



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO 51 OF 2018

PETER THUO MURUGAH.....PLAINTIFF

VS

GITHINJI WAWERU.....DEFENDANT

JUDGMENT

1. The Plaintiff filed suit on the 22/6/18 against the Defendant for orders;

a. A declaration that the Defendant's registration of land parcel No LOC3/KARIUA/783 was done in trust for the Plaintiff as a son to the late Francis Muruga Muthee.

b. That the Land Registrar be ordered to cancel the Defendant's title and cause the subdivision of the suit land into 8 equal portions and issue titles to the 8 children of the late Francis Muruga Muthee (deceased) namely John Maina Murugah, Zachary Mugo Muruga, Lucy Njeri Mwangi, Rose Wanjiku Njogu, Charity Waithira Muruga, Thomas Nduati Muruga, Julia Nyagithii Kariuki and Peter Thuo Murugah.

c. Cost and interest of the suit

2. The Plaintiff avers that the Defendant is the registered proprietor of the suit land. That the land is held under trust by the Defendant for the family of Francis Muruga Muthee since the said Muthee could not hold title of two parcels of land. He has listed 8 siblings in total.

3. He stated that the Defendant declined to share out the land with the Plaintiff and his siblings claiming that he is the sole registered owner which the Plaintiff terms as fraudulent. He has pleaded particulars of fraud in para 7 of the Plaintiff.

4. He urged the Court to declare that the suit land is encumbered with trust.

5. The Defendant denied the Plaintiff's case and contended that the suit land was given to him by his grandfather because he was the first grandchild. He denied that the land was not held under trust. He stated further that his father too was given land parcel No.s LOC3/KARIUA /823,822 and T.93 by his grandfather the late Maina Muruga.

6. At the trial the Plaintiff led evidence and adopted his written statement dated the 19/10/18 and produced the official search in respect to the suit land and marked PEX No 1.

7. He stated he has filed the suit on his own behalf and that of his disclosed siblings. He reiterated the contents of the plaintiff and added that the registration of the suit land in the name of his elder brother, the Defendant was because his father could not hold two lands contrary to Government policy then that one man could not be registered with more than one plot in one scheme. That his father already had another land in the same scheme.

8. That he sued his brother the Defendant because he has refused to share the land with him and his 8 siblings. He was born in 1958. He stated that the land is family/ancestral land held in trust for them by the Defendant. That the land belonged to Francis Muruga Muthee, his father.

9. Further he informed the Court that his father too had three other lands; LOC3/KARIUA/ 822, 823 and T.93. These parcels were given to his father by his grandfather.

10. That it was the policy then that if one had planted coffee like what his father had done in 1961, he would not be moved to another scheme. His father died in 1961.

11. In his further evidence he stated that parcel LOC3/KARIUA /822 came from his uncle Kimani Kiiru, while LOC3/KARIUA /823 was a subdivision of LOC3/KARIUA /822. LOC3/KARIUA /T93 on the other hand was a plot where they lived.

12. PW2- Peter Kariuki Wanganga testified and relied on his written statement dated 13/12/18 as evidence in chief. That he is from the same village and clan with the parties in the suit.

13. That he was the Secretary of Kariua land allocation scheme at its formation and tasked to consolidate the lands in the scheme in 1959/60 and allocate land to members of the community. Other duties included verification of the sizes of the fragments as well as dispute resolution. Land was allocated by clans where each clansmen were allocated land by consolidation of fragments. That the Plaintiff's father was allocated the suit land measuring 1.83 acres with coffee. That his portion had a deficit of 1.38376 acres which comprised plot LOC3/KARIUA /823. The policy supported one man one plot in one scheme. Francis Muthee therefore caused the suit land to be registered in the name of the Plaintiff in trust to conform with the one man one land parcel registration policy.

14. Whilst being cross examined he stated that though he has land in the village he did could not remember the land reference number. That he did not know if the father of the Plaintiff had other lands. That he died in 1981 and the land was registered in the name of the Defendant while he was a minor. That none of the parties live on the land but the Defendant cultivates coffee and other subsistence crops.

15. The Defendant testified and stated that he is the elder brother of the Plaintiff. That his paternal grandfather Muthee Kiiru registered the suit land in his name on account that he was the first born grandchild in the family. That he was born in 1956. His father on the other hand was given parcel LOC3/KARIUA/ 822, 823 and T.93. That his parents used to cultivate the suit land but after their death he took over the land and plants coffee and subsistence crops. He recalled when his grandfather asked his father and brother to remove their houses from the land as it belonged to him. That he does not hold the suit land in trust.

16. He presented list of documents marked as DEX No 1-4.

17. He stated that the land belonged to his grandfather. Likewise the three parcels registered in his father name.

18. Parties filed written submissions which I have read and considered in writing the judgement.

19. The key issue is whether the Plaintiff has proven trust.

20. It is not in dispute that the parties are siblings. The suit land was registered in the name of the Defendant in 1961 as a first registration. The Defendant is in possession and control of the suit land. The suit land was registered in the name of the Defendant whilst he was still a minor.

21. Customary trust is concept through which land may be acquired in Kenya. It is anchored in both the Constitution (as part of intergenerational equities) and statute. It is an overriding interest in land which need not be registered.

22. Section 28 (b) of Land Registration Act provides as follows;

i. 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 their being noted on the register—

ii. (a).....

iii. (b) trusts including customary trusts;

23. The provisions of Section 27 & 28 of Registered Land Act, Cap 300 state that the rights of a registered proprietor of registered land under the Act are absolute and indefeasible and only subject to rights and encumbrances noted on the register or overriding interests which are set out under section 30 of the Act. The provisions of 27 & 28 are similar to the provisions set out in section 24, 25 26 & 28 of the Land Registration Act, 2012.

24. Section 30 of the Registered Lands Act provides:

“Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -

(a) rights of way, rights of water and profits subsisting at the time of first registration under this Act;

(b) natural rights of light, air, water and support;

(c) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;

(d) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies within the meaning of section 46;

(e) charges for unpaid rates and other moneys which, without reference to registration under this Act, are expressly declared by any

written law to be a charge upon land;

(f) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;

25. One of the overriding interests under Section 30 (g) is the right of the person in possession or actual occupation of the registered property

26. In the case of **Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others [2005] eKLR** which quoted with approval the holding in the case of **Muthuita –vs- Muthuita [1982 – 88] 1 KLR 42**, the Court of Appeal held that customary trust is proved by leading evidence on the history (root) of the suit property and the relevant customary law on which the trust is founded and the claimants subscribe to.

27. Similarly in the case of **Peter Gitonga Vs Francis Maingi M’ikiara Meru HC.CC NO. 146 OF 2000-** it was stated that :-

i. A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged”.(emphasis is mine).

28. The Plaintiff avers that the suit land is family land encumbered with a trust and has urged the Court to determine the trust and allocate the land to the 8 siblings, the parties included. The Defendant on the other hand has led evidence that he was gifted the suit land by his grandfather on account of his being the first born grandson in the family.

29. In the case of **Isack M’Inanga Kieba Vs Isaaya Theuri M’Lintari & Isack Ntongai M’Lintari SCOK Petition 10 of 2015** the apex Court held as follows;

“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 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).

30. Going by the SCOCK case above the following are critical to prove of the existence of a trust ;

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.”

31. The PW2 testified and stated that he was the Secretary of the demarcation committee and that due to the policy of one man one parcel in one scheme, Francis Muthee caused the land to be registered in the name of his son, the Defendant in 1959-1960. He also stated that land was being allocated according to clans and each person was given specific acreage.

32. This evidence has not been controverted by the Defendant successfully.

33. The Plaintiff led evidence through PW2 that the suit land was alienated in favour of the late Francis Muthee who owned the land after and even used it and had planted coffee. The Defendant admits that the suit land was in the hands of his late father and that he took over after his demise. He stated in evidence;

“That his parents used to cultivate the suit land but after their death he took over the land and planted coffee and subsistence crops”.

34. This lends credence that the suit land was family land.

35. The Defendant does not dispute the fact that their father had other parcels (though registered much later), the Defendant has listed these parcels in his pleadings and evidence.

36. The Plaintiff further posits that the Defendant was the first born son .The Defendant does not refute this. In the case of **Henry Mwangi vs Charles Mwangi CA 245 of 2004** the Court of Appeal noted that under Kikuyu Customary Law, to which both parties are subject to, the eldest son inherits land as a Muramati to hold in trust for himself and other heirs.

37. It would then follow that even when the title was registered in the name of the Defendant, it was subject to customary trust. Customary trust is an overriding interest that attaches and moves with the land.

38. It is trite that the registration of the land in the name of the Defendant did not relieve him from the responsibilities of a trustee. In the case of **Kanyi vs Muthiora (1984) KLR 712** the Court stated that;

“The registration of the land in the name of the Appellant under the Registered Land Act (Cap 300) did not extinguish the respondents rights under Kikuyu Customary Law and neither did it relieve the Appellant of her duties or obligations under Section 28 as trustee.....The trustees referred to in Section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under Customary law, if the Act had intended to exclude Customary law rights it would have been clearly so stated.”

39. It is also common ground that their father lived on the land over the years and raised his family. When confronted with similar facts, Justice B N Olao had this to say in the case of **Jason Gitimu Wangara v Martin Munene Wangara & Others [2013] eKLR:**

“However, the Plaintiff does not explain why only he was given the whole 35 acres of the suit land. It can only be that the “*practice*” of giving land to the first born that he himself alludes to arises out of Kikuyu custom. The Defendants did confirm that the Plaintiff as the eldest son was given the land by the clan to hold in trust for the family. In my view, there is sufficient evidence on record to make a finding that the Plaintiff holds the land in trust for the family. This is supported by the fact that the parties who are all family live on the suit land and so too did their father who was buried on the same land together with his six wives as well as other family members. There is also evidence that there are some twenty homesteads on the suit land .Under those circumstances, the only conclusion that this Court can arrive at is that the Plaintiff, though registered as proprietor of the suit land, holds the same in trust for the family and that registration does not relieve him of his duty as a trustee.”

40. Equally in the instant case the Defendant has not established that he acquired the suit land through purchase. His claim that it was gifted to him by his grandfather was not supported by cogent evidence. Admittedly he states that the land was registered in his name at the age of 5 years. How did he know he acquired it by way of gift. This may be a convenient route to take now that the parents and grandfather are dead. For the case to turn on his part he needed to have led evidence to support a gift. He did not.

41. It is the finding of the Court that the Plaintiff has proved trust.

42. The Plaintiff pleaded fraud on the part of the Defendant. He stated that by refusing to share the suit land with his siblings he is fraudulent. The particulars of fraud are; declining to share the suit land with his siblings; refusing to allow the Plaintiff and his siblings to use the suit land; breaching trust by refusing to share the suit land; refusing to accept that he did not buy the land.

43. The concept of fraud in exercise of a trust was defined in the case of **Muriithi Imanyara & 2 Others v Equity Bank Limited & 3 Others [2019] eKLR** where the Court adopted Blacks Law Dictionary definition of fraudulent act as conduct involving bad faith, dishonesty, a lack of integrity or moral turpitude. The Court further held that

“..... it can be safely said that a fraudulent breach of trust would be a conduct in bad faith that violates ones obligation while in a position of trust. My view therefore, what is to be established in a pleading is that the party against whom a claim is being made is or was in a position of trust but whilst in such a position, he acted in bad faith in violation of the obligation entrusted upon him.....

In my view, the pleading by the Plaintiff and the particulars supplied are adequate to establish a cause of action of fraudulent breach of trust on the part of 1st Defendant. In my view, it was not necessary that the Plaintiff should have used the specific words “fraudulent breach of trust” in the Plaint for its claim to be under Section 20(1) of the Limitation of Actions Act. To my mind, it was sufficient enough to plead the facts that will establish a special relationship between the parties and an unconscionable conduct by the 1st Defendant towards the Plaintiff.” [own emphasis]

44. In this case the Defendant notwithstanding the presence of customary trust is said to have denied the other family members the right to land.

45. That said, going by the pleadings, the evidence analyzed, the law and the materials placed before me the Plaintiffs suit succeeds to the extent of the proven customary trust.

46. The parties are related. I order that each to meet the cost of their suit.

47. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 28TH DAY OF NOVEMBER 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Chumba HB for Mr Kanyi for the Plaintiff

Defendant: Present in person. Advocate is absent.

Ms Irene and Ms Kuyiki, Court Assistant