



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 7 OF 2013**

SABASTIANO NJOGU NJAGI.....1<sup>ST</sup> PLAINTIFF

CATHERINE WANJIRU NJOGU.....2<sup>ND</sup> PLAINTIFF

MADRINA MUTHONI NJOGU.....3<sup>RD</sup> PLAINTIFF

ESTHER WAKUTHII NJOGU.....4<sup>TH</sup> PLAINTIFF

MARY WAIRIMU NJOGU.....5<sup>TH</sup> PLAINTIFF

**VERSUS**

JANEFFER WAKUTHII MUNYI.....1<sup>ST</sup> DEFENDANT

TERESSA WAMBUI MURIITHI.....2<sup>ND</sup> DEFENDANT

JAMES WAIYAKI.....3<sup>RD</sup> DEFENDANT

**JUDGMENT**

**INTRODUCTION**

In a plaint dated 3<sup>rd</sup> April 2012 and amended on 2<sup>nd</sup> September 2013, the plaintiffs sought for an order for declaration that the 1<sup>st</sup> and 2<sup>nd</sup> defendants holds land parcel No. NGARIAMA/NGIRIAMBURU/4550 and 4551 in trust for the plaintiffs and transfer of the same or share thereof to the plaintiffs. The plaintiffs also pray for costs and interest. The plaintiffs gave a brief background and stated that the 1<sup>st</sup> plaintiff is their biological father who is now deceased while they are blood sisters from the same father and mother. Their late mother was known as Pauline Wambura (deceased). They also stated that their late father was married to three wives namely Pauline Wambura (deceased), Njoki Njogu and Cicily Wanjiru. They also contend that they were born eight sisters and brothers namely Joseph Muruthi, Mary Wairimu, Madrin Muthoni, Esther Wakuthii, Francis Maritu (deceased), Catherine Wanjiru and Jane Njoki (deceased). The plaintiffs further averred that their father shared his parcels of land amongst his three wives before his demise. The plaintiffs have filed this suit seeking from the defendants shares that rightly belong to them which the defendants are holding in trust.

On 4<sup>th</sup> April 2013, the defendants filed a joint statement of defence denying the plaintiffs claim and sought to have the suit dismissed with costs.

**PLAINTIFFS' CASE**

The plaintiffs called Catherine Wanjiru Njogu to testify on their behalf. In her testimony, the 2<sup>nd</sup> plaintiff stated that they are all sisters and that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are their sister in-law while the 3<sup>rd</sup> defendant is not related to them. The 1<sup>st</sup> plaintiff is their father who passed on during the pendency of this suit. The 2<sup>nd</sup> plaintiff was granted limited grant of letters of administration which she produced in evidence. The witness stated that their late father Sebastian Njogu Njagi was married to three wives namely Pauline Wambura (deceased) who was also their mother, Njoki Njogu and Cicily Wanjiru. She also testified that their mother was blessed with eight (8) children namely Joseph Muruthi, Mary Wairimu, Madrin Muthoni, Esther Wakuthii, Francis Maritu (deceased), Catherine Wanjiru and Jane Njoki (deceased). The plaintiffs further stated that their father Njogu Njagi was the registered owner of two parcels of land L.R. No. NGARIAMA/NGIRIAMBURU/925 and 3664. As regards to first parcel of land, their late father sub-divided the same into two portions namely L.R. No. NGARIAMA/NGIRIAMBURU/3868 and 3869. He then transferred parcel No. NGARIAMA/NGIRIAMBURU/3868 to his 3<sup>rd</sup> wife

Cicily Wanjiru Njoki while parcel No. NGARIAMA/NGIRIAMBUR/3869 was transferred to Francis M. Njogu to hold in trust for their mother's household. The plaintiffs stated that in breach of the trust bestowed upon him, their brother Francis M. Njogu unlawfully transferred the land to his wife Janeffer Wakuthii Munyi (1<sup>st</sup> defendant) and Felista Wambui Muriithi (2<sup>nd</sup> defendant) who is also their sister in-law and the 3<sup>rd</sup> defendant who is a purchaser after sub-division. As regards the second parcel of land, the plaintiffs stated that their late father sub-divided the same into 4 portions being L.R. No. NGARIAMA/NGIRIAMBUR/3768, 3769, 3770 and 3771. Thereafter, he transferred parcel No. 3768 to himself, 3769 to Joseph Muriithi Njogu (2<sup>nd</sup> defendant's late husband), parcel No. 3770 to his wife Njoki Njogu Njagi and L.R. No. 3771 to his other wife Cicily Wanjira Njogu. The plaintiffs contend that land parcel No. NGARIAMA/NGIRIAMBUR/3869 which was registered in the name of Francis M. Njogu to hold in trust for their household was sub-divided into three portions namely NGARIAMA/NGIRIAMBUR/4549, 4550 and 4551. Parcel No. 4549 was transferred to James Gakio Wanyaki (3<sup>rd</sup> defendant, 4550 was transferred to Jennifer Wakuthii Munyi (1<sup>st</sup> defendant) while parcel No. 4551 was transferred to Felista Wambui Muriithi (2<sup>nd</sup> defendant). They now want parcel No. 4550 and 4551 to be declared that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are holding in trust for them and that the same be transferred and/or shared between the plaintiffs. The plaintiffs are also seeking costs of this suit.

### **DEFENDANTS' CASE**

The defendants offered no evidence after they failed to attend Court during the hearing. Their lawyer sought adjournment which was declined by Court. The defence case was therefore closed.

### **LEGAL ANALYSIS**

The plaintiffs claim is hinged on trust **Section 25 of the Land Registration Act No. 3 of 2012** Laws of Kenya states as follows:

**25 (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges, and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:**

**(a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register and;**

**(b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.**

**(2) Nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee"**

Any party wishing to lay claim on land on the basis of a trust must plead, particularize and be proved. Customary trust is classified as an overriding interest that need not be noted in the register. The existence or not of a customary trust is a matter of fact which must be proved. In the case of **Isack M'Inanga Kieba Vs Isaaya Theuri M'Lintari & Isack Ntongai M'Lintari SCOK Petition 10 of 2015**, the Supreme Court held as follows:

**"Each case has to be determined on its own merits and quality of evidence. It is not every claim of right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie, Vs Kinuthia, that what is essential is the nature of the land intention of the parties. If the said holding were 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; the land in question was before registration family, clan, or group land; the claimant belongs to such family, clan or group; 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; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances, the claim is directed against the registered proprietor who is a member of the family; clan or group (Emphasis mine)".**

In the instant case, the plaintiffs have testified on oath explaining the family relationship between the defendants and the suit land. The defendants did not attend Court despite the fact that they were aware of the hearing date. The plaintiffs' claim therefore remains uncontroverted. In the end and guided by the evidence on record which is unchallenged and the case of **Isack M'Inanga Kieba** (supra) the Court is satisfied on a balance of probabilities that the plaintiffs have proved the existence of a customary trust on the suit land parcel Numbers NGARIAMA/NGIRIAMBUR/4550 and 4551.

### **DECISION**

Having found that there exists a trust on the suit land properties stated above, I enter judgment for the plaintiffs against the 1<sup>st</sup> and 2<sup>nd</sup> defendants as follows:

**1. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> defendants hold land parcel No. NGARIAMA/NGIRIAMBUR/4550 and 4551 in trust for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> plaintiffs.**

**2. The two parcels of land No. NGARIAMA/NGIRIAMBUR/4550 and 4551 to be shared between the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> plaintiffs in equal shares.**

**3. In view of the relationship between the plaintiffs and the defendants, I order each party to bear their own costs of this suit.**

***READ, DELIVERED and SIGNED in open Court at Kerugoya this 20<sup>th</sup> day of September, 2019.***

**E.C. CHERONO**

**ELC JUDGE**

**20<sup>TH</sup> SEPTEMBER, 2019**

In the presence of:

1. Mr. Maina Kagio holding brief for Ms Wangechi Munene
2. Defendants/Advocate – absent
3. Mbogo – Court clerk – present