



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT NAIROBI**

**ELC SUIT NO. 388 OF 2012**

**NAOMI WAKONYU KAMAU.....1<sup>ST</sup> PLAINTIFF**

**ANNE WANGUI KAMAU.....2<sup>ND</sup> PLAINTIFF**

**KARIUKI KAMAU.....3<sup>RD</sup> PLAINTIFF**

**WILSON MBUGUA KAMAU.....4<sup>TH</sup> PLAINTIFF**

**(All suing as legal representatives of BENSON KAMAU KARIUKI,**

**deceased whilst 1<sup>st</sup> Plaintiff partly sues on her own behalf)**

**VERSUS**

**DORCAS WANJIRA KARIUKI.....DEFENDANT**

**RULING**

The plaintiffs brought this suit against the defendant on 5<sup>th</sup> July, 2012 seeking the following reliefs:

1. A declaration that the defendant is a constructive trustee in respect of the parcels of land known as Umoja Inner Core Sector V Plot No. 230 and Umoja Inner Core Sector V Plot No. 231 (hereinafter referred to as “the suit properties”).
2. A declaration that the defendant holds the suit properties upon trust for the 1<sup>st</sup> plaintiff and the estate of the late Benson Kamau Kariuki deceased (hereinafter referred to as “the deceased”).
3. An order that the defendant transfers to the plaintiffs the suit properties forthwith.
4. A permanent injunction to restrain the defendant by herself, her servants and agent from interfering with the plaintiffs’ management of the suit properties.

The 1<sup>st</sup> plaintiff was the wife of Benson Kamau Kariuki, deceased (“the deceased”). The 2<sup>nd</sup> to 4<sup>th</sup> plaintiffs are the 1<sup>st</sup> plaintiff’s children with the deceased. The defendant on the other hand was a sister of the deceased. The plaintiffs are the legal representatives of the deceased. The 1<sup>st</sup> plaintiff brought this suit on her own behalf and together with the 2<sup>nd</sup> to 4<sup>th</sup> plaintiffs as legal representatives of the estate of the deceased.

The suit properties were initially owned by the deceased until 2002 when he transferred the same to the defendant. In their pleadings, the plaintiffs contended that the deceased and the 1<sup>st</sup> plaintiff purchased the suit properties in the year 1995 and developed the same with residential buildings between 1995 and 2001. The plaintiffs contended that although records held by the City Council of Nairobi showed that the deceased was the sole registered owner of the suit properties, upon purchase of the said properties, the 1<sup>st</sup> plaintiff and the deceased became equitable tenants in common in respect thereof. The plaintiffs contended that the deceased held the legal estate in the suit properties upon trust for himself and the 1<sup>st</sup> plaintiff. The plaintiffs averred that the deceased had no right to dispose of the suit properties without the 1<sup>st</sup> plaintiff’s consent as the co-owner thereof. The plaintiffs averred that in 2011 after the 1<sup>st</sup> plaintiff had had a very difficult relationship with the deceased arising from a stroke that he suffered in 2002, the 1<sup>st</sup> plaintiff learnt that the deceased had purportedly transferred the suit properties to the defendant in December, 2002 and that the deceased had given the defendant a power of attorney in relation to the properties.

The plaintiffs averred that the purported transfer of the suit properties by the deceased to the defendant offended the doctrine of co-ownership

and that upon the transfer of the suit properties to the defendant, the defendant became a constructive trustee and held the suit properties in trust for the 1<sup>st</sup> plaintiff. The plaintiffs averred further that upon the death of the deceased on 16<sup>th</sup> May, 2012, the defendant held the legal estate in the suit properties upon trust for the 1<sup>st</sup> plaintiff and the estate of the deceased.

The plaintiffs filed a list of documents together with the plaint and among the documents listed and attached to the said list was a power of attorney dated 10<sup>th</sup> December, 2002 that was given by the deceased to the defendant. The said power of attorney was drawn by one M. N. Ng'ethe Advocate and was also witnessed by her.

The defendant filed a defence on 20<sup>th</sup> June, 2016 in which she denied that the 1<sup>st</sup> plaintiff was a co-owner of the suit properties. The defendant averred that the suit properties were wholly owned by the deceased. The defendant contended further that the deceased did not require the consent of the 1<sup>st</sup> plaintiff to transfer the suit properties to her. The defendant averred that the 1<sup>st</sup> plaintiff mistreated and abandoned the deceased during his illness and the defendant resigned from her employment to take care of the deceased. The defendant averred that in December, 2002 the deceased lawfully transferred to her the suit properties in the presence of an advocate in appreciation of the assistance that she accorded to him during his illness. The defendant denied that the transfer of the suit properties to her offended the doctrine of co-ownership and that she held the suit property in trust for the 1<sup>st</sup> plaintiff and the estate of the deceased.

Together with the defence, the defendant filed a list of witnesses and witness statements. Among her witnesses was one, Mary Ngechi advocate who recorded a witness statement dated 17<sup>th</sup> June, 2016. In her statement, Mary Ngechi stated that she was an advocate of the High Court of the Kenya and that at all material times she was employed by the then City Council of Nairobi as a legal officer. She stated that on 10<sup>th</sup> December, 2012 while she was working in her office, the deceased who was known to her came to the office in a wheel chair accompanied by the defendant. She stated that the deceased informed her that he had suffered a stroke and that he owned the suit properties which he wanted to transfer to the defendant. She stated that since the properties had no titles the deceased inquired from her on the procedure that he could use to effect the transfer. She stated that she advised the deceased that he could give the defendant a power of attorney on the strength of which the records held at the City Council of Nairobi in respect of the suit properties could be changed to the name of the defendant. Mary Ngechi stated further that on that advice, the deceased requested her to prepare for him a power of attorney which she prepared and the same was signed by the deceased in her presence. She stated that the said power of attorney was used to change the records held at the then City Council of Nairobi relating to the suit properties from the name of the deceased to that of the defendant. She stated that the deceased told her that she wanted to reward the defendant because she was the one who was taking care of him since he had stroke.

The suit is part heard. The plaintiffs have closed their case while the defendant has given evidence and intend to call one witness before closing her case. The defendant intends to call Mary Ngechi advocate as her witness. When the matter came up for hearing on 21<sup>st</sup> January, 2019, the plaintiffs' advocate Dr. Kamau Kuria S.C. raised an objection to the evidence of Mary Ngechi. Dr. Kamau Kuria S.C. contended that Mary Ngechi advocate was not competent to give evidence in the matter as she acted for the deceased and as such she could not give evidence against the deceased without his consent or that of his legal representatives. He contended that her evidence would be contrary to the provisions of section 134 of the Evidence Act. The Court directed that the objection by the plaintiffs be heard by way of written submissions. The plaintiffs filed their submissions on 6<sup>th</sup> February, 2019 while the defendant filed her submissions in reply on 28<sup>th</sup> February, 2019. The plaintiffs' objection to the evidence of Ms. Mary Ngechi advocate was based on Section 134 of the Evidence Act, Chapter 80 Laws of Kenya which provides as follows:

*(1) No advocate shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:*

*Provided that nothing in this section shall protect from disclosure*

*(a) any communication made in furtherance of any illegal purpose;*

*(b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.*

*(2) The protection given by subsection (1) of this section shall continue after the employment of the advocate has ceased.*

The plaintiffs submitted that Mary Ngechi acted for the deceased when he transferred the suit properties to the defendant and that Section 134 of the Evidence Act aforesaid prohibits an advocate from disclosing communication exchanged between him and the client without the client's consent. The plaintiffs submitted that the witness statement which Mary Ngechi wished to rely on was made after the death of the deceased and as such the deceased was not in a position to give consent to Mary Ngechi to divulge the information in the statement. The plaintiffs averred further that Mary Ngechi did not obtain the consent of the legal representatives of the deceased who are the plaintiffs to disclose the communication between her and the deceased. The plaintiffs relied on the case of King Woolen Mills Ltd. v Kaplan & Stratton Advocates (1990 – 1994) E.A 244 (CAK) and submitted that the relationship between an advocate and a client is of a fiduciary nature and that it is from the nature of the transaction between the client and the advocate that the court will infer confidentiality of the information sought to be disclosed.

The plaintiffs submitted further that when they instituted this suit, Mary Ngechi was instructed to act for the defendant and that they raised an objection against her appearance in the matter against the plaintiffs which objection forced her to cease acting for the defendant. The plaintiffs submitted that if Mary Ngechi could not be allowed to act for the defendant in this suit on the ground that she would use the information that she had acquired from the deceased while acting for him against him, she could not be allowed to testify in the matter as she will be disclosing the same information in her testimony. The plaintiffs submitted that the court should infer from the foregoing that the

contents of the statement of Mary Ngechi consists of confidential information. The plaintiffs relied on the case of Kinluc Holdings Ltd. v Mint Holdings Ltd & Another [1998] eKLR for the definition of a retainer. To buttress their argument that the communication between Mary Ngechi and the deceased was privileged, the plaintiffs also relied on Cross & Tapper on Evidence, 10<sup>th</sup> Edition at page 462 where the authors stated as follows:

*“The central case of this privilege is a communication passing between lawyer and client conveying legal advice relating to the conduct of on-going litigation which need not to be given in evidence or disclosed by the client and without the client’s consent may not be given in evidence or disclosed to the legal advisor. Its scope is however broader than that in that it extends as between the lawyer and his client to legal advice outside the context of litigation when it is sometimes described as litigation privilege.”*

The plaintiffs also relied on the case of Virji and others v Sood [1993] E. A. 145 where Trevelyan J. interpreted section 134 of the Evidence Act. In that case the judge stated at page 146 as follows:

*“I do not doubt that every communication made by a client to his advocate is privileged. Ratanlal and Thakore on the Law of Evidence (11<sup>th</sup> ed.) says, on P. 257, that “the word ‘disclose’ shows that the privileged communication must be of a confidential or private nature.... The privilege extends only to communication made to him confidentially, and with a view to obtaining professional advice” and Sarkar, on P. 184 says the same thing. He says that to be privileged the communication must be of a confidential or private nature and that the section has no application where the statement is made not confidentially but for the purpose of communication.”*

The plaintiffs submitted that whether communication is confidential or not depends on the circumstances of each case. The plaintiffs submitted that since Mary Ngechi’s advice was sought by the deceased after the breakup of his marriage with the 1<sup>st</sup> plaintiff, the communication between the deceased and Mary Ngechi must be deemed to have been confidential in view of what transpired between the deceased and the 1<sup>st</sup> plaintiff as narrated in the testimony and witness statements by the 1<sup>st</sup> plaintiff, her sister, Joyce Nyambura Mbugua and the 2<sup>nd</sup> plaintiff. The plaintiffs urged the court to hold that Mary Ngechi is not competent to testify in this case in support of the defendant.

In her submissions in reply, the defendant submitted that the plaintiffs’ objection against the defendant’s witness, Mary Ngechi should be overruled. Relying on the case of Virji & others v Sood (Supra) that was also cited by the plaintiffs, the defendant submitted that the plaintiffs had failed to demonstrate that the communication which Mary Ngechi intends to disclose through her testimony was given to her confidentially. The defendant submitted that the gist of the statement by Mary Ngechi was that the deceased consulted her and caused the suit properties to be transferred to the defendant. The defendant submitted that there was nothing from which the court could infer that the communication between the deceased and Mary Ngechi was confidential. The defendant urged the court to overrule the objection and allow Mary Ngechi to testify.

According to the list of issues dated 14<sup>th</sup> October, 2014 drafted and filed in court by the plaintiffs’ advocates on 7<sup>th</sup> May, 2015, the main issues to be determined in this suit are:

1. Whether the 1<sup>st</sup> plaintiff and the deceased were equitable tenants in common in respect of the suit properties.
2. Whether the deceased became a trustee of the legal estate in the suit properties which he held in trust for himself and the 1<sup>st</sup> plaintiff.
3. Whether the deceased could dispose of the suit properties without the consent of the 1<sup>st</sup> plaintiff.
4. Whether on the death of the deceased his share in the suit properties devolved to his estate.
5. Whether upon the transfer of the suit properties to the defendant, the defendant became a constructive trustee of the same and held the same upon trust for the 1<sup>st</sup> plaintiff and the deceased.
6. Whether upon the death of the deceased the defendant held the legal estate in the suit properties upon trust for the 1<sup>st</sup> plaintiff and the estate of the deceased.
7. Whether the defendant should transfer the suit properties to the plaintiffs forthwith.

As I have stated at the beginning of this ruling, the plaintiffs’ case against the defendant is that the 1<sup>st</sup> plaintiff and the deceased acquired the suit properties jointly during their marriage and as such they owned the same jointly. The plaintiffs have contended that although the suit properties were registered in the name of the deceased, the deceased held the legal interest in the same in trust for himself and the 1<sup>st</sup> plaintiff. The plaintiffs have contended that the deceased had no right to transfer the suit properties to the defendant without the consent of the 1<sup>st</sup> plaintiff.

From the issues which I have set out above, there is no dispute between the parties that the deceased executed two (2) powers of attorney in favour of the defendant which were used to change the ownership of the suit properties from the name of the deceased to that of the defendant in the City Council of Nairobi records. It is also not disputed that on the strength of the said powers of attorney, fresh letters of allotment of the suit properties were issued by the City Council of Nairobi in favour of the defendant. It is also not disputed that the said powers of attorney were drawn and witnessed by M. N. Ngethe Advocate whom I believe is also known as Mary Ngechi who is the witness whose evidence is objected to by the plaintiffs. Copies of the said powers of attorney and letters of allotment were produced by the plaintiffs in evidence. The same are at pages 91 to 96 of the plaintiffs’ exhibit 1.

I have at the beginning of this ruling reproduced the contents of Mary Ngechi's witness statement. The issue which I have been called upon to determine in the objection before me is whether what has been set out in the said witness statement of Mary Ngechi dated 17<sup>th</sup> June, 2016 constitutes privileged information under section 134 of the Evidence Act which she cannot be allowed to disclose without the consent of the deceased or his legal representatives. At the hearing of the objection, the parties were unanimous in their submissions that the correct interpretation of section 134 of the Evidence Act was given by Trevelyan J. in the case of Virji and Others v Sood (Supra) where it was held that only communication between a client and an advocate given confidentially with a view to obtaining advice is privileged. In that case, the court noted that not every communication between a client and his advocate is privileged. The plaintiffs urged me to find that in the circumstances of this case, the communication between the deceased and Mary Ngechi was confidential in nature and as such privileged. The defendant submitted to the contrary.

As I have stated earlier, the fact that Mary Ngechi advocate drew the powers of attorney on the strength of which the suit properties were transferred to the defendant is not disputed and in fact the plaintiffs have produced the said powers of attorney in evidence in support of their case. The said powers of attorney are self-explanatory. The said powers of attorney state that the deceased in consideration of love and affection that the deceased had for the defendant who was his sister, had appointed and ordained her to be his lawful attorney in respect of the suit properties with full power to manage, sell, lease, receive rents and in any other way deal with the said properties. The said powers of attorney show on their face that they were drawn and witnessed by M. N. Ngethe whose evidence is now in contention. In her statement, Mary Ngechi has simply stated how she was approached by the deceased for advice on how to go about transferring the suit properties to the defendant, the advice she gave and how it was executed. All this information is already in evidence before the court in the form of documents produced by the plaintiffs which I have referred to and the testimony of the plaintiffs. I am unable to agree with the plaintiffs that the communication between the deceased and Mary Ngechi as to the services the deceased wanted her to render to him was confidential. It is not in dispute that the deceased had instructed Mary Ngechi to draw the said powers of attorney. The nature of the instructions and how she executed the same is also not in dispute. I am unable to see at all how the evidence to be given by Mary Ngechi would be against the interest of the deceased. As I have stated above, the plaintiffs have not denied that the deceased instructed Mary Ngechi and that Mary Ngechi prepared for him powers of attorney through which the suit properties were transferred to the defendant. What is in dispute and which this court would determine is whether the transfer of the suit properties by the deceased to the defendant was lawful.

Due to the foregoing, it is my finding that the communication between the deceased and Mary Ngechi as to the services he wanted her to render to him and the fact that she rendered the said services was not confidential and private communication which should be accorded privilege under Section 134 of the evidence Act.

The upshot of the foregoing is that the plaintiffs' objection to the evidence of Mary Ngechi is overruled. The costs of the objection shall be in the cause.

**Delivered and Dated at Nairobi this 20<sup>th</sup> day of June, 2019**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Ndungu h/b for Dr. Kamau Kuria for the Plaintiffs

Mr. Maina for the Defendant

Catherine Nyokabi-Court Assistant