221 was subdivided as per the mutation forms dated the 4/4/2001 to create LOC 6/KANDANI/1662 and 1663. LOC 6/KANDANI/ 1663 was transferred to the Defendant. He later subdivide into parcels LOC 6/KANDANI /1705, 1706 and 1707. LOC 6/KANDANI /1705 was sold to a third party.

37. In 2006 the Plaintiff and the Defendant were back in the LDT tribunal No. 7 of 2006. In that case the Defendant categorically stated that;

“In 1991 I was staying in Gachuma’s land and we had claimed our fathers land and he gave us as a gift 2 acres of land.”

The import of this statement is that the 2 acres was the share belonging to their father Macharia Gathu. In this LDT the tribunal awarded the Plaintiffs acres out of parcels LOC 6/KANDANI /1706 and 1707. Aggrieved by this decision the Plaintiff moved the Provincial LDT who upheld the decision of the Maragwa LDT. The Plaintiff then moved the Court by way of Judicial Review application Misc No 1061 of 2007 and challenged the decision on grounds of want of jurisdiction for which it was upheld and all the decisions and awards were quashed for being null and void in its decision rendered on the 29/4/2010.

38. The Plaintiff has averred that the Defendant is his elder brother, being the sons of Macharia Gathu who died in 1950s. He averred that the late father owned land which at consolidation and registration were registered in the names of their paternal uncles namely Kingara Gathu and Gachuma Nganga Gathu. He stated that the suit lands are subject to trust and consequently the Defendant held them in trust for himself and for the Plaintiff.

39. The Defendant on the other hand asserted that he is not the son of Macharia Gathu and therefore cannot be said to be holding family land. Clearly the evidence of the Defendant is a 360 degrees turn around from the evidence he led in PMCC No 302 of 1992. The Defendant has actually perjured himself since he gave evidence under oath.

40. The finding of this Court is that the Plaintiff and the Defendants are the sons of Macharia Gathu who was the brother of Kingara Gathu and Gachuma Gathu.

41. The Court made a finding that the Defendant was entitled to 12 acres of land that was held by Kingara Gathu in trust for his father. The Defendant therefore received 12 acres of land comprised in land parcel 1663 that was encumbered with a trust. He led evidence that it was he and the Plaintiff who were sons of Macharia Gathu and entitled to the lands. Customary trust is an intergenerational provision of entitlement to property. It subsists on the land and moves with the land. It is an overriding interest that need not be noted on the register. The same can only be terminated by distribution of the trust asset to the intended beneficiaries. In this case the Defendant received a trust asset. The beneficiaries of this customary trust are the Plaintiff and the Defendant. The Defendant will stand discharged from the trusts at the distribution of the asset. In this case he has not distributed the asset and he is obligated in law to account for it to the beneficiaries.

42. In the case of **Isack M’Inanga Kieba Vs Isaaya Theuri M’Lintari & Isack Ntongai M’Lintari SCOK Petition 10 of 2015** where the apex Court set out the requirements to be met before a Court determines the presence of a customary trust.

43. In this case the parties are the sons of Macharia Gathu. The paternal uncles held land in trust for their father. Kingara Gathu was ordered by the Court to transfer 12 acres to him while he received 2 acres from the estate of Gachuma Gathu, all lands were encumbered with customary trust. The green card for LOC 17/SABASABA/1537 shows that it emanated from parcel LOC17/SABASABA/ 1003 registered in the name of Gachuma Gathu. On subdivision it birthed LOC17/SABASABA /1537 which devolved to the Defendant 0.81 Ha and Beth Nyambura Wanyoike 0.73 ha. Both parties led evidence that they both live on LOC17/SABASABA /1537 with their families. They also gave evidence that they each cultivate on separate portions of LOC 6/KANDANI/1707 and 1706. The portion for Beth Nyambura is distinguishable and is separate from that of the Defendant.

44. 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).

45. In this case the root of the suit land is traceable to the parties’ late father. The land was ancestral land. Both parties have lied in their evidence and misled the Court that the land was given to them as gifts. There is no plausible reason tendered by either of them to support that evidence. The Defendant did not lay any evidence to show how he purchased the suit lands. It is the finding of the Court that he did not acquire the land through purchase. The land is family land.

46. The upshot is that the Plaintiffs case succeeds.

47. In the interest of justice, I make the following orders;

a. A declaration be and is hereby made that the Defendant is registered in parcel LOC6/KANDANI/1706, LOC6/KANDANI1707 and LOC17/SABASABA/1537 in trust for himself and the Plaintiff to the extent of half share.

b. It is hereby ordered that the trusts be and is hereby determined in favour of the Plaintiff and an order is hereby made that the Plaintiff be registered as owner of his share of the parcels.

c. The Defendant is ordered to transfer half share of the suit lands to the Plaintiff. In default the Deputy Registrar is mandated to execute all documents to give effect these orders.

d. Any restrictions that may subsist on the titles are hereby removed forthwith.

e. Costs of the suit shall be payable by the Defendant.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 24TH DAY OF JUNE 2019.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff: present in person. Advocate is absent

Defendant: Present in person. Advocate is absent.

Kuiyaki and Njeri, Court Assistants