



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 74 OF 2017

(Formerly Nairobi HCC Case No. 1406 of 2014)

JOEL WAHINYA WANYAGITHERI.....1ST PLAINTIFF

MWORIA GITHERI.....2ND PLAINTIFF

Versus

DAVID NJIHIA MUCHERU.....1ST DEFENDANT

PETER NJOROGE MUCHERU.....2ND DEFENDANT

(Sued on his behalf and as registered trustee of

Simon Ndungu Mucheru)

SIMON NDUNGU MUCHERU.....3RD DEFENDANT

JOYCE WAMBUI NJIHIA.....4TH DEFENDANT

JUDGMENT

1. On 6th November 2015, the plaintiffs filed an amended plaint dated 3rd November 2015 pursuant to an order of the court made on 22nd October 2015 wherein they have sued the defendants jointly and severally for :-

i. A declaration that the defendant hold Land parcel number NDARUGU/GAKOE/1349, NDARUGU/GAKOE/1350, NDARUGU/GAKOE/1351, NDARUGU/GAKOE/1352, NDARUGU/GAKOE/1353 (herein after referred to as the 1st, 2nd, 3rd, 4th and 5th suit land parcels respectively) in trust for the plaintiffs.

ii. An order directing Thika District Land Registrar to transfer the aforesaid 1st to 5th suit land parcels to the plaintiffs.

iii. Costs of the suit.

2. The plaintiffs' claim in brief is that the 1st defendant is the registered proprietor of the 1st suit land parcel while the 2nd defendant is the registered proprietor of the 2nd and 3rd suit land parcels. That the 3rd defendant is the registered proprietor of the 4th suit land parcel while the 4th Defendant, the registered proprietor of the 5th suit land parcel. That during demarcation, adjudication and initial registration all the five land parcels were carved out of the original land parcel **No. NDARUGU/GAKOE/526** which was registered in the name of **STANLEY MUCHERU NYAGITHERI** (the deceased Stanley), who was the father of the defendants and a step brother to the plaintiffs to hold the land in trust for the plaintiffs under Kikuyu Customary Law.

3. The plaintiffs' further claim that in the year 1997, the deceased Stanley conspired with the defendants and fraudulently caused the 1st to the 5th suit land parcels to be registered in the name of the defendants. They have pleaded particulars of fraud, illegal conspiracy and breach of trust on the part of the said deceased Stanley and the 1st, 2nd, 3rd and 4th defendants. They also state that there was Nairobi High Court Misc. Civil Application no. 495 of 2005 between the 2nd plaintiff and the defendants whereby Gatundu North Land Disputes Tribunal's award was quashed for the tribunal's lack of jurisdiction on the claim relating to title to the land. Thus, it proved the instant suit.

4. By an amended statement of defence dated 28th June 2018 and filed on 2nd July 2018, the defendants deny the plaintiffs' claim and seek its dismissal with costs. They term the plaintiffs' suit bad in law, misconceived, embarrassing, and incompetent and that the same does not disclose any reasonable cause of action against.

5. The defendants state that the suit land parcels were properly subdivided and legally distributed. That the reliefs sought in the amended plaint are incapable of being granted as no trust under Kikuyu Customary law or otherwise did exist over the 1st to 5th suit land parcels.

6. The plaintiffs are represented by the firm of Nganga Ngigi and Company Advocates. The defendants are represented by the firm of Kairu Mbutia and Kiingati Advocates.

7. By submissions dated 13th November, 2018, the plaintiffs' counsel referred to the reliefs sought in the plaint, facts of the case which include that the plaintiffs and the defendants are all descendants of the family's Patriarch, Wanyagitheri Mucheru (the deceased Patriarch), who had five (5) wives. That the said deceased Patriarch made his wishes known to all his wives regarding distribution of his wealth. That upon the death of the said Patriarch, the original land parcel was then held by the deceased Stanley who was the eldest son from the 2nd household of the deceased Patriarch.

8. Counsel urged the court to grant the orders sought in the amended plaint. He relied on the following authorities:-

a) **Njuguna –v-Njuguna (2008) 1KLR 889** where the court held that a trust under Kikuyu customary law was usually registered in the name of the eldest son “a Muramati”

b) **Macharia Kihari –v- Ngigi Kihari (1994) eKLR** where the court of Appeal held that under Kikuyu customary law, land is always held in trust by the eldest son.

c) **Joseph Wainaina Gathiru –v- Anthony Njoroge Gathuru (2018) eKLR** where J.G. Kemei, J drew the conclusion that the defendant held family land in trust for himself and the plaintiff.

9. The defendants' counsel filed fifteen (15) paged submissions dated 26th January, 2018 and three (3) paged further submission's dated 3rd December 2018. Therefore, counsel filed submissions which exceeded ten (10) pages and since the court did not certify the matter as complex and grant leave to the defendants' counsel to file the lengthy submissions, I find the submission contrary to the mandatory practice direction No. 33 (b) of the Environment and Land Court practice directions, 2014. Nonetheless, in the spirit of **Article 23 (c) as read with Article 50 (1) of the Constitution of Kenya, 2010**, I consider the submissions save that the excess pages of the same are superfluous and counsel is advised to comply accordingly in future matters.

10. Learned counsel for the defendants submitted on the plaintiffs' case, the evidence of the plaintiffs, the defendants' case and issues for determination in a summed up form. Counsel submitted that the defendants' evidence has shown that the deceased Stanley was given more than one parcel of the 1st to 5th suit parcels of land by the deceased Patriarch, among other things. He also submitted that the plaintiffs have not proved their case to the required standard and the same should be dismissed with costs to the defendants.

11. Counsel further submitted that no evidence was led to show a purported Kikuyu customary trust and that the deceased Stanley was given the original land as “a Muramati” under Kikuyu customary law. That the case of **Njuguna (supra)** has been relied on in a vacuum and that **Macharia Kihari case (supra)**, cannot help the plaintiffs as there was no evidence provided by the plaintiffs to support their claim. That the plaintiffs failed to show that the deceased Patriarch had several other properties that were given to various households.

12. The 1st plaintiff (PW1) testified that the deceased Patriarch was his father, who had five (5) wives, and owned the original land which he gave to his four wives except the 1st wife who had only a daughter. That later the deceased Patriarch left the land to the deceased Stanley hold it in trust for others including PW1. He relied on documents dated 13th May, 2008 which include an extract of title to the original land parcel as at 24th March, 1997 (P Exhibit 1) and a photocopy of extract of title to the original land as at 8th May, 1997 (P Exhibit 6).

13. PW2, KARANI KURIA a brother in law of the plaintiff and who substituted the deceased 2nd plaintiff on 22nd October, 2015 relied on his statement dated 13th December, 2012 in evidence in respect of the original land. He stated that the deceased 2nd plaintiff's mother, Isabella Wanjiru was given a portion of land in the original land.

14. PW3, PATRICK GAKINYA WANYAGITHERI relied on his statement dated 13th February, 2012 in his testimony. He stated that he belonged to 5th wife of the deceased Patriarch.

15. According to SAMUEL NDUNGU MUCHERU (DW4), the deceased Stanley was his father who died in 1993. That he (DW1) has lived in LR NO. NDARUGU/GAKOE/141 since 1941. That his deceased father obtained the land through transmission. He relied on his list of documents dated 7th August, 2013 (D Exhibits 1 to 8). That the succession of the estate of deceased Patriarch was done with regard to L.R No. Ndarugu/Gakue/141 as per D Exhibit 1 and beneficiaries got satisfied accordingly.

16. I have anxiously considered the entire pleadings, evidence and submissions herein. Agreed issues dated 19th March 2008 signed by the plaintiffs' counsel together with his issues dated 8th August, 2008, the defendants' statement of issues dated 7th August, 2013 and issues in the defendants submissions are all noted. To that extent and bearing in mind the decision of the Court of Appeal in the case of **Galaxy Paints company Limited –vs- Falcon Grounds Limited (2000) 2 EA 385**, the issues for determination are distilled as follows;

a) **Whether the deceased Stanley was registered as the proprietor of the 1st, 2nd, 3rd, 4th and 5th suit land parcels which**

were curved out of the original land parcel No. Ndarangu/Gakoe//526 to hold them in trust for the plaintiff's under Kikuyu customary law.

b) Did the deceased Stanley collude with the Defendants to fraudulently subdivide and subsequently transfer the 1st to 5th suit land parcels in favour of Defendants?

c) Are the plaintiffs entitled to the reliefs sought in their amended plaint?

17. On the first issue, PW1 stated that the deceased Patriarch left the original land to the deceased Stanley, who was a son of the 2nd wife of the deceased Patriarch to hold the land in trust for other family members including PW1. That the deceased Stanley refused to do so and that they attempted to resolve the dispute before Gatundu Land Disputes Tribunal (the tribunal case).

18. During cross-examination, PW1 stated that the tribunal case was with regard to L.R No. Ndarugu/Gakoe/141 and not the suit land parcels. He also stated, interalia;

“I stayed in L.R No. 141 with my mother and siblings. The defendants stay on the original land.....my late mother sold her portion of the original land.....my brothers from the other wives are satisfied and not involved in the matter”

19. PW2, testified that the late mother of the 2nd plaintiff lived on another land behind the original land. This witness did not mention about the deceased Stanley and the suit land parcels.

20. PW3, claimed that the deceased Stanley held the original land to hold it in trust for the 4th household of the deceased Patriarch.

21. DW1, further stated interalia;

“ my late grandfather has other parcels of land. The mother of PW1 and plaintiff (deceased) was Isabella Wanjiru (deceased) and she was given portions of L.R No. 141.”

22. The plaintiffs seek to rely on Kikuyu customary trust as the basis of their claim. They are obligated to prove by evidence the existence of such custom; see **Ernest Kinyanjui Kimani-vs- Muiru Gikanga and another (1967) EA 735.**

23. It is evident that the 1st to 5th suit land parcels were curved out of the original land and registered under the repealed Registered Land (Cap 300). Furthermore, Kikuyu customary law and the said registered land Act at section 30, recognized the law of trusts; see **Mwangi and another-Mwangi (1986) KLR 328.**

24. I bear in mind the decision in **Njuguna Kihari and Gathiru case (Supra)**. However, the plaintiffs failed to show that the defendants hold the 1st to 5th suit land parcels in trust for them.

25. As regards the 2nd issue, quite clearly, the plaintiffs pleaded particulars of fraud, illegal conspiracy and breach of trust of the part of the deceased Stanley at paragraphs 12 of the amended plainti. In the case of **Ndolo-vs-Ndolo 2008) KLR and (G & F) 742,** it was held that allegations of fraud must be specifically be specifically pleaded and strictly proved to the required standard.

26. I am aware of the definition of the term “fraud” **under section 2 of the Limitation of Actions Act (Cap 22)** which provides;

“Fraud” includes conduct which, having regard to some special relationship between the parties concerned, is unconscionable thing for the one to do towards the other.”

27. No evidence was tendered by the plaintiffs to support the allegations of fraud in their amended plaint to the required standard. In **Ndolo case (supra)**, it was held that the standard of proof required of any allegations of fraud is obviously higher than that required in ordinary civil cases, namely upon a balance of probabilities but certainly not beyond any reasonable doubt as in criminal cases.

28. It is not in dispute that succession was done in respect of the estate of deceased Patriarch as shown on D Exhibit 1. Furthermore, PW1 was involved in the succession matter and all beneficiaries got satisfied of its outcome. I find the plaintiffs' claim an afterthought and brought in bad faith hence the plaintiffs are not entitled to the reliefs sought in plaint in the circumstances.

29. The upshot is that the plaintiffs have failed to prove their case to the required standard. Accordingly, I dismiss the plaintiffs' case with costs to the defendants.

Dated and SIGNED at Migori this 29th day of April, 2019

G.M.A. ONGONDO

JUDGE

DATED, SIGNED and DELIVERED at THIKA this 14th day of June 2019.

L. N. GACHERU

JUDGE

In the presence of: -

1 M.S Mwangi holding brief for Mr. Ngige for the Plaintiff

2Mr. ligame holding brief for Kingati for the Defendant

3. Lucy Court Assistant