



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 541 OF 2013

JULIUS MUTURI MACHARIA.....1ST PLAINTIFF

SALOME WAMBUI MICHAEL 2ND PLAINTIFF

RUTH WANGUI NJUGUNA3RD PLAINTIFF

ISAAC MACHARIA NGARANGE 4TH PLAINTIFF

VERSUS

SAMUEL JOSEPH K. MACHARIADEFENDANT

JUDGMENT

Parties and pleadings

1. The plaintiffs and the defendant herein are brothers and sisters. The plaintiffs filed this case on 23rd September 2013 pursuant to plaint dated 20th September 2013. They aver that the defendant who is the registered proprietor of **Naivasha/Maraigushu Block 7/277** and **Naivasha/Maraigushu Block 7/662** (the suit properties) holds the said properties in trust for them and their siblings. They thus seek judgment against the defendant for:

i. A declaration that the Defendant has been registered as the owner of Title Numbers Naivasha/Maraigushu Block 7/277 and Naivasha/Maraigushu Block 7/662 for his benefit and in trust for the plaintiffs and other family members.

ii. A permanent injunction restraining the defendant by himself, his employees, agents, servants etc. from quarrying, leasing, charging, or selling Title Numbers Naivasha/Maraigushu Block 7/277 and Naivasha/Maraigushu Block 7/662.

iii. The defendant be ordered to transfer Title Number Naivasha/Maraigushu Block 7/277 and title number Naivasha/Maraigushu Block 7/662 into the names of Samuel Joseph K. Macharia, Julius Muturi Macharia and Isaac Macharia Ngarange to hold in trust for other family members and in default the Deputy Registrar of this honourable court to sign the transfer forms on his behalf.

iv. Costs of this suit.

v. Any other relief that this honourable court may deem fit to grant.

2. The defendant responded to the plaint through statement of defence dated 22nd October 2013 and filed in court on the same date. In it, he denies the plaintiffs' allegations and states that the suit properties belong to him absolutely. He urges the court to dismiss the case with costs.

Evidence in support of plaintiffs' case

3. In support of the plaintiffs' case, Julius Muturi Macharia; the 1st plaintiff, testified as PW1 on his own behalf and on behalf of the other plaintiffs. He told the court in his evidence in chief that the parties to this case are the sons and daughters of Paul Macharia Ngarange (deceased) who passed away on 23rd March 1997. The deceased bought shares in North Karati Co-operative Society Ltd in 1964 in the name of Joel Ngugi, PW1's elder brother. The deceased did so because he had 6 wives and many children. The deceased got information that the society was selling shares. Due to earlier differences with the society's officials, the officials refused to deal with him but he managed to acquire shares for PW1's mother which was bought in Joel's name. The share was registered in Joel's name because the deceased wanted it to be for Phyllis Wanjiru Macharia, the mother of the parties to this case. Joel was registered as trustee for the family. PW1 stated that he was told this by both his mother and father.

4. He further testified that the society no longer exists. It was dissolved after the people completed paying for their shares but some of its records of the society were kept by the area chief. PW1 went to the chief and obtained a certified copy of share certificate for North Karati Co-operative Society Ltd which was issued on 1st January 1972 in the name of Joel Ngugi. He produced it as an exhibit. He also obtained a certified copy of the share register which he produced as an exhibit. The share was converted into two plots, one for residential and the other for farming. The residential plot is **Naivasha/Maraigushu Block 7/662** measuring 0.1809 hectares and the farming one is **Naivasha/Maraigushu Block 7/277** measuring 0.708 hectares. PW1 also obtained a document at the Chief's office confirming the allocation. The name of Joel does not appear in the document. Instead, the allottee for both plots appears as Samuel Joseph K. Macharia. PW1 also went to Naivasha Land Registry and obtained certified copies of the green cards for the two plots. He produced them as exhibits. They show that Joseph K. Macharia became the registered owner of both plots on 23rd January 1989. He remains the owner up to now.

5. PW1 added that the change of ownership by Joel to Samuel was done without the plaintiffs' knowledge and that they only came to know of it when a neighbour told him on 28th November 2012 that the two plots were on sale. On learning this he called all his brothers and sisters to meet at the plot. They met on 2nd February 2013 and agreed that the land should not be sold but should be retained and transferred to the family in the names of the four brothers namely Joel Ngugi Macharia, Julius Muturi Macharia, Joseph Samuel Macharia and Isaac Macharia Ngarange. It was agreed that the title documents should be handed over to the parties' elder brother Joel Ngugi Macharia so that he gives it to PW1 to start the process. Joseph Samuel declined to hand over the title deeds.

6. According to PW1, the land is family land because it was bought by their deceased father being the share of their mother. She lived on parcel number 662 from 1964 to September 2001 when she passed away. There is a permanent house on the plot which the parties to this case built for her. She was buried on the plot. Other family members buried there include Esther Nyambura Macharia who was a sister to the parties to this case and who passed away in 1973, the wife of Joseph Samuel Macharia who was buried there in 1985 as well as two children of Joseph Samuel Macharia.

7. He further testified that their father had another plot in Murang'a which was divided among his wives. PW1's mother's share was again registered in their elder brother Joel Ngugi Macharia's name as trust land. Consequently, Joel could not exchange the Murang'a land with the suit properties. He therefore urged the court that the suit properties be transferred to the four brothers namely Joel, Julius, Joseph and Isaac to hold jointly as trustees of the family.

8. Under cross examination, he stated that the suit properties were bought by their deceased father and that he PW1, Joel and all brothers helped their mother to finalize the payment of the plot. The receipts were issued in Joel's name because it was his name that was in the share register.

9. The plaintiffs' case was then closed.

Evidence in support of defendant's case

10. For defence case, the defendant testified as DW1 and called two other witnesses. DW1 stated in his evidence in chief that he is the registered owner of the suit properties. He adopted his witness statement which was filed in this matter on 5th November 2013 as part of his evidence in chief. He stated that his mother told him that she would like him to be the owner of the Naivasha land and Joel Ngugi Macharia to exchange Joel's plot with him so that DW1 takes Joel's land in Naivasha while Joel takes DW1's $\frac{3}{4}$ acre share of the ancestral land in Murang'a. Joel, agreed. The 1st and 4th plaintiffs were aware of this arrangement. Consequently, around 1988 Joel went to North Karati Co-operative Society Ltd and instructed the society to transfer Joel's share to DW1. The change was effected and DW1 was given two title deeds on 23rd January 1989. The first title was for **Naivasha/Maraigushu Block 7/662** measuring approximately 0.1809 hectares while the second one was for **Naivasha/Maraigushu Block 7/277** measuring approximately 0.7038 hectares. He constructed a four-bedroom house and a big water tank of 15 feet in diameter. He completed construction of the house in 1995 and the only person who assisted him during construction was his wife. The 4th plaintiff requested him to allow him plaster the house so that the parties' mother could occupy it and DW1 agreed.

11. He added that from the time he became the registered owner in 1989 to 2001 when their mother passed away, twelve years had passed. Nobody in the family protested about his ownership of the land when their mother and father were alive yet they were quite aware that he owned the land. He gave an example of a time when his first born daughter was admitted in high school but he did not have enough money for school fees. He requested the 4th plaintiff to pay the fees for him. The 4th plaintiff agreed but on condition that DW1 deposits his title deed with Mrs. Magdalene Nyokabi Waiganjo, a family member who is a lawyer, as a guarantee. DW1 deposited the title for **Naivasha/Maraigushu Block 7/662**. The 4th plaintiff withdrew the financing after two years and DW1 retrieved the title from the lawyer.

12. Joel Ngugi Macharia testified as DW2. He told the court that the parties' father Paul Macharia Ngarange was working for a farmer called Major Denning. Their father was arrested during the emergency period and while he was in custody the parties' mother Peris Tabitha Wanjiru Macharia took over his job at the farm. He was set free in 1955 and was relocated to Murang'a by the colonial government. When their mother became pregnant and stopped working, she convinced the farmer to allow DW2 to take over her job. His salary used to be sent by the farmer to his father. When DW2 visited his uncle at North Karati, he learnt that the farm where the uncle was working was being bought by way of shares. He therefore asked his father to give him the money he had kept for him so that he could join the co-operative. His father registered him as a member in 1964 at a registration fee of Ksh.30/=. From 1966, he started paying for the shares. He paid until he finished.

13. He added that because of their mother's and the defendant's religious beliefs, the two decided to live near each other and near their church. Therefore, since the defendant had a share in the family's Murang'a plot, the defendant and the mother asked DW2 that he leaves for the defendant the Karati plots and in exchange the defendant gives DW2 his share of the Murang'a plot. DW2 agreed and since their father had not yet shared out the Murang'a plot, DW2 transferred his North Karati shares to the defendant. The defendant later processed the shares and obtained title deeds.

14. DW2 further testified that their father shared out the Murang'a plot in 1985 using the formula of allocating to each wife's house a portion. The parties' mother therefore got a share of the Murang'a plot though the plot was still in the parties' father's name. On 17th December 1990, the parties' mother congregated DW2 and his brothers at DW2's home in Murang'a and told them to share the Murang'a plot among DW2 and 1st plaintiff, defendant and 4th plaintiff. At the said meeting, DW2 was given the defendant's share in exchange for the North Karati property. DW2 also bought 1st and 4th plaintiffs' share of the Murang'a plot. Ultimately, the parties' father transferred the whole parcel to DW2. He added that he **could not have taken** and used the Murang'a plot all these years if there was no such agreement and that since his father had six wives, there was no other reason why he would transfer the Murang'a plot to

DW2 only.

15. Finally, the defendant called Abraham Ngugi Macharia who testified as DW3. He stated that he is a brother of the defendant and the plaintiffs but from a different mother. He reiterated that the Naivasha plots belong to the defendant and that nobody had complained about defendant's ownership while their parents were alive. The defendant then closed defence case.

Submissions

16. Parties filed written submissions. The defendant filed initial submissions on 11th September 2017 and supplementary submissions on 18th October 2017 while the plaintiffs filed submissions on 27th September 2017.

17. The plaintiffs submitted that the defendant holds the suit properties as a trustee of the plaintiffs and in support of this contention they referred the court to evidence that the initial money for the purchase of the share at North Karati Farmers' Co-operative was paid by Paul Macharia Ngarange (deceased), father to the parties to this case. They further submitted that this contention is supported by the fact that all the parties to this case were brought up on the suit properties and that Phyllis Wanjiru Macharia, the mother of the parties lived on the suit properties from 1964 to her demise in 2001. They also referred the court to evidence that the permanent house on the suit properties though built by the defendant was plastered by the 4th plaintiff. Further, they referred to the evidence that the parties' mother and three other family members are buried on the suit properties.

18. The plaintiffs submitted that there exists an implied or resulting trust under customary law. For a definition of this kind of trust, they cited **Snell's Principles of Equity** 12th Edition page 172 wherein the author states:

“An implied trust is a trust founded upon the unexpressed but presumed intention of the settlor. Apart from mutual wills, such trusts are also “resulting” because the beneficial interest in the property comes back (or ‘results’) to the person who provided the property, or to his estate. Some writers make the term “implied” trust include all trusts which are not express, and divide implies trusts into (i) resulting, i.e. dependent or the purposed intention, and (ii) constructive, i.e. arising by operation of law independently of intention. The difference is purely one of terminology.”

19. The plaintiffs also cited the cases of **Joseph Githinji Gathimba –vs- Charles Kingori Gathimba [2001] eKLR** and **James Ndungu Kiarie –vs- Geoffrey Mwangi Kinuthia & another [2012] eKLR** as well as the provisions of **Section 28 of Registered Land Act** (repealed) and **Section 25 of Land Registration Act**.

20. The plaintiffs further submitted that the defendant has carried out quarrying on Naivasha/Maraigushu Block 7/662 and in this regard they referred the court to photographs which had been produced in evidence. In conclusion, the plaintiffs urged the court to grant judgment in terms of prayers 1, 2 and 3 of the plaint.

21. The defendant submitted that the titles of the suit properties were issued to him in 1989 with the full knowledge of all the family members and he has been in peaceful occupation and lived with his mother until her demise in the year 2001. He added that if indeed the property was being held in trust for other siblings, the siblings would have raised an issue with the defendant's ownership when the titles were issued in the defendant's name and not in the name of Joel Ngugi. Given that the defendant was issued the titles for the suit properties when both their parents were alive, the plaintiffs would have complained then so that ownership issues would have been resolved by their parents.

22. Citing the provisions of **section 26 (1)** of the **Land Registration Act**, the defendant further submitted that the titles for the suit properties were issued to him in 1989 and he is therefore the absolute and

indefensible owner. The plaintiffs cannot claim that a customary trust had arisen as none of the plaintiffs or any of the defendant's other siblings have possessory or occupational interests over the suit properties, which could be protected as an overriding interest, by virtue of Section 28 of the Land Registration Act. They referred the court to the cases of **Esiroyo v. Esiroyo, [1973] E.A 388**, **Obiero v. Obiero, [1972] E.A 227**; **John Peter Mureithi & others v. The Attorney General 7 others** and **Mbui Mukangu v. Gerald Mutwiri Mbui, C.A No. 281 of 2000**.

23. On the issue of whether or not he holds the suit properties in trust for the plaintiffs, the defendant submitted that there is no customary trust over the suit properties since the properties were acquired by Joel Ngugi Macharia and later the defendant. As such, the issue of customary trust therefore does not arise. Accordingly, he urged the court to dismiss the plaintiff's case with costs.

Analysis and determination

24. I have carefully considered the pleadings herein, the evidence and the submissions. There is no dispute that the defendant is the registered proprietor of **Naivasha/Maraigushu Block 7/277** and **Naivasha/Maraigushu Block 7/662** (the suit properties) and that the properties were acquired by way of purchase of shares from North Karati Farmers Co-operative Society through the efforts of Paul Macharia Ngarange, the father of the parties herein. He passed away on 23rd March 1997. The shares were registered in the name of Joel Ngugi Macharia, a brother to the parties to this suit. Subsequently, the shares were transferred to the defendant and this led to titles being issued in the defendant's name. The major point of departure is the circumstances under which the shares were acquired, registered in the name of Joel Ngugi Macharia and later transferred to the defendant.

25. The following issues emerge for determination:

- i. Whether the defendant holds the suit properties in trust for the plaintiffs
- ii. Whether the plaintiffs are entitled to the reliefs sought

Whether the defendant holds the suit properties in trust for the plaintiffs

26. On the first issue above, as to whether the defendant holds the suit properties in trust for the plaintiffs, it is important to note from the onset that whether or not a trust exists is a matter of evidence which therefore requires proof. The only exception to this general rule would be a situation where it is necessary to presume a trust out of absolute necessity. In the present case, the court has not been invited to find that there is absolute necessity to presume a trust. In **Dorcas Indombi Wasike v Benson Wamalwa Khisa & another [2010] eKLR** the Court of Appeal stated:

The appellant's counsel, Mr Amolo, cited several authorities and a careful reading of all those authorities reveal one thing. Whether or not a trust exists is a matter of evidence. Those authorities, and in particular Mbothu & 8 Others vs Waitimu & 11 Others [1986] KLR 171, are clear that: -

"The law never implies, the Court never presumes a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied."

27. As a registered proprietor, the defendant is entitled to the full benefits conferred by **Section 25** of the **Land Registration Act** which provides as follows:

25. Rights of a proprietor

(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.

28. Section 28 of the Act which is referred to above provides:

28. Overriding interests

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) deleted by Act No. 28 of 2016, s. 11(a);

(b) trusts including customary trusts;

29. It follows therefore that trusts are recognised under **section 28** of the Act as an overriding interest which does not require registration. The plaintiffs maintain in their submissions that there exists an implied or resulting trust under customary law and in support of this contention they referred the court to evidence that the initial money for the purchase of the shares at North Karati Farmers' Co-operative was paid by their deceased father. They also urged the court to take into account the fact that all the parties to this case were brought up on the suit properties and that Phyllis Wanjiru Macharia, the mother of the parties lived on the suit properties from 1964 to her demise in 2001. They also referred the court to evidence that the permanent house on the suit properties though built by the defendant was plastered by the 4th plaintiff.

30. I suppose that by customary law the plaintiffs are referring to Kikuyu customary law since all the parties to this case are siblings and are of that community. Customary law is a question of fact that always requires proof through evidence. In **Eliud Maina Mwangi v Margaret Wanjiru Gachangi [2013] eKLR** the Court of Appeal stated:

Since this appeal revolves around a woman-to-woman marriage under Kikuyu customary law, it is opportune to consider at this stage also the legal position pertaining to proof of customary law and practices. In KIMANI VS GIKANGA, (1965) EA 735, at page 739, Duffus JA expressed himself as follows on proof of customary law:

“To summarise the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case.”

See also SAKINA SOTE KAITTANY & ANOTHER VS MARY WAMAITHA, CA NO 108 OF 1995 and ATEMO VS IMUJARO, (2003) KLR 435.....

Under section 51 of the Evidence Act, Cap 80 Laws of Kenya, opinions of persons who are likely to know of the existence of any general custom or right are admissible where the court is required to form an opinion of the existence of such custom or right. The phrase “general custom or right” is defined in section 52 (2) to include customs or rights common to any considerable class of persons.

31. The issue of customary law never came up at the trial and no evidence was led on it. It was only introduced by the plaintiffs at the submissions stage. Consequently, customary law is not available to the plaintiffs as an avenue for proving trust.

32. It is unfortunate that the issue of trust is being raised after the death of the father of the parties. He is the one who arranged for the acquisition of the shares and would have been best placed to state with authority whether or not the suit properties were meant to be held in trust for the plaintiffs. Nevertheless, I note that though the defendant became registered proprietor of the suit properties on 23rd January 1989 and though the plaintiffs had an opportunity as early as the year 2004 to confirm that the defendant was the registered proprietor when the defendant deposited title documents with the 4th plaintiff's lawyer to secure funds borrowed from the said the 4th plaintiff, they did not raise any issues about the defendant's proprietorship. It was not until the year 2012 when the plaintiffs started raising issues regarding the defendant's proprietorship, this was long after the death of the parties' father in the year 1997 and their mother in 2001.

33. Further, I note that the building on the suit properties was largely constructed by the defendant even if there were minor contributions from some of the plaintiffs on issues such as plastering. I take it that such contributions were necessitated by the fact that the parties' mother was to stay in the building and not because the plaintiffs had a stake in the ownership of the suit properties. I also find corroboration for the defendant's claim to exclusive ownership from the fact that besides the parties' mother, no immediate member of the plaintiffs' families is buried on the properties. On the other hand, the defendant buried his first wife and his two biological children on the properties. There is no evidence of any protest by the plaintiffs in regard to the defendant burying his wife and two children on the suit properties. Again, besides the defendant who constructed a big permanent house as well as a water tank on the property, none of the plaintiffs constructed any house on it. All this supports the defendant's assertion that he owns the suit property absolutely.

34. As was previously observed, whether or not a trust exists is a matter of evidence. The plaintiffs have not adduced sufficient evidence to establish existence of trust. In the circumstances, I find that the plaintiffs have not established that the suit properties are held in trust.

Whether the plaintiffs are entitled to the reliefs sought

35. The plaintiffs sought judgment for a declaration that the defendant was registered as the owner of the suit properties in trust for the plaintiffs and other family members. The plaintiffs further sought an order that judgment for defendant be ordered to transfer the suit properties into the names of the plaintiffs. In view of my finding above that there is no proof of trust, none of the prayers in the plaint can issue. The plaintiffs' case has not been established and is therefore dismissed.

36. The defendant prayed for costs. Though costs generally follow the event, the court has a discretion in the matter. I take into account that the litigation herein pits siblings against one another. So as not to fray the family bond any further, I order that each party bears own costs.

Disposal

37. In the end, the suit is hereby dismissed. Each party to bear own costs.

Dated, signed and delivered in open court at Nakuru this 22nd day of February 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms. Mathenge for the plaintiffs

Mr. Samuel Joseph K. Macharia the defendant present in person

Court Assistants: Gichaba and Lotkomoi