



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO.4 OF 2018

FRANCIS KIHORO MAINA.....1ST PLAINTIFF

FRANCIS GICHUHI KAMAU MAINA.....2ND PLAINTIFF

PETER MAINGI MAINA.....3RD PLAINTIFF

(SUING AS ADMINISTRATORS OF THE

ESTATE OF ESTON MAINA KAMERE- DECEASED)

VS

DAMARIS WANJIRU MAINA.....DEFENDANT

JUDGMENT

1. By a Plaint dated 23/1/2018 and later amended on 19/2/2019 the Plaintiffs sued the Defendant and sought for judgment against the Defendant for the following reliefs;

- a. A declaration that Hannah Wanjiru Maina alias Wanjiru Maina held LR LOC 19/KIAWAMBOGO/204 in trust of the late Eston Maina Kimere and his family.
- b. A declaration that LR LOC 19/KIAWAMBOGO/204 belongs to the estate of Eston Maina Kimere (Deceased).
- c. The certificate of title for LR LOC 19/KIAWAMBOGO/204 issued on 14th August 2017 to the Defendant Damaris Wanjiru Maina be and is hereby revoked.
- d. Costs of this suit and interest at Court rates.
- e. Any other relief this Honourable Court may deem fit to grant.

2. The Plaintiffs' case is that they are the administrators of their father's estate, the late Eston Maina Kimere duly appointed as such vide Nairobi Succession Cause No. 1112 of 2010 and the Defendant is a granddaughter of the late Eston Maina Kimere. That the Defendant is the daughter of the late Elispher Muthoni Maina who was the only child of the 1st wife to the late Eston Maina Kimere namely Hannah Wanjiru Maina alias Wanjiru Maina.

3. That at the time of his death the late Eston Maina Kimere was survived by several beneficiaries being his wives and children. That the late Eston Maina Kimere was the son of Kimere Maina who hailed from Kiawambogo village where he owned a large parcel of land in which he resided with his large polygamous family and was later buried there.

4. Upon the demise of Kimere Maina his land was inherited by the late Eston Maina Kimere and his siblings with the portion where their father was being buried being allocated to Eston Maina Kimere, which is presently known as LR LOC 19/KIAWAMBOGO/204. That during the land demarcation the land was registered in the names of the family heads/ or their representatives depending on availability.

5. They claim that in the periods of 1950s and 1960s the late Eston Maina Kimere was working at a hotel in Nairobi and was not able to frequently travel back home. That when the land adjudicator visited their home in the year 1963 in absence of the late Eston Maina Kimere his family including his four wives, his siblings and clan members sat down and agreed that his portion of the ancestral land being LR LOC 19/KIAWAMBOGO/204 be registered in the name of his 1st wife namely Hannah Wanjiru Maina alias Wanjiru Maina to hold in trust and on behalf of her husband and his family.

6. The Plaintiffs' claim that after the registration the family of the land they settled and developed the land by some planting tea bushes that they pluck to date. Others planted food crops while others opted to get married and settle elsewhere including the Defendant.
7. That the late Eston Maina Kimere did not disturb the status quo during the lifetime of his 1st wife based on trust, and after her death in 2004 he embarked on the succession process but unfortunately succumbed to illness before taking out the letters of administration.
8. That upon his demise the family unanimously appointed the Plaintiffs to be the administrators of their father's estate with an agreement that each of the assets would be succeeded separately depending on how the various properties were registered.
9. The Plaintiffs claim to have noticed unbecoming conduct from the Defendant in respect to the suit land from the year 2016 necessitating the lodging of a caution on the suit land. Thereafter in 2017, the Plaintiffs learnt that the Defendant had secretly obtained letters of administration in respect to the estate of late Hannah Wanjiru Maina alias Wanjiru Maina vide Kangema Succession Cause No. 21 of 2016 and had the suit land transmitted to her name.
10. It is their case that the Defendant obtained the said grant through fraud and deceit, some of the particulars enlisted thereunder are; the failure to involve the Plaintiffs in the Succession Cause; failing to disclose the full list of beneficiaries in the chief's letter and denying the other beneficiaries their rightful shares.
11. That after obtaining the title in her name the Defendant has been threatening to evict the Plaintiffs from the suit land, she has destroyed their crops and barred them from plucking their tea bushes.
12. The suit was opposed by the Defendant through her statement of defence and counterclaim dated 09/05/2018 in which she categorically denies the averments made in the Plaintiffs' statement of claim particularly in respect to the inheritance of the suit land by her grandfather from her great-grandfather and the holding of the land in trust by her grandmother on behalf of her grandfather.
13. She contends that around the same time when the suit land was registered in her grandmother's name, her grandfather Eston Maina Kimere had another parcel of land namely LR LOC 19/KIAWAMBOGO/211 registered in his name in refuting the alleged absence of her grandfather as the reason for registering the suit land in her grandmother's name. She further challenges the ownership of the suit land by her grandfather based on the fact that he failed to pursue the transfer of the land to himself for the five years he was still alive after the death of her grandmother who predeceased him. She contends that her grandfather had informed the family that the suit land would belong to her for being the only grandchild in the first house.
14. The Defendant in her counterclaim contends that she is the lawful owner of the suit land and holds a title to the same issued to her on 14/08/2017. That the suit land was personally acquired by her grandmother and was never part of her grandfather's estate. That her grandfather had only two parcels of land in Kiawambogo, which are still registered in his, names namely LR LOC 19/KIAWAMBOGO/211 and LR LOC 19/KIAWAMBOGO/540.
15. The Defendant insisted that the family had full knowledge of the Succession Cause filed at Kangema and alleges that prior to filing the cause the family had met at the chief's office to deliberate on the same. That the other wives of her grandfather had their own personal parcels of land, which have since been succeeded by their families to the exclusion of the Defendant. That the Plaintiffs' suit is brought with the ill motive of disinheriting her. That the Plaintiffs forcefully entered onto the suit land without her authority and rushed to construct structures on the suit land after she obtained the letters of grant to the estate. She avers that the Plaintiffs are trespassers and are in wrongful occupation of the suit land, which has denied her rights of ownership and use of the suit land.
16. Subsequently she urged the Court to dismiss the Plaintiffs' suit and enter judgment against the Plaintiffs for the following orders;
 - a. A declaration that the Defendant is entitled to exclusive uninterrupted right of possession and occupation of land parcel number LR LOC 19/KIAWAMBOGO/204, and that the Plaintiffs are trespassers and not entitled to remain in the land and should therefore give vacant possession of the suit land to the Defendant.
 - b. A permanent injunction restraining the Plaintiff by themselves or through their servant's agents or otherwise howsoever from constructing, developing, interfering with, remaining on or continuing in occupation of the suit land.
 - c. Mesne profits and general damages
 - d. Costs of this suit and interest
 - e. Any other further relief that the Honorable Court may deem fit to grant.
17. The Plaintiffs filed a reply to the defence and counterclaim in which they denied the averments made in the defence and contend that they were in occupation and use of the suit land way before the title became registered in her name. They deny the particulars of damages as listed by the Defendant and urged the Court to decline the counter claim.

The Plaintiffs' evidence

18. PW1 – Francis Kihoro Maina testifying on his own behalf and that of the 2nd Plaintiff claimed that the suit land belonged to their late father which he had inherited from their grandfather. That their grandfather died in 1924 and was buried on the suit land. That the suit land comprised of various fragments of land, which were consolidated into one totaling to over 27.8 Acres.

19. He testified that their father was absent during the land demarcation hence, the family resolved to have the land registered in the name of the 1st wife. That his father worked as a cook at the Nairobi Gymkhana and managed a bus transport business in partnership with his brother. He also owned and managed a number of hotels in Thika, Nairobi and Nyahururu. That though they moved from the suit land in 1962 their father planted tea and also showed the sons portions on the suit land to plant tea, which they rely on to date. That to date upto 14 children of the late Eston tend and pluck green tea from the land and deliver the produce to Mataara tea buying centre among other tea factories in the area.

20. He informed the Court that the Defendant and her mother never lived on the suit land neither did they plant any tea on the suit land as they were born and brought up in Nyahururu.

21. The witness stated that they have recently discovered that the suit land was transmitted to the Defendant and pray for cancellation of the title in her name to revert to their father's estate for distribution. That the Defendant benefitted from the estate of her grandfather through the share allocated to her late mother Elispher Muthoni Maina.

22. He claimed that Hannah Wanjiru was not a person of means with ability to purchase the suit land on her own. That the suit land was registered in her name because their father was working away from home. He claimed that in the olden days women were also registered to hold land in trust for their families.

23. He stated that the old timber/mabati house on the land was constructed by his father. He stated that there were 4 houses belonging to his father 4 wives before they were relocated to Nyahururu. He added that the suit land was not included in the list of assets in the succession of his father because their lawyer advised them to omit it because it was not registered in the name of their father.

24. The witness informed the Court that the proceeds of the tea that belonged to his father is shared among all the beneficiaries, the Defendant included. He produced a cheque drawn in the name of the Defendant in the sum of Kshs 350,000/- dated the 28/2/17. He also explained that the name of the Defendant's mother was included in the succession of the estate of his father as a beneficiary.

25. In his testimony he stated that none of the parties and or siblings live on the suit land. That they plant tea in various portions and have workers who live on the land.

26. He conceded that his mother Gladwell had a privately acquired parcel of land, which he succeeded and shared out to the members of their house only. He claimed that he had no notice of the Kangema petition.

27. PW2 – Peter John Mathira Kihoro stated that he is a resident of Kiawambogo village and a grandson to Eston Kimere Maina. That he was born in 1943. He stated that he helped the late Eston Kimere Maina to identify/demarcate the many fragments which were consolidated into the suit land. Some of the fragments were inherited from grandfather while were purchased by him.

28. The witness informed the Court that he was aware that the suit land was registered in the name of Hannah Wanjiru Eston's 1st wife to hold in trust for him because he was denied a pass to come home during the travel restrictions imposed by the colonial regime. That the demarcations were done in twice (1959 and 1962) with the subsequent one confirming the original registered owners.

29. He testified that after the demarcation and registration was completed, the four wives of Eston settled on the suit land and planted tea bushes with the exception of Hannah. That there were 4 houses which were demolished. That Eston relocated all his wives and family to Nyahururu but continued picking their tea on the farm. He was aware that the grandfather of the Plaintiffs was buried on the suit land and claims his grave is still there to date.

30. PW3 – Francis Kihoro Wanjau testified that he owns the adjacent parcel of land No. 212. That he knew that the suit land belonged to Hannah's husband which was registered in her name to hold in trust and claimed that all the co-wives of Hannah used to cultivate on the suit land. That the parcel No. LR LOC 19/KIAWAMBOGO /211 did not belong to Eston Maina.

31. PW4 - Eunice Wanjiru Gikuma Kimere, a sister in law to Eston Kimere, whose husband was his business partner, testified that the suit land was registered in the name of Hannah to hold in trust because Eston was away in Nairobi during demarcation. That the wives of the late Eston do not live on the suit land but their children are cultivating the land in various portions.

32. PW5 – Beatrice Wangari Maina, the only surviving wife of the late Eston claimed to have participated in the meeting that resolved to register the suit land in her co-wife's name Hannah Wanjiru because she had only one child unlike the other 3 wives who had many children. That Eston believed that if the land was registered in their names they would fight over it and he felt save to have it registered in the name of the elder wife on account of seniority and because she had one child only. She was emphatic that Hannah did not have money to buy such a large parcel of land. That Eston planted tea in 1960s on the suit land. That the late Eston owned businesses in partnership with his brothers. That her co-wives had tea bushes planted on the suit land but they all lived in Nyahururu. She testified that the land was family land.

The Defendant's evidence

33. DW1 – Damaris Wanjiru Maina the Defendant testified that she was born in 1962 and lived in Nyahururu before she got married in 1983. That she now runs business and lives in Nyeri. That she is the only child of Elispher Muthoni, the daughter of Hannah Wanjiru. That the Plaintiffs are her maternal uncles.

34. She testified that the suit land belonged to Hannah Wanjiru having acquired it by purchase. She however did not produce any documents to support the purchase. That she was not present during the purchase of the suit land but was informed by her grandmother.

35. The witness informed the Court that the structures on the photographs were constructed by her grandmother. She claimed that the tea bushes were planted by her grandmother, but conceded that her mother and herself never planted any tea bushes. She was aware of the sale of a portion of parcel number LOC 19/KIAWAMBOGO /540 to the local tea buying center.

36. Further she stated that she filed the succession after the death of her grandfather and did not demand the land during the lifetime of her grandfather. That the suit land was not included as part of the estate of her late grandfather. She testified that she has no information in respect to the occupation and mode of use of the suit land except that the Plaintiffs have staged workers who have restrained her from accessing the suit land.

37. DW2 – Stephen Gikonyo testified and stated that he resides near the suit land. He stated that the suit land belonged to the Defendant's grandmother but he had no information of how she acquired the land. He also did not know who planted the tea bushes on the suit land neither did he know if the Defendant's grandmother had made any developments on the suit land. He informed the Court that the children of the late Eston cultivate tea on the suit land.

38. DW3 – Paul Maina Kabeu identified himself as a grandson of Hannah and testified that he knew the land belonged to Hannah but she did not know how she had acquired the land. He denied that the land belonged to Eston. He claims that the children of Eston are in control of the land and though they hardly visit they farm and have workers who work the land and pluck the tea.

39. The Plaintiffs submitted that the suit land comprised of 9 fragments among them being the land in Gathamara belonging to their grandfather that were consolidated to a total of 27 acres and registered as the suit land. They reiterated that the reason for the registration in Hannah' name was because Eston was held up in Nairobi.

40. In their further submissions they stated that the tea bushes were planted by the 2nd, 3rd and 4th wives of Eston. That the Defendant's mother was married off before the demarcation of the land. That the parcel of land number LR LOC 19/KIAWAMBOGO/211 belonged to Eston's step brother namely MAINA KIMERE (WAMBU KIRIGIRO) while parcel No. LOC 19/KIAWAMBOGO /540 was owned by Eston and registered in his name in 1973. That Eston purchased other lands in Nyahururu and relocated his family of 4 wives and settled there.

41. They submitted that PW2 confirmed to have attended the meeting that resolved to register the suit land in the name of Hannah on behalf of the family. That PW3 gave evidence of the absence of Eston Maina during the registration of the land and that at the time when the tea bushes were being planted the 1st wife had already moved to Nyahururu leaving behind her three co-wives who planted the tea bushes. PW4 testified that after her marriage to Eston in 1984 they lived at her husband's father's land in Kiawambogo along with her co-wives and her husband's siblings.

42. They reiterated that PW4 was present during the meeting that resolved to register the land in the name of Hannah on behalf of the family. She was firm that her husband left to work in Nairobi in 1950 and rarely came home due to the travel constraints imposed by the colonial Government post the emergency period.

43. In their further submissions they faulted the evidence of the Defendant that the late Hannah Wanjiru did not have the means to purchase the suit land. That she neither owned a hotel nor livestock to enable her purchase the suit land. Interalia the Plaintiffs faulted the Defendants for failing to produce evidence to support their allegations on the purchase.

44. That the relationship between the parties herein is undisputed and the fact that the suit land was initially registered in the name of Hannah Wanjiru as the 1st wife of Eston Kimere does not preclude the existence of a trust. That the Plaintiffs have established that the 50,000 tea bushes were planted by the 9 children of the deceased and have continued to pick and deliver the tea to the tea factory as evidenced by their particulars of delivery . The Plaintiffs are convinced that if indeed the land was privately owned the Defendant would have stopped them from planting the tea bushes long time ago. That the Plaintiffs' ought to have been cited in the Kangema succession case.

45. In her submissions the Defendant contended that she was the only child in the lineage of her grandmother Hannah Wanjiru her mother having been her grandmother's only child who passed on in 1995 therefore she is entitled to succeed her grandmother's estate. She dismisses the narrative that her grandfather was not available at the time when the demarcation was done because he got two other parcels of land registered in his name around the same time being parcel numbers LOC 19/KIAWAMBOGO /540and 211.

46. She submitted that the kikuyu customary practice was to register the land in the name of the eldest son and not in the name of the wife in the event that the heads of the home were absent. It was her contention that her grandmother had privately acquired the suit land and had it registered in her name. She contends that the issue of Plaintiff plucking and tending to the tea bushes does not create an ownership right under trust.

47. She asserts that she rightfully acquired the title by way of transmission through a legal process and urged the Court to declare that she is the rightful owner of the suit land. That the other wives of her grandfather also had their own private personal parcels of land, which have been inherited by their families. She urged the Court to grant her counterclaim as prayed.

48. The following issues are apt for determination;

- a. Whether the Plaintiffs proved the existence of customary trust?
- b. Whether the Defendant is entitled to the prayers sought in the counterclaim
- c. Who meets the cost of the suit?

49. The undisputed facts are that the parties are related being from the house hold of the late Eston Maina. The Plaintiffs are the maternal uncles of the Defendant. The Defendant is the only child and daughter of the Plaintiff's sister, Muthoni. The late Eston Maina had 4 wives. Muthoni was the only child of his 1st wife Hannah Wanjiru. All the 4 wives of the late Eston Maina are deceased with the exception of Beatrice Wangari Maina, PW5 who is alive.

50. The Plaintiffs case is that the suit land is family land encumbered with a customary trust. That though the land was registered in the name of Hannah Wanjiru, she held it in trust for the family of the late Eston Maina. The Defendant on the other hand contends that the suit land was purchased by Hannah Wanjiru and was not part of the estate of the late Eston Maina. That it was neither family nor clan land. It is her case that the land is not trust land and the same devolved to her legally being the only heir of her late grandmother.

51. Customary trust is one of the ways in which one can acquire land in Kenya. Customary trust is provided for in Section 28 (b) of the Land Registration Act. It states that unless the contrary is expressed in the register, all registered land shall be subject to the disclosed overriding interests as may from time to time subsists and affect the land without it being noted on the register. One of the disclosed overriding interests under section 28(b) is customary trust.

52. The issue of customary trust was settled by the Supreme Court in the case of **Isack Kieba M'Inanga Vs Isaaya Theuri M'Lintari & Another SCoK No 10 of 2015** were apex Court Justices held that;

“...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; (c) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and, (d) The claim is directed against the registered proprietor who is a member of the family, clan or group.

53. In the case of **Peter Gitonga V Francis Maingi M'Ikiara Meru HCCC NO. 146 of 2000-** it was held that:-

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 mine].

54. Going by the decision of the SCOCK referred to hereabove, it follows that evidence must be led that points to the root source of the land. In arriving to a verdict the Court will determine how the land was first registered, whether the land was community family or privately owned before registration, whether the land was inherited or passed down from the family lineage of the Defendant.

55. It was the Plaintiff's case that the suit land was family land that was initially occupied by the Plaintiffs' father and his four wives along with his siblings have been passed on to him from their grandfather who died in 1924 and was buried on the suit land in which his grave stands to date.

56. Further that at the time of demarcation and registration of the suit land, the Plaintiffs' father was away from home and all his family members being his wives and children along with the family agreed to have the suit land registered in the name of the 1st wife namely Hannah Wanjiru to hold in trust for his husband's family .

57. The Plaintiffs' witnesses refuted the narrative of the Defendant's that her grandmother had purchased the suit land using proceeds from the sale of cattle and her hotel business. A fact that her co-wife PW5 categorically denied that Hannah could not have raised that kind of money. The alleged sale was not supported by documentary evidence by the Defendants neither did she adduce credible evidence around the sale the Defendant claims to only have been informed as much by her late grandmother.

58. In fact the Defendants own witnesses were unsure how the land was acquired by Hannah Wanjiru. DW2 stated in evidence as follows;

“I know the parcel of land No 19/KIAWAMBOGO/204. It belonged to Hannah Wanjiru. I do not know how she acquired it. She may have purchased it.”

DW3 on the other hand stated as follows;

“the suit land is parcel 19/KIAWAMBOGO /204. I do not know the full description of the land. I do not know the acreage. It belongs to Hannah Wanjiru Maina. I do not know how she acquired it.”

59. The explanation given by the Plaintiffs' witnesses as the reason for registering the suit land in the name of the Hannah sounds probable.

60. The Plaintiffs' witnesses led evidence to indeed show that the suit land was for all purposes family and ancestral land before its registration. The PW5 testifies that when she got married in 1948 they lived with her husband on the suit land along with her other three co-wives and their children together with the siblings of her husband. That the land belonged to her husband's father which clearly shows it was indeed family land. DW2 led unchallenged evidence that he assisted Eston to identify the family fragments which were consolidated into the

suit land. That some of the fragments belonged to Eston's father while he purchased some of them to comprise the suit land.

61. PW2, PW3 and PW5 testified that part of the fragments of land that were consolidated into the suit land was land that belonged to Eston Maina's land which goes to show that the suit land was ancestral land that was passed down to Eston Maina's lineage.

62. How did Hannah acquire the suit land? The Defendant's contended that the suit land was purchased by Hannah. She however did not lead any evidence to support this. There was no documentary evidence adduced by the Defendant in Court. Her two witnesses lead evidence that they had no knowledge how Hannah acquired the suit land. In any event the Defendant conceded that she was not present when the land was purchased by her grandmother, having been born in 1962. In the absence of evidence to support purchase, it is highly probable that she did not buy the suit land.

63. From the evidence adduced in Court by PW1-PW4, the said Eston relocated his wives to Nyahururu in the early 1960s and continued to manage the tea farm for many years. If indeed the land was purchased by Hannah Wanjiru, why would she relocate to live in the family land in Nyahururu. Uncontroverted evidence was led that she did not plant any tea on the land meaning that she had no control and use of the land to denote a private proprietorship. It is stated in evidence that the late Eston farmed the land. It is the view of the Court that the suit land was family land.

64. It is the finding of the Court that the Plaintiff has proved the existence of customary trust on a balance of probabilities.

65. Having made a finding that the suit land is encumbered with a customary trust, the 2nd issue is determined in the negative.

66. In the upshot the Plaintiffs case succeeds and I make the following final orders;

a. Plaintiff's suit succeeds.

b. The Counterclaim is dismissed.

c. It is hereby declared that the parcel No LOC 19/KIAWAMBOGO/204 was held by Hannah Wanjiru Maina in trust for the family of the estate of Eston Maina Kimere (deceased).

d. The certificate of title for LR LOC 19/KIAWAMBOGO/204 issued on 14th August 2017 in the name of Damaris Wanjiru Maina is encumbered by trust.

e. The trust be and is hereby determined and the title in the name of Damaris Wanjiru Maina is cancelled and reverted to Hannah Wanjiru Maina.

f. Parties being related, I order that each meets the cost of the suit.

67. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 7TH DAY OF NOVEMBER 2019

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

1st Plaintiff – Absent

2nd Plaintiff – Absent

3rd Plaintiff – Present in person

Mshila HB for Muchiri Wa Gathoni for the Defendant

Ms Irene and Ms Njeri, Court Assistants