



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NAIROBI

CASE NO. 25 OF 2018

(FORMERLY CIVIL SUIT NO. 1566 OF 1994)

HANNAH WANJIRU KAMAU

(Suing as the legal representative of the estate of

KAMAU KIRUI KARONGO)..... PLAINTIFF

VERSUS

JANE NJERI KARONGO &

HARRISON MUNGA KARONGO

(Sued as the legal representatives of the estate of

RONGO KIURI 1st DEFENDANT

MARGARET WAMAITHA KARANJA &

STEPHEN NJENGA KARANJA

(Sued as the legal representatives of the estate of

KARANJA KIURI) 2nd DEFENDANT

J U D G M E N T

1. By a plaint dated 27th April 1994 Kamau Kiuri Karongo (deceased) sued his elder brothers Rongo Kiuri (deceased) and Karanja Kiuri (deceased) to recover from them portions of land parcels **Kiambaa/Kihara/573** and **Kiambaa/ Kihara/584** respectively. Kamau claimed that when he was detained by the Colonial Government during the emergency period around 1954 to 1958, his brothers were registered as proprietors of the parcels of land which belonged to their family in trust for themselves and himself. He stated that after his release from detention, Rongo Kiuri (herein **“the 1st Defendant”**) gave him 1 ½ acres out of land parcel **Kiambaa/Kihara/ 573** and Karanja Kiuri (herein **“the 2nd Defendant”**) gave him 1 acre out of land parcel **Kiambaa/Kihara/584** which he had been in occupation of since 1962. He claimed that he had repeatedly requested his brothers to transfer the portions to him but they had refused to do so which had prompted him to file the suit.

2. The 1st Defendant and the 2nd defendant denied their brother’s claim and put him to strict proof thereof. The 1st Defendant in his defence dated 12th July 1994, which was subsequently amended on 29th October 2018, denied apportioning land to Kamau as an owner and stated that he had allocated some of his land to him as a squatter. In his defence dated 24th June 1994, the 2nd defendant contended that the suit was res judicata, as the same issues in the suit had been raised and had been dealt with in RMCC No. 137 of 1990 at Kiambu. He similarly denied holding his parcel of land in trust for his brother and averred that he had allowed Kamau to use a portion thereof in accordance with the Kikuyu Customary practice of allowing landless persons (*Ahoi*) access to land.

3. By the time this matter was heard to conclusion, all three brothers had passed away and had been substituted by the administrators of their estates. The plaint which was amended on 15th October 2018, seeks the following orders against the Defendants jointly and severally:

a. A declaration that the 1st defendant holds Kiambaa/Kihara/573 in trust and/or as trustee for himself and the Plaintiff.

b. A declaration that the 2nd defendant holds Kiambaa/Kihara/584 in trust for himself and the Plaintiff

c. An order that each of the Defendants and or their legal representatives do subdivide/transfer portions of the suit premises held by the Plaintiff into the names of the Plaintiff and/or his representatives.

d. An order that the Defendants their servants agent or anybody claiming through them be restrained from interfering with the Plaintiff's occupation and use of the portions of Kiambaa/Kihara/ 573 and Kiambaa/Kihara/584 he has been occupying until final determination of this suit.

e. An order that the Defendants and/or their legal representatives do execute all the documents necessary to effect subdivisions and transfer.

f. That the Defendants and/or their legal representatives do pay costs of this suit.

4. The evidence of Hannah Wanjiru Kamau (PW1) was partially taken by **P. Kihara Kariuki J.** (as he then was) on 14th February 2005. The Plaintiff's bundle of documents dated 17th June, 2004 was deemed as having been duly filed by consent of the 2nd Defendant. After more than a decade, this matter proceeded for hearing before me on 31st October 2018 and 2nd November 2019 during a service week organized for the Milimani ELC Nairobi.

5. Hannah Wanjiru Kamau (PW1) testified that she and her husband Kamau had been in detention camp up to 1965. When they left the camp, she stated they moved to the land held by the defendants and had been residing thereon since then. She testified that some of her children lived with her on the land and her husband lived and was buried on the land when he died. She told the court that when her husband was in detention, his brothers caused the land to be registered in their names. During Kamau's lifetime, elders had resolved that her husband should get 2 acres from the 1st defendant and 1 ½ acres from the 2nd defendant. She urged the court to grant her the prayers as she had constructed on the 1st Defendant's land and was farming on the 2nd Defendant's land.

6. On cross examination, PW1 clarified that her husband had left detention in 1958, married her in 1960 and that the land consolidation process was carried out between 1955 and 1960. She told the court that her husband was his mother's last born and according to Kikuyu custom, the last born inherited his mother's property. She testified that her mother-in-law's land had been consolidated and registered in the names of the 1st and 2nd Defendants after she died. She stated that she had only learnt about the sale of the 2nd Defendant's land when she went to the Kiambu Lands Office to lodge a caution.

7. Jane Njeri Karongo (DW1) stated that she was the daughter of the 1st defendant. She testified that the land consolidation and adjudication process began in 1958 during which time her father had been registered as the proprietor of the land. She stated that her father had been forced into showing Kamau a place he would reside when Kamau and a younger brother, Ringui sold off land that had been given to them by her grandmother. Kamau had then occupied this land from 1965. She explained that her brother Peter Munga (deceased) had written a notice to evict the plaintiff under stressful conditions as he was battling cancer and wanted to take out letters of administration in respect of their father's estate. She informed the court that her family had agreed to give PW1 the portion of land she had lived on all her life.

8. On his part, Stephen Njenga Karanja (DW 2) told the court that the plaintiff had no claim to parcel 584. He averred that when his father was released from detention in 1959, he was registered as the owner of Parcel 584. He testified that the plaintiff who was his father's brother and his grandmother's last born was born in 1939 and could not have been detained as he was not an adult then. He denied the claim that his father had agreed to give the plaintiff a portion of the parcel of land but conceded that the plaintiff had been cultivating on the land between 1962 and 1963. He testified that the plaintiff had not gone back to Parcel 584 and stated that they had subdivided their father's land in succession proceedings which had not been objected to. He further testified that Parcel 584 had been sold off without resistance and only a small portion of it remained. When shown an affidavit sworn by his father in Kiambu RMCC No. 137 of 1990, DW 2 admitted that the affidavit stated that his father had voluntarily granted the plaintiff a place as a *muhoi*.

9. Margaret Wamaitha Karanja (DW 3) adopted her statement. She was not cross examined as she had sat through all the evidence and the court was of the opinion that there would be no probative value in allowing her to be cross examined.

10. After the close of the defendants' case, the plaintiff and the 1st defendant filed their written submissions canvassing their positions. I have reviewed their respective submissions alongside the evidence tendered and the following issues arise for determination:-

a. Whether this suit is res judicata;

b. Whether the Defendants were registered as proprietors of Parcels 573 and 584 in trust for the plaintiff;

c. Whether the Plaintiff is entitled to the remedies sought

Whether this suit is res judicata;

11. This issue was raised by the 2nd Defendant in his defence but appears to have been abandoned by the parties in due course. The 2nd Defendant had contended that the Plaintiff's suit was *res judicata*, the subject matter in dispute having been dealt with by the Magistrate's Court in Kiambu, RMCC No. 137 of 1990. The Plaintiff availed copies of the pleadings in RMCC No. 137 of 1990 where he had filed originating summons seeking similar orders to those sought in this case. The Magistrate's Court directed the plaintiff to file a plaint to enable the matter proceed to trial due to the complexity of the matter.

12. The trial magistrate in Kiambu PMCC No. 137 of 1990 (OS) in dismissing the suit preliminarily on 10th July 1990 without hearing the parties observed as follows:-

“I have perused the application brought by way of originating summons and the replying affidavit and I am of the view that this is not a simple and straight forward matter, and as such the application is hereby ordered to file a plaint in the normal way so that the defendants can file their respective statements of defence in the matter to proceed to a normal trial.

This originating summons is dismissed. No orders as to costs.”

13. The doctrine of *res judicata* is inapplicable in the present matter as the Magistrate’s Court did not determine the matter on its merits and also lacked jurisdiction to hear issues relating to trust in land. For the doctrine of *res judicata* to apply there must have been a previous suit raising the same issues and the court with competent jurisdiction must have made a final determination on the issues. In the previous suit it is evident the suit was dismissed at the preliminary stage and there was no determination on the issues. The present suit is therefore not *res judicata*.

Whether the defendants were registered as proprietors of Parcels 573 and 584 in trust for the plaintiff;

14. It was the Plaintiff’s case that when he was held in detention, the land parcel 573 and land parcel 584 which were owned by their family were registered in the names of his brothers during the process of land consolidation and adjudication. The Plaintiff’s contention was that he was entitled to a share of the family land and therefore the Defendants could only have been registered as trustees for themselves and Plaintiff.

15. In regard to land parcel 573, the Plaintiff claimed that he had been apportioned 1½ acres out of 7 acres of that land. According to PW1, the Plaintiff had lived and constructed on that portion and some of his children also resided on the land. DW1 told the court that the 1st Defendant had been forced to give his brother Kamau land after he (the Plaintiff) had sold off his own land which had been allocated to him by their mother. DW1 affirmed that the plaintiff had been allocated a portion on land parcel 573 and had lived on the land throughout his lifetime after he left the camp with his wife, PW1 and the children and that the plaintiff had been buried on the land upon his death.

16. The 1st Defendant’s counsel filed submissions refuting the existence of a trust and submitted that the 1st Defendant had allowed the Plaintiff to live on the land as a “*muhoi*” and not a beneficiary. The 1st Defendant relied on the case of **Gichinga Kibutha -vs- Caroline Nduku [2018]eKLR** in support of his argument that his title in respect of land parcel 573 was indefeasible and had not been challenged by the Plaintiff in accordance with Section 26 of the Land Registration Act, 2012 which stipulated that a title could only be challenged where there is proof of fraud or misrepresentation in its acquisition. Section 26(1) of the Land Registration Act, 2012 provides:-

26.(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

17. It was further submitted for the 1st defendant that under Kikuyu customary law, a father would distribute his land amongst his heirs during his lifetime and in this case, no evidence had been adduced to show that the parties’ father had land that could have been distributed amongst his heirs. Counsel urged the court to dismiss the claim that the parcel of land was being held in trust for the plaintiff vide an oral will made by the parties’ mother, as the validity of that oral will had not been proved. He also questioned the minutes of the elders’ meeting held on 21st February 1998, as the agenda of the meeting, the circumstances that led to its being held and the 1st defendant’s name had not been included in the minutes. Counsel also questioned why the plaintiff had not claimed from Ringui, the third son of their father, if he had been apportioned land.

18. As for parcel 584, the Plaintiff claimed that he had been apportioned 1 acre out of the entire 5 acres on which he cultivated. DW2 refuted this claim and stated that Kamau Kiuri (PW1’s late husband) had only cultivated parcel 584 briefly between 1962 and 1963 and had not gone back since. He also denied the claim that Kamau (the Plaintiff) had been detained stating that he was too young during that period. It was further DW2’s evidence that the Plaintiff had been given a portion of land by the 1st Defendant instead when he returned from the camp but had no claim to parcel 584.

19. It is not in dispute that Kamau Kiuri, the Plaintiff Rongo Kiuri and Karanja Kiuri, the original parties, to this suit were blood brothers sharing the same mother and father. It is also not in dispute that Rongo Kiuri and Karanja Kiuri were the elder brothers of Kamau Kiuri and that they were the registered owners of land parcels **Kiambaa/ Kihara/573** and **Kiambaa/ Kihara/584** respectively at the time this suit was filed. Further, it is apparent that the titles to land parcels **Kiambaa/Kihara/573** and **Kiambaa/Kihara/584** were acquired following the land adjudication and consolidation process which took place between 1955 and 1960. The land was then registered in the names of the defendants in 1958 as first registrations when the Plaintiff was still in detention.

20. All the witnesses were in agreement that Land parcels **Kiambaa/Kihara/573** and **Kiambaa/Kihara/584** were part of the land the parties’ mother utilized before the land adjudication and registration process. There is therefore no doubt that the subject parcels of land were initially part of family land that should have been distributed among all the male children in accordance with Kikuyu customary law after the demise of their parents. Although the 1st Defendant and the 2nd Defendant gave evidence that the Plaintiff was allocated land which he sold, no

particulars of such land was provided or any details of who the purchaser was. My own view of the matter was that there was infact no such land that was allocated to the Plaintiff. He could not have been allocated land when he was in detention. I therefore make a finding that he was not allocated any land and that he was entitled to a share of the available family land. I therefore reject the argument that the Plaintiff was given a portion of land to occupy by his brothers as a squatter. The evidence by DW1 that the 2nd Defendant did not agree to give a portion of land to the Plaintiff was at variance with the pleadings by the 2nd Defendant and infact the 2nd Defendant own evidence that the Plaintiff cultivated a portion of land parcel 584 albeit for a short period. The 2nd defendant under paragraphs 5 and 6 of the defence pleaded as follows:-

5. The 2nd Defendant shall further maintain that he allowed the Plaintiff to use a portion of his property mentioned above which portion was infact less than one acre and the Plaintiff was so allowed to use the said portion in accordance with the Kikuyu Customary Practice of allowing landless person (“Ahoi”) to have access to some land and not otherwise.

6. The 2nd Defendant shall maintain that the portion aforesaid was awarded to the Plaintiffs gratias and that the Plaintiff is not ipso facto entitled to claim ownership.

This pleading constitutes an admission that the Plaintiff was allowed and/or permitted by the 2nd Defendant to utilise a portion of his land parcel **Kiambaa/Kihara/584** save that the 2nd Defendant averred that the Plaintiff was occupying/using the portion as a “*Muhoi*”. This is consistent with PW1’s evidence that she was using the portion of land upto sometime in 2010 when the 2nd Defendant allegedly sold the portion.

21. The green card in respect of land parcel **Kiambaa/Kihara/ 564** which was referred to by the witnesses during trial shows that that land was held by Ringui Kiuri, another brother of the parties to the suit, who was said to have sold his land and relocated to Loitoktok. No evidence was led in support of the claim that Kamau Kiuri had been allocated his own portion or that the defendants acquired the subject parcels of land through their hard work. It is therefore my finding that the defendants were indeed holding land parcels **Kiambaa/Kihara/573** and **Kiambaa Kihara/584** in trust for themselves and the plaintiff.

22. I concur with the observations of the court in the case of **David Mbugua Mbogo & 3 Others -vs- Justus Mugweru Mbogo Civil Case 116 of 1994 [2007]eKLR** where the court held as follows;

“I may wish to take Judicial Notice of the fact that during the period of emergency in Kenya, many families especially in the Central Province were affected and were either detained and or ran away from their homes to places of safety and when land demarcation and registration started, those “sons” who remained behind were registered to hold land on behalf of those who were not present at home. In this way “customary trusts”, were created. This point has been the subject of many court decisions. One such decision is the court of Appeal case of Philicery Nduku Mumo -vs- Nzuku Makau Civil Appeal No. 56 of 2001 (Unreported).”

23. The argument that the law excludes any claims to land once a parcel of land has been registered is untenable in the face of the abundance of judicial precedent that state otherwise. Moreover, the proviso to **Section 28** of the repealed **Registered Land Act** (Cap 300 Laws of Kenya) was categorical that a proprietor who had acquired title on first or subsequent registration could not be relieved of his obligations where he was subject as a trustee. The proviso to Section 28 of the Act provided as follows; **Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.**

24. The Court of Appeal in **Kanyi Muthiora -vs- Maritha Nyokabi Muthiora Civil Appeal No. 19 of 1982 [1984] eKLR** upheld a claim for land under a Kikuyu customary law, finding that, **“the appellant as proprietor by this first or any subsequent registration is not relieved by anything in section 28 from any duty or obligation to which she is subject as a trustee as its proviso declares.”**

25. Madan J. in **Gatimu Kinguru -vs- Muya Gathangi Civil Case No 176 of 1973 [1976]eKLR** and **Mwangi Muguthu -vs- Maina Muguthu (unreported)** also held that the claimants in those suits were entitled to succeed in their claim for land under customary trust. So too did Cortran J. in the case of **Edward Samuel Limuli -vs- Marko Sabayi Civil Case No 222 of 1978 (OS) [1979]eKLR**, Recently, the Supreme Court in the case of **Isack M’inanga Kiebia -vs- Isaaya Theuri M’lntari & Another Petition No. 10 of 2015 [2018] eKLR**, pronounced itself on the matter as follows;

“[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.”

26. Section 28 (b) of **The Land Registration Act No.3 of 2012** now expressly provides for the protection of customary trusts thus;

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 being noted on the register:-

(b) trusts including customary trusts

27. Counsel for the 1st defendant submitted that the plaintiff PW1 occupied 0.125hectares of land parcel 573, and should be content with the portion she holds. The 2nd Defendant on his part claimed that they had sold off parcel 584 and only a small portion of it remained. According to DW 2’s statement, new titles had since been issued after land parcel 573 was subdivided during succession proceedings.

28. For the Plaintiff, it is submitted that her prayer for 1 ½ acres out of land parcel 573 is reasonable given that the parcel of land measuring 7 acres is still intact. As for parcel 584, the plaintiff urged the court to note that the subdivisions and sale of the land were effected while the matter was still pending the determination of the court contrary to the common law doctrine of *lis pendens*. The plaintiff suggested that a survey report be prepared and filed in court to determine the available acreage from parcel 584.

29. The Plaintiff filed a supplementary bundle of documents on 16th October 2018 comprising the Green Card for land parcel **Kiambaa/Kihara/573** and Green card for land parcel **Kiambaa/Kihara/584**. The title abstract for land parcel 573 shows the land is still registered in the name of Karongo Kiuri Karongo while land parcel 584 was following succession proceedings in 2009 transferred to the administrators of the estate of Karanja Kiuri. The administrators as per the green card subdivided the parcel of land to create land parcels 4509 - 4515 on 12th August 2009 whereupon the title was closed. It is evident the succession proceedings were undertaken during the pendency of the present suit and it is doubtful the existence of the present suit was brought to the attention of the court that handled the succession proceedings. The 2nd Defendants have stated some of the subdivisions have been transferred out to 3rd parties. It is unfortunate that the details of the subdivisions were not furnished to the court and the court is therefore not in a position to affirm who the registered owners of the subdivisions are. DW2 who was one of the administrators affirmed in his evidence that they sold a portion of the land in 2010. He did not specify the portion he sold out.

30. On the evidence adduced before the court. I am satisfied that the Plaintiff (PW1) has proved on a balance of probabilities that the 1st and 2nd defendants who were brothers to her husband were holding land parcels **Kiambaa/Kihara/573** and 584 in trust for themselves and her late husband. I have considered that the other brother Ringui Kiuri had been allocated land parcel **Kiambaa/ Kihara/564** as per green card (“**PEX.14**”). This land was approximately 1.41acres (0.68Ha). Land parcel **573** was approximately 7 acres while land parcel 584 was approximately 5 acres and that could explain why the plaintiff only sought land from only the 1st and 2nd Defendants who undoubtedly had been allocated bigger parcels of land. The subdivision by DW2 of land parcel **584** and sale of a portion thereof cannot relieve the 2nd Defendant of his obligation as a trustee to the Plaintiff as the proviso to Section 28 of the Registered Land Act (repealed) clearly placed a continuing trust on persons registered subject to a trust as in the present case. Any subdivision or sale would be subject to the Plaintiff’s overriding interest as a beneficiary under a trust.

31. In the premises, I enter judgment for the Plaintiff and make the following final orders:-

1. That the 1st Defendant and/or his legal representative hold land parcel number Kiambaa/ Kihara/573 in trust and/or as trustee for himself and the Plaintiff and is hereby ordered to excise a portion of 1 ½ acres therefrom and to transfer the same to Hannah Wanjiru Kamau as the personal legal representative of the estate of Kamau Kiuri Karongo in discharge of the trust.

2. That the 2nd Defendant and/or his legal representatives held land parcel Kiambaa/Kihara/ 584 (now subdivided into parcels 4509 - 4515) in trust and/or as trustee for himself/themselves for the Plaintiff and are hereby ordered to cause the excision of a portion measuring 0.75 of an acre therefrom and to transfer the same to Hannah Wanjiru Kamau as the legal representative of the estate of Kamau Kiuri Karongo in discharge of the trust. For the avoidance of doubt the excision can be effected from any of the subdivisions held by the administrators and/or the beneficiaries to whom they may have effected transfer to.

3. This being a family dispute I order that each party bears their own costs of the suit.

JUDGMENT DATED AND SIGNED AT NAKURU THIS 4th DAY OF October 2019.

J. M. MUTUNGI

JUDGE

JUDGMENT DELIVERED AT NAIROBI THIS 30th DAY OF October 2019.

S OKONG’O

JUDGE