



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C NO. 97 OF 2017**

**EUSTACE MUNGAI MATHIGU - PLAINTIFF**

**VS**

**MWAURA MATHIGU - 1<sup>ST</sup> DEFENDANT**

**LOICE WANGUI GACHUCHA - 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed suit against the Defendants seeking the following Orders;

- a) An Order for cancellation of the Defendants' title deeds for land parcel numbers Loc.4/Muruka//1484 and 1483 and the same do revert to the old title deed LOC. 4/MURUKA/363.
- b) A declaration that land parcel number LOC.4/MURUKA/363 was registered in the names of the 1<sup>st</sup> Defendant to hold the same in trust for himself and his brothers and the same be shared out equally amongst Mwaura Mathigu, Eustace Mungai Mathigu and Mary Njeri Gitau.
- c) Costs of this suit and interest at Court rates.
- d) Any other or further relief that this Honourable Court may deem fit to grant.

2. The Plaintiff and the 1<sup>st</sup> Defendant are brothers. It is his case that Land Ref. Loc.4/Muruka/363 is clan land which was registered in the name of the 1<sup>st</sup> Defendant to hold in trust for himself, the Plaintiff and his brothers namely Eustace Mungai Mathigu, Pius Waihenya Mathigu (deceased) and Gitu Mathigu deceased but survived by his wife Mary Njeri Gitu.

3. The Plaintiff avers that the 1<sup>st</sup> Defendant has without their knowledge and consent subdivided the suit land into 2 to wit: Loc.4/Muruka/1483 & 1484 and further sold Loc.4/Muruka/1484 to the 2<sup>nd</sup> Defendant without their knowledge. He has pleaded 3 counts of fraud by the 1<sup>st</sup> Defendant. Further he avers that the Plaintiff, 1<sup>st</sup> Defendant and the other 2 brothers are entitled to equal share of the original Loc.4/Muruka/363.

4. In his defence the 1<sup>st</sup> Defendant denied the allegations in the plaint and urged the Court to dismiss the Plaintiff's claims.

5. The 2<sup>nd</sup> Defendant in her defence stated that she lawfully purchased the suit property LR Loc.4/Muruka/1484 from the 1<sup>st</sup> Defendant after carrying out due diligence and satisfying herself that the

said 1<sup>st</sup> Defendant was the legal owner.

6. The Plaintiff testified at the hearing and admitted that the 1<sup>st</sup> Defendant is his brother. He averred that the original suit property Loc.4/Muruka/363 was family land inherited from their father. He stated that his father had two wives and their mother was the 2<sup>nd</sup> wife (house). That it is the tradition and custom of the Akikuyu to have the land registered in the name of the eldest son in the family as the proprietor of the land to hold in trust for himself and his siblings. That their mother bore 4 sons namely: Eustace Mungai, Pius Waihenya – deceased and left no beneficiaries, Gitu Mathigu – deceased but survived by Mary Njeri Gitu and Mwaura Mathigu.

7. He stated that despite many requests to have the land divided amongst themselves, the 1<sup>st</sup> Defendant has refused to cooperate. That without their knowledge and consent the 1<sup>st</sup> Defendant caused the suit property Loc.4/Muruka/363 to be subdivided into 2 portions in 2014 to wit: Loc.4/Muruka/1483 & 1484. That the action of selling the land to the 2<sup>nd</sup> Defendant was fraudulent as it deprived them of their entitlement in the suit property which was held in trust. That they all reside on land and depend on it for their livelihood. Further that they have buried their relatives on the suit land. He averred that the 2<sup>nd</sup> Defendant does not live nor farm on the suit land.

8. On cross-examination the Plaintiff clarified that the family land is 4.8 acres. That the land should be subdivided into 3 amongst; Plaintiff, 1<sup>st</sup> Defendant and Mary Njeri Gitu, the wife of the late Gitu Mathigu. That Pius Waihenya died and left no beneficiaries. That effectively the 3 will get 1.6 acres each.

9. The Plaintiff further stated that though the title was registered in the name of the 1<sup>st</sup> Defendant, he held it in trust on his behalf and that of the 3 siblings. That though he has filed suit in his name, he is seeking a declaration that the trust be dissolved and the land subdivided equally amongst himself and 2 siblings, the 1<sup>st</sup> Defendant included.

10. Further the Plaintiff averred that the 1<sup>st</sup> Defendant sold the land secretly to the 2<sup>nd</sup> Defendant without their knowledge and consent.

11. Mary Njeri Gitu (PW2) testified that she is the wife of Gitu Mathigu, deceased. That the Plaintiff and the 1<sup>st</sup> Defendant are his brothers in Law. That she resides on suit land. She averred that the suit land is registered in the name of the 1<sup>st</sup> Defendant to hold in trust for himself and his siblings including her deceased husband. That she learnt that the land had been subdivided secretly and sold to the 2<sup>nd</sup> Defendant.

12. On Cross-examination PW 2 stated that she was informed by her late husband that earlier the land had been subdivided into 4 portions on instructions of her mother in Law. She stated that the 1<sup>st</sup> Defendant took a larger portion and removed the boundary of the land. Asked to state when this happened, she responded that she could not remember. She stated that the suit land is 4.8 acres and 0.2 acres was sold to the 2<sup>nd</sup> Defendant. That the suit land is family land and was registered in the name of the Defendant to hold in trust.

13. PW 3 – Cyrus Ndungu Kinyanjui testified and stated “that his father Mathigu Wa Regemi had two wives. His mother was the 1<sup>st</sup> wife and the mother of the Plaintiff and 1<sup>st</sup> Defendant was the 2<sup>nd</sup> wife. He averred that during demarcation of the lands, in the 1960s, it was the custom and practice to register land in the name of the 1<sup>st</sup> son of the family. That the suit property was registered in the name of the 1<sup>st</sup> Defendant to hold in trust for himself and his 3 other siblings. That the Kigumo LDT determined that the land was family land and ruled that it should be divided into 4 equal portions. He stated that the late Gitu Mathigu’s wife Mary Njeri has lived on the suit land since 1973 and has 7 children and should not be disinherited from the family land.” That the 1<sup>st</sup> Defendant’s action of subdividing the land and selling a portion to the 2<sup>nd</sup> Defendant without the consent of his siblings is illegal and the sale should be revoked.

14. The 1<sup>st</sup> Defendant testified and stated that he was the registered owner of the original land Loc.4/Muruka/363 having bought the same in 1964 from the following: 0.5 acres from Waweru Mungai; 1.0 acres from Kiarie Wandai; 1.0 acres from Muchonjo; 1.0 acres from Mungai and 0.5 acres from Kimani wa Mwaura .That all the above sellers are deceased and that he bought the pieces of land in cash and therefore has no documents to support the purchase. He did not produce any documents in Court in support of his averments. The 1<sup>st</sup> Defendant confirmed that he subdivided the land into 2 parcels Loc.4/Muruka/1483 & 1484 and sold the Loc.4/Muruka/1484 to the 2<sup>nd</sup> Defendant. That the remainder portion LR No. Loc.4/Muruka/1483 belongs to him absolutely and that at no time did he hold the land in trust.

15. DW2, the 2<sup>nd</sup> Defendant testified that she bought LR Loc.4/Muruka/1483 which is a subdivision of the original Loc.4/Muruka/363 from the 1<sup>st</sup> Defendant after carrying out due diligence and satisfying herself that the land was registered in the 1<sup>st</sup> Defendant's name. She produced a copy of Agreement of sale, title Loc.4/Muruka/1484, consent of Land Control Board to transfer and an official search of LR No Loc.4/Muruka/363. Further she averred that she is a purchaser for value without notice and urged the Court not to cancel her title.

16. On Cross-examination the 2<sup>nd</sup> Defendant stated that she inspected the portion 0.2 acres of the land that she was buying as that is where her interest was. She stated that the portion is next to the school and she is able to point it out on the ground. On Re-examination she stated that there was an incomplete house on the suit land which she did not get to know the owner. That todate nobody has challenged the transaction. She also confirmed that she does not reside on the suit land.

17. Parties were directed to file written submissions but only the Plaintiff did while the Defendants did not.

18. I have considered the pleadings, the evidence adduced at the hearing and the written submissions available and the issues that commend themselves to the Court for determination as follows;- whether the 1<sup>st</sup> Defendant acquired the land by purchase; whether the suit land is family property; whether the 2<sup>nd</sup> Defendant acquired a good title to the suit land; who pays the costs of the suit.

19. The 1<sup>st</sup> Defendant in his evidence and pleadings states that the suit land was acquired by purchase. He has listed the parcels of land that he purchased as follows; 0.5 acres from Waweru Mungai; 1.0 acres from Kiarie Wandai; 1.0 acres from Muchonjo; 1.0 acres from Mungai and 0.5 acres from Kimani wa Mwaura. The total acreage of the land is 4.0 acres. The suit land is 4.8 acres. These do not consistently become the land purchased by the 1<sup>st</sup> Defendant in comparison with the suit land. The 1<sup>st</sup> Defendant did not produce any agreement for sale or purchase of the land he alleges to have purchased so as to make up the suit land. For the 1<sup>st</sup> Defendant to succeed in his allegations that he bought some parcels of land which could allegedly form part of the suit land, he should bring further evidence on the following matters; Agreement for sale and purchase duly signed by the 1<sup>st</sup> Defendant and the alleged sellers, witnesses to same as well as evidence of payment made pursuant to the Sale Agreement by the 1<sup>st</sup> Defendant.

20. In the 1<sup>st</sup> Defendants case these formalities were not produced in Court by way of any evidence. The 1<sup>st</sup> Defendant testified that he bought the lands in cash without disclosing the purchase price. In consideration of this matter in totality the Court is not satisfied that the 1<sup>st</sup> Defendant made any financial contribution to the acquisition of Loc.4/Muruka/363.

21. Trust is a matter of evidence and the Court will not presume it except in cases of absolute necessity – **MBOTHU VS WAITITU 1986 K.L.R 171**. As to whether the suit land is family property, Plaintiff and two others namely: (PW 2 + PW 3) led evidence to say that Loc.4/Muruka/363 is family land registered in the name of 1<sup>st</sup> Defendant pursuant to Kikuyu Customary Practices as the 1<sup>st</sup> son of his mother's house on his own behalf and that of other beneficiaries . As at the time of the suit the beneficiaries of the suit land going by the evidence would be 1<sup>st</sup> Defendant, Plaintiff; Mary Njeri Gitu. The 4<sup>th</sup> beneficiary of the

suit land died before the suit commenced. So much so that the suit land would devolve to the 3 surviving beneficiaries. The 1<sup>st</sup> Defendant did not deny the Kikuyu Customary practice of the 1<sup>st</sup> born son being registered to hold in trust for himself and other family members.

22. The evidence of Cyrus Ndungu was more persuasive in so far as the practice of Kikuyu Customary trust is carried. The same was not controverted by the 1<sup>st</sup> defendant. He stated that he is the step brother of the plaintiff and the 1<sup>st</sup> Defendant, their father one Mathigu Wa Regemi was married two wives. He was born of the 1<sup>st</sup> wife and the 1<sup>st</sup> defendant was the 1<sup>st</sup> born son of the 2<sup>nd</sup> wife (house). That the land was registered in the name of the 1<sup>st</sup> defendant to hold on behalf of the 2<sup>nd</sup> wife's house as the 1<sup>st</sup> born son in accordance with the Kikuyu customs at the time. That the land is family land.

23. In the evidence of the Plaintiff the 1<sup>st</sup> Defendant and Mary Njeri it is acknowledged that they are live and reside on the larger land comprising the suit land. Again the evidence of the Plaintiff became more persuasive and consistent when read together with the evidence of Cyrus Kinyanjui. This is so because the Plaintiff stated that they have buried relatives on the suit land. The 1<sup>st</sup> Defendant did not controvert this evidence and the conclusion that the Court can arrive at is that it is because the land belonged to the family.

24. In all these circumstances the Court finds that the 1<sup>st</sup> Defendant held the title to the suit land Loc.4/Muruka/363 in trust for himself and his siblings who are beneficiaries in family and he was, therefore, not entitled to subdivide the land into 2 plots namely Loc.4/Muruka/1483 & 1484 without concurrence of the beneficiaries.

25. In the case of **Kanyi vs Muthiora (1984) KLR (C.A)**, it was held that registration of land in the name of one proprietor under the Registered Land Act does not extinguish rights under Kikuyu Customary Law and neither does it relieve the proprietor of his duties or obligations as a trustee. The Court further stated that customary right is a matter of fact and must be proved by evidence. See **Wambugi v Kimani (1992) 2 KAR 58**. Further in **Njuguna –vs- Njuguna (2008) 1 KLR 889**, the Court observed that under Kikuyu customary law the eldest son inherits land to hold in trust for himself and the other heirs.

26. Section 28 (b) of the Land Registered Act No 3 of 2012 states that 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—

(a) .....

(b) trusts including customary trusts;

The 1<sup>st</sup> and 2<sup>nd</sup> Defendant proceeded to transact by way of sale and purchase a portion of Loc.4/Muruka/363 comprising Land Ref. Loc.4/Muruka/1484 measuring 0.080 Ha. This parcel of land Loc.4/Muruka/1484 is a portion of Loc.4/Muruka/363 which the Court has found is family land held by the 1<sup>st</sup> Defendant in trust for himself and others. Going by the decision in **Mathiora case supra**, and Section 28(b) of Land Registration Act the 2<sup>nd</sup> Defendant bought land that was encumbered by the undischarged rights of the Plaintiff and others who were beneficiaries of Loc.4/Muruka/363 held in trust by 1<sup>st</sup> Defendant for himself and his siblings. The 2<sup>nd</sup> Defendant did not acquire a good title. Her claim that she is a bonafide purchaser for value without notice fails in the face of the holding in this suit. She has alluded in her defence that in the alternative, should the title she is holding be cancelled, she would still be entitled to a share of the 1<sup>st</sup> Defendant's entitlement after the dissolution of the trust. Further her admission that the land she bought had an unfinished house, supports the fact that the land after all was not free from unregistered encumbrances such as possessionary and trust rights.

27. The costs follow the event and in this case the Defendants are condemned to pay costs to the Plaintiff.

28. The final orders are;

- a) Titles Nos 1484 & Loc.4/Muruka/1483 are hereby cancelled and the same revert to title deed No. Loc.4/Muruka/363.
- b) It is hereby declared that the Loc.4/Muruka/363 was registered in the name of 1<sup>st</sup> Defendant to hold in trust for himself and his brothers, which trust is hereby dissolved and Loc.4/Muruka/363 to be shared out equally amongst Plaintiff, 1<sup>st</sup> Defendant and Mary Njeri Gitu.
- c) The 1<sup>st</sup> and 2<sup>nd</sup> Defendant shall pay the costs of the suit to the Plaintiff.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 25<sup>TH</sup> DAY OF JANUARY 2018.**

**J G KEMEI**

**JUDGE**