



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MURANG'A**

**ELCA 26 OF 2018**

**LUCY WANGUI MWANGI..... APPELLANT**

**VS**

**BENARD GITHII MWANGI.....RESPONDENT**

**(Being an appeal against the judgment of Hon A Mwangi PM in PMCC No 159 of 2016 delivered on the 23/11/18**

**JUDGMENT**

1. The Appellant herein being aggrieved with judgment and decree of Hon A. Mwangi Principal Magistrate delivered on 23/11/2018 in the Kigumo Principal Magistrate's Case No. 159 of 2016 preferred the present appeal vide a Memorandum of Appeal dated 17/12/2018 on the following grounds;

- a. The Honorable Magistrate erred in law and fact by her failure to construe and find for a trust both customary and constructive as binding land parcel number LOC.18/GITHIMA/1186 as registered in the name of the Respondent.
- b. The Honorable Magistrate erred in law and in fact by ignoring all the Appellant's evidence that pointed to creation and the existence of a customary trust in the circumstances of the case.
- c. The Honorable Magistrate erred in law and fact by her failure to note and make a finding that the subject being family and ancestral property, the Appellant was entitled to her just share of the land.
- d. The Honorable Magistrate erred in law and fact by her analogy and finding that the Appellant as a married daughter of the deceased was not entitled to share in the land, that determination was unconstitutional and discriminatory.
- e. The learned Magistrate erred in law and fact by her determination and finding that the fact of the Respondents registration as owners of the land gave him exclusive and absolute rights over the property.
- f. The learned Magistrate erred in law and fact by placing undue weight on the defence and evidence while totally ignoring the Plaintiff's case and evidence.

2. The Appellant then made the following prayers;

- a. That the lower Court decision to be set aside and
- b. That the Appellant be awarded her share of 0.29(naught decimal two nine) Hactares out of land parcel number LOC 18/GITHIMA/1186.

3. The impugned judgment was in regard to the lower Court suit instituted by way of plaint dated 25<sup>th</sup> July 2016 filed by the Plaintiff / Appellant seeking for the following prayers;

- a. The honourable Court be pleased to issue a declaration that the land parcel number LOC.18/GITHIMA/999 measuring 1.45ha is both family and ancestral land encumbered by a trust and the Defendant be ordered to transfer to the Plaintiff a portion of .029 ha there from being her share and entitlement.
- b. The honourable Court be pleased to issue an order authorizing and empowering its executive officer to execute on behalf of the

Defendant all land transfer forms and documents to facilitate the transfer to the Plaintiff her rightful portion as above the production of the original title as held by the Defendant be dispensed with.

c. Costs and interests of the suit

d. Any other relief the honourable Court may deem fit to grant.

4. The Plaintiff's case before the trial Court was in respect to an alleged customary trust over the Defendant/ Respondent's land known as LOC.18/GITHIMA/999 hereafter referred to as the suit land. The Plaintiff contended that the suit land which initially belonged to their deceased father was transferred and registered in the name of the Defendant to hold in trust for himself and his other four (4) siblings who are all sisters of the same house. The Plaintiff further claimed that the suit land being 1.45 ha each of the siblings was entitled to 0.29 ha but was categorical that she was only claiming the portion entitled to herself. She claimed that her father had two wives and each wife had one son, and he had two parcels of land, which he transferred to the sons of each home to hold in trust for the other siblings of each home.

5. At the hearing of the case the Plaintiff testified for the Plaintiff's case and produced her list of documents to include copy of search, a letter from the area chief that alludes to a trust over the suit land and two summons addressed to the Defendant requiring him to appear before the County Commissioner. It was her testimony that her father had recognized her entitlement to the portion of the estate during his lifetime and claimed that after his death the Plaintiff continued to cultivate on the portion of the estate along with her mother until their mother's death when the Defendant barred her from cultivating on it.

6. The suit was defended by the Defendant through his statement of defence dated 10/09/2016 in which he claimed that the suit land was given to him by his father in the year 1998 as a gift inter-vivos, which was registered in his name as an absolute owner and does not hold in trust for anyone. He stated that his brother of the first house named PHARIS GITHII MWANGI has also been given the other parcel of land belonging to their father in Turuturu to hold in the same manner. He also claimed that the Plaintiff had not been in occupation of the suit land since 1986 when she was married and left to her matrimonial home.

7. Four witnesses testified for the defence thus; DW1 the Defendant herein reiterated his averments in his statement of defence and added that the land was given to him by his father when he was about 94 years old and was fully conscious of what he was doing and his father never informed him that he was to hold the land in trust for his sisters nor share the land with them. He conceded that at the time he was given the land his mother was still using it but she later died in 2012 and he took over and has been in occupation and use since. He conceded that he did not purchase the suit land. That he was given the land as a gift in 1998 during the lifetime of his father. Equally that his step brother from the 1<sup>st</sup> house was also given land at Turuturu as an absolute owner.

8. DW2 Githii Mwangi the step brother to the Defendant of the 1<sup>st</sup> house testified that their father Isphan Mwangi had two parcels of land and two wives, and in each house there was one son each, he in the first house and the Defendant in the second house. That their father voluntarily gave his two parcels of land to each of the sons in each of the houses to hold absolutely in their names and not in trust. That their father was opposed to giving any land to any of his daughters as they were all married. That the daughters cannot get the land because their father did not give them any. That the sisters did not ask for any land from their father during his lifetime.

9. DW3, Stephen Nganga testified that the Defendant's father had confided in him while he took him to the land board to obtain consent that he had decided to bequeath his two parcels of land during his lifetime to each of his sons in each of his houses in order to avoid conflict when he was gone (died). He claimed to be well known to the family and knew that the Plaintiff was married and had her own land at her matrimonial home. That it was never the intention of the deceased for the sons to hold the land in trust for their siblings. Further that the deceased did not tell him that he was not giving the daughters land. He denied knowledge that in Kikuyu Customs sons hold land in trust for their families.

10. DW4, Mary Njeri, one of the daughters of the 2<sup>nd</sup> house testified that they are four sisters in her house and none of them was given any land by their father. In her opinion, it was not the intention of her father to give land to his daughters. That if it was he would have done so in his lifetime. That the suit land was given to the Defendant as a gift inter-vivos and not to hold in trust for the sisters.

11. The trial Court subsequently made its verdict and decreed that;

a) The Plaintiff has not proved that the Defendant was registered as the proprietor to hold the property for the benefit of other members of the family.

b) The Plaintiff has not established that the register is encumbered by a customary trust hence the prayers sought are not allowed.

c) Each party to bear its own costs being family members.

12. The appeal was disposed of through written submissions by the parties.

13. The Appellant in her submissions gave a historical background of the case as thus; that she is the sister of the Respondent, their father Isphan Mwangi Githii died in 2004. The deceased had two wives (houses). The parties are from the 2<sup>nd</sup> house and their mother is also deceased. The Respondent was the only son of the 2<sup>nd</sup> house. According to the Appellant each house got land and that the one for the 2<sup>nd</sup> house is LOC 18/GITHIMA/999 measuring 1.45 ha. The Appellant claims a portion of 0.29 ha by way of customary trust which is a 1/5 entitlement of the whole land. There are 5 siblings of the 2<sup>nd</sup> house, 4 daughters and one son.

14. The Appellant submitted that her claim before the trial Court was premised on the existence of both a legal (constructive trust) and a customary trust. It is the Appellants' contention that the transfer and registration of her father's parcels of land to his two sons of each house

was done with the intention that they would hold the land in trust for the other members of each house. She claims that it was never the intention of their father to disinherit his daughter's from inheriting land.

15. That at the time their father transferred the land to the sons he was already at an advanced age and claims to have been common practice for the African father to register land in the name of the sons of the home with no intention of extending absolute ownership to them. She contends that the Defendant and his brother of the first house seemed to hold that the daughters of the home should be dis-inherited because they are married. She also claims to have used the land together with her mother until the year 2013 when their mother died and the Respondent barred her from using the Suitland.

16. In her submissions she stated that trust is a matter of law and fact and as such all facts point to a creation of a trust and legally her deceased father never excluded his daughters from inheriting the land. Quoting from the case of **Philomena Wangari & 2 others Vs Maria Njeri Chege (2005) ECLR**, the Appellant submitted that her father held the land under trust for his family and so the land was both family and trust land and that the registration of the Respondent as owner did not extinguish the rights of the beneficiaries which in her own submissions remain valid. Further that the children of the deceased have equal rights to inherit property regardless of their marital status.

17. The Appellant submitted that the registration of land is a creation of the law and in determining whether trust exists, considerations surrounding the registration of the land must be looked into to see whether a trust was envisaged. In support of this submission the Appellant relied on the cases of **Mwangi Vs Mwangi (1986) KLR** and **Kanyi Muthiora Vs Nyokabi Muthiora (1984) ECLR**.

18. In respect to grounds 1-3, the Respondent submitted that for one to establish a claim in customary trust one had to prove that they are in actual physical possession or occupation of the parcel of land. This was buttressed by the decision in **Mbui Mukangu Vs Gerald Mutwiri Mbui CA 281 of 2000**. Relying on the test in that case the Respondent argued that the Appellant did not establish her claim.

19. The Respondent submitted that the Appellant had failed to establish the ingredients of a claim in customary trust, by virtue of the fact that she was not in occupation and use of the suit land. That she left the suit land upon getting married in 1986 and had been residing at her matrimonial home at Miriira since then. The Appellant claims to have been assisting her mother to till the suit land until 2012 when she died, the Appellant has therefore not claimed to have been tilling the land as of right before the death of their mother. The Appellant conceded that she was barred from tilling the land after the death of their mother by the Defendant.

20. The Respondent submitted that the suit land was transferred to him by his father as a gift *inter vivos*. That he has been utilizing the land and has developed it extensively over the years.

21. The Respondent went on to submit and relying on the Kieba's case that the Court is enjoined to enquire into the circumstances of the registration of the suit land in order to find whether there was intention to create a trust. The Respondent asserts that in the instant case it was their father's intention to give his sons land as gifts *inter vivos* to hold absolutely. That the Respondent adduced corroborated evidence to clearly demonstrate his father's wish as such and since the transfers were done during their father's lifetime nothing would have stopped him from stating his wishes if they were on the contrary. That the burden of proving the existence of the trust lay squarely on the Appellant which she failed to do.

22. In respect to grounds 4 and 5 of the appeal the Respondent submitted that the Court did not make any such findings. Equally ground 6 of the appeal the Respondent submitted that the Court drew its own conclusions based on evidence tendered on record by the parties.

23. Having reviewed the material placed before this Court, I shall now analyse the grounds of appeal and draw conclusions thereon. This being the first appellate Court my role will be to re-examine the evidence placed before the trial Court and see if I would have arrived at a different verdict, however I must take into account that the trial Court had the opportunity to examine and assess the witnesses appearing before it, which advantage I do not have.

24. The law and application of customary trust has had a chequered journey in the legal history of this country. It being one of the ways in which one can acquire land, it has been subject of many a judicial inquiry. The Supreme Court in the case of **Isack M'Inanga Kieba versus Isaaya Theuri M'Lintari & another [2018] eCLR**, expressed itself as follows on customary land rights:

“[52] Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the Court to make a determination on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

25. 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 is 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:

- 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.”

26. From the evidence on record it is not disclosed if the suit land was family/ancestral land before registration. I have looked at the green card presented by the Appellant and it is clear that the title is a first registration. Save for the admission by the Respondent that he got the land as a gift from his father and that he did not purchase it, no evidence was led to suggest that the suit land was family or ancestral land prior to registration.

27. It is not in dispute that the parties are siblings being the children of Isphan Mwangi Githinji and his second wife Prisca Njoki. His first wife Serah Njeri had two children one of whom, a son who was given land *intervivos* as well. The parties therefore belong to one family. It is not disputed that the suit land was registered in the name of the Respondent in 1998 while his father was alive. It is also not in dispute that the father of the parties died in 2004 way after giving out his land to the Respondent. DW3 testified and stated that he accompanied the deceased to the land control board meeting to seek consent to transfer the land to the Respondent. This clearly shows that the Respondent's father was in charge of his affairs while alive. There is no disclosed evidence that the Appellant could, but for any intervening circumstances, have been registered as the owner of the suit land.

28. A trust can never be implied by the Court unless there was intention to create one in the first place. In **Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR** where the Court held,

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

29. In the foregoing it is not for the Court to imply trust. There is no evidence placed before the Court that would support a ground for absolute necessity. The Appellant bore the singular responsibility to prove the existence of trust by leading evidence. The Appellant failed in this endeavor.

30. Looking at the root of the source of the land and going by the decision of the SCOCK referred to hereinabove, it has been explained that the Respondent got the land by way of a gift in 1998. This has not been challenged by the Appellant. It was not through inheritance nor acquired by purchase. It is not clear if the suit land was passed down through family lineage so much so that a case for family or ancestral land is established. The green card shows that the suit land was registered in the name of Esphan Mwangi Githinji on the 22/9/1965.

31. It is the finding of the Court that no evidence was led to prove trust. It is trite law as laid in the case of **Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others [2005] eKLR** which quoted with approval the holding in the case of **Muthuitta –vs- Muthuitta [1982 – 88] 1 KLR 42**, that customary law trust is proved by leading evidence. Trust is a question of fact which must be proved by whoever is claiming a right under customary trust.

32. The Appellant has failed to establish the ingredients of trust as set out in the above cases.

33. My attention has been drawn to the submission of the Respondent in which he claimed that for one to establish a claim in customary trust one had to prove that they are in actual physical possession or occupation of the parcel of land. The jurisprudence set out by the justices of the Court of appeal in Kieba case, which was upheld by the SCOCK was as follows;

“ unless a trust is proved, the Respondents have neither possessory nor occupational rights that can be protected as overriding interests.. we hasten to add that to prove a trust in land; one need not be in actual physical possession and occupation of the land.”

34. This decision was echoing the earlier decisions of the Court in **James Kiarie Vs Geoffrey Kinuthia & Anor (2012) EKLR** where the Court stated;

“ . . . . While occupation may be relevant and has been found to be relevant in some cases in raising the inference of a trust, it is not . . . a necessary ingredient for a trust to be established.”

35. It is therefore not necessary for a claimant in a claim for customary trust to be in possession or occupation of the suit land. It is clear from the record that the Appellant does not live on the suit land but at her matrimonial home at Mariira. That said, nothing would bar her from claiming customary trust, subject to prove. The Court has held that she failed to do so.

#### **Whether the trial Court ignored the evidence of the Appellant.**

I have looked at the judgment of the trial Court and note that the Court paid due regard to all the evidence tabled before it by the parties, went ahead to analyze the same and gave reasons for arriving at the verdict as it did. The trial Court found that the Plaintiff had failed to establish that there was an intention to create a trust over the suit land and that there was overwhelming evidence to show that the suit land was transferred to the Defendant as a gift *inter vivos* and not to hold in trust for the other family members.

#### **Whether the trial Court found that the Appellant being a married person was not entitled to inheritance and if that decision was**

**unconstitutional and discriminatory.**

36. There is no evidence on record that the trial Court based its finding on the issue of the Appellant's marital status. I understand the decision of the trial Court to have been premised on the failure on the part of the Appellant to clearly establish that there was intention to create a trust over the suit land by their deceased father at the time when he transferred the suit land to the Defendant. The ground in respect to unconstitutionality of the decision is rather vague.

**Whether the trial Court made a determination that the Respondent is registered as an absolute owner?**

37. From my own review of the decision of the trial Court, the Court only made a finding that the Plaintiff failed to prove that the title to the suit land was encumbered by a customary trust.

**a. Who should bear the costs of this appeal?**

38. The appeal is dismissed with costs to the Respondent.

39. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MURANGA THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2019**

**J G KEMEI**

**JUDGE**

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

Kirubi for the Appellant

Ndegwa for the Respondent

Kuiyaki and Njeri, Court Assistants