



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO 31 OF 2017

FRASHIA NJERI MUTHAKA.....PLAINTIFF

VS

PERIS WANJIRU KARAGU.....1ST DEFENDANT

GLADYS WANGUI PERIS.....2ND DEFENDANT

KENNETH KINUTHIA WANJIRU.....3RD DEFENDANT

ALPHAXARD KARAGU WANJIKU.....4TH DEFENDANT

JUDGMENT

1. Frashia Njeri Muthaka filed suit against the Defendants on 26.9.14 seeking the following orders;

- a) A declaration that the 1st Defendant was registered owner of Loc. 3/Gaturu/72 in trust for herself and the Plaintiff herein.
- b) A cancellation of all the resultant titles arising out of the sub division of land parcel No Loc. 3 Gaturu/72 and consequent registration thereof being titles to land Loc. 3 Gaturu/1131, 1132 and 1133 in the names of the 2nd, 3rd and 4th Defendants respectively and a declaration of them being a nullity.
- c) That the parcel of land namely Loc. 3/Gaturu/72 be subdivided into two equal portions to be shared by the Plaintiff and the 1st Defendant.
- d) Costs and interest of the suit.

2. The Plaintiff's case is that the 1st Defendant was registered owner of the suit land in trust for both of them as the suit land is family and ancestral land. That the suit land has been subdivided and registered in the names of the 2nd, 3rd and 4th Defendants. These are the children of the 1st Defendant. That the said subdivision and transfer of the suit land is fraudulent and amounts to unjust enrichment from trust property thus depriving her of her legal entitlement. She pleaded and particularized fraud on the part of the Defendants.

3. In her Defense the 1st Defendant contended that she was the absolute owner of the suit land Loc. 3 Gaturu/72. She denied any trust or fraud and asserted that the subdivision and transfer of the land to her children was done as of right. The 1st Defendant added that the land was not ancestral land and the Plaintiff has no entitlement.

The Plaintiffs case

4. The Plaintiff and the 1st Defendant are sisters, being the only children of Gladys Wangui Karagu who died in 1976. Their father Alphaxard Karagu died in 1947. It is contended that the suit land was initially in parcels belonging to the father. That during the land consolidation in 1960s caused the lands to be registered as one in the name of Gladys Wangui Karagu, the mother of the two sisters.

5. The Plaintiff contended that in 1975 their mother during a meeting between the three of them, informed them that she wished to give the title to the land. That since the 1st Defendant was educated and she (Plaintiff) being illiterate, it was agreed that the land be registered in the name of the 1st Defendant to hold in trust for both of them and that once she raised enough finances to meet the cost of transfer, she would then commence the process to transfer her portion to herself. That she contends that the land is to be shared equally between the 1st Defendant and the Plaintiff. That at that time no dispute had arisen on the land.

6. The Plaintiff stated that even during the lifetime of their mother the land had been subdivided on the ground with a boundary fence where, the 1st Defendant occupied and cultivated half share of the land on the eastern side while she was allocated the western side. That each of them developed their portion and that she did plant tea and other assorted crops on her side of the land. That the Defendants have restricted themselves to their portion of the land ever since.

7. It is her evidence that sometime in 2001 it came to her notice that the 1st Defendant was intent on selling the land prompting her to lodge a caution on the suit land on the 22.6.2001. That she reported the case to the local District Officer who referred the matter to the Land Disputes Tribunal vide case no 91 of 2001. The Land Disputes Tribunal award was granted in her favour on the 4.2.2011. Aggrieved by the decision, the 1st Defendant filed a Judicial Review Misc. Civil Appeal HCCC No. 163 of 2001 in Nyeri (JR) where the High Court held that the Land Disputes Tribunal award as granted was null and void the tribunal having been devoid of jurisdiction to determine rights in the land. The High Court in its decision issued on the 16.12.2013 reversed the decision of the Land Disputes Tribunal provoking the filing of the current suit on 24.9. 2014.

8. That in 2010 the 1st Defendant and her children approached her and informed her that they desired to reconcile and have the land surveyed to enable both of them (the Plaintiff included) to get their own share. That believing in them, she on 7.10.10 withdrew the caution registered on 26.6.2001 but later realized that she had been duped and misled as the Defendants proceeded to subdivide the original suit land in 2012 into 3 portions comprising of Loc. 3 Gaturu/1131, 1132 and 1133 and registered them in separate names of the 2nd, 3rd and 4th Defendants leaving her out. That this was deceptive, fraudulent and illegal on the part of the Defendants. Further that some of the titles have been charged to a bank to secure loan facilities. That all these actions are intended to defeat her claim in the family land.

9. PW2 – Alphaxard Karagu Muthaka testified that he is the son of the Plaintiff. That he with his late brother's wife Catherine Wangui Maina have been peacefully cultivating the western side of the suit land on the permission of the Plaintiff. This was when the 1st Defendant's children were young. That later his cultivation was interfered with by threats and intimidation from the 1st Defendant's sons which threat he reported to the local Chief. That the land is family land and his mother is entitled to half share.

10. PW3- Catherine Wangui Maina stated that she is the daughter in law of the 1st Defendant, the wife of the late Joseph Maina Muthaka, deceased. That she got married to the deceased in 1988 and she and her husband have been cultivating the land with the permission of the Plaintiff and she was interrupted by the sons of the 1st Defendant who threatened her. That the Plaintiff's advocate wrote a letter to the Defendants on 16.1.17 demanding that they desist from interfering with our quiet use and occupation of the land to avail. That she was advised by the advocate to halt the cultivation until the matter now in Court is determined. That the land is family land and the Plaintiff's portion is on the western side of the land and was in cultivation and occupation by herself and the brother in law Alphaxard Karagu Muthaka. Further that the Plaintiff is yet to construct a house on her western side. However, the Defendants have a house on their eastern side beside leasing part of their portion of the land and that the harassment and intimidation from the Defendants started in 2014. She stated that the land is family land and the Plaintiff is entitled to ½ share.

The defence case

11. The 1st Defendant filed her witness statement which the 2nd 3rd and 4th Defendants fully associated with and adopted as their evidence in the case. See their signed statement dated 2.11.15

12. She stated that the Plaintiff is her elder sister and that her mother transferred the land to her in 1975 as a gift. That she became registered as an absolute owner in 1975. That the Plaintiff was aware of the transfer and she did not raise any objection. That the transfer of the title to her name, subdivision and transfer to her children was not fraudulent, having been done openly and procedurally.

13. Further she stated that the mother transferred the land to her because she took the responsibility to care for the mother when she was aged and sickly. That her mother asked her not to get married so that she would care for her as she had only two children, the Plaintiff being the eldest having been married by then. That she was given the land in 1973 as a gift and became registered in her name in 1975.

14. She explained that the Plaintiff removed the caution she had lodged in 2001 in 2010 on her volition and denied persuading her to do so in return for a ½ share of the land. She confirmed that the subdivision took place when the case was ongoing at Nyeri. She clarified that their mother died intestate.

15. Parties elected to file written submissions however by the time of writing this judgment only the Defendants had filed.

16. The 1st Defendant reiterated her evidence in the written submissions and stated that she and the Plaintiff are the only two children of Gladys Wangui Karagu, the previous registered owner of the Loc 3/Gituru/72. That the said land was transferred to her by her mother as a gift in 1973 and became registered as such in 1975. She further denied that the Plaintiff occupied the portion of the land through her son and daughter in law and further denied that there are any tea and assorted crops on the alleged Plaintiff's portion of land. She stated that she followed all the processes in transferring the land to her children and denied any fraud. She challenged the Plaintiff to explain why her interests in the land were not registered and accordingly denied holding the land in trust for the Plaintiff. Further on paragraph 9 of her written submissions, she avers that the Plaintiff's claim for ½ share in Loc. 3 /Gituru/72 has been overtaken by events because Loc. 3 /Gituru/72 no longer exists. She as a matter of fact admitted subdividing the said Loc 3/Gituru/72 and transferring to her children, the 2nd, 3rd and 4th Defendants. She denied that she is married in Kiambu and demanded evidence. Finally, she raised her objection to the Plaintiff's sons evidence for reasons that they will not be impartial in the case.

17. Parties filed issues for determination which the Court has taken the liberty to reduce them into;

a) Whether L.R NO Loc.3/Gituru/72 is trust land.

- b) Whether the 1st Defendant held the Loc. 3/Gituru/ 72 in trust for herself and the Plaintiff.
- c) Whether the titles held by 2nd, 3rd and 4th Defendants should be cancelled.
- d) Should the land be divided equally?
- e) costs

18. As to whether the suit property is trust land, the law is now settled. The existence of a customary trust as an overriding interest in land is set out in the law. Even before the new Land Registration Act was promulgated Courts in this Country by interpretation of the relevant law being Section 30(g) of the Registered Land Act moved away to the position where customary trust in land was recognized. Section 30(g) of the then Registered Land Act, Cap 300 (now repealed) makes the following provision: -

“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) -----.
- (b) -----.
- (c) -----.
- (d) -----.
- (e) -----.
- (f) -----.

(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”.

19. In the case of **George Mbiti Kiebia & another – Vs - Isaya Theuri M’lintari & another [2014] eKLR** the Court of Appeal held;

“However, in *Mutsonga – v- Nyati, (1984) KLR 425* and also in *Kanyi – v- Muthiora, (1984) KLR 712*, it was held that the equitable doctrines of implied, constructive and resulting trusts are applicable to registered land by virtue of Section 163 of the Registered Land Act which provides for the application of the common law of England as modified by equity. In the *Mutsonga* case, the Court held that a constructive trust arose in favour of the Plaintiff’s father as the owner of the land under customary law when the land was first registered in the name of the defendant. In *Kanyi – Vs- Muthiora, (1984) KLR 712*, it was held that the registration of the land in the name of the appellant under the Registered Land Act did not extinguish the Respondent’s rights under Kikuyu customary law and neither did it relieve the appellant of her duties or obligations under Section 28 as trustee. In *Mwangi & Another – v – Mwangi, (1986) KLR 328*, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights and the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the provisions of Section 126 (1) of the Registered Land Act as to the reference to a trustee are merely permissive and not mandatory.”

20. In the Registration of Land Act Section 28 (b) customary trusts are specifically provided for as follows;

“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) Including trusts inc customary trusts;

It is clear from the above that customary trust being an overriding interest need not be noted on the register and that all registered land is subject to the overriding interests.

21. It is common ground that Loc 3 Gaturu/72 was registered in the name of Gladys Wangui Karagu. The background of this land is that the fragments owned by the father to the Plaintiff and the 1st Defendant, namely Alpharxard Karagu who died in 1947 were consolidated during demarcation in the 1960s and registered under the name of the mother to the Plaintiff and the 1st Defendant, namely Gladys Wangui Karagu. Like in the Courts referred to in paragraph 19 above, I hold that there was a constructive trust arose in favour of the Plaintiff’s father as the owner of the land under customary law when the land was first registered in the name of the Gladys Wangui Karagu, that the said Gladys Wangui Karagu held the suit land as a Trustee for herself, the Plaintiff and the 1st Defendant and that the transfer of the suit land to the 1st Defendant did not extinguish the Plaintiff’s rights under Kikuyu Customary Law. Further as at the date the suit land was subdivided and transferred to the 2nd, 3rd and 4th Defendants .The Plaintiff had acquired equitable rights in the suit land by reason of possession and/or

occupation of half share thereof which were binding on the land. Again, these rights were not extinguished by reason of the subdivision and transfer of the suit land to the 2nd, 3rd and 4th Defendants.

22. On the facts of this case the foregoing notwithstanding, the 1st defendant became registered as owner of the suit land on 5.5.1975 and consideration is indicated as gift. The mother to the Plaintiff and the 1st Defendant, namely Gladys Wangui Karagu died in 1976, by which time the 1st Defendant has become the registered owner. By dint of section 30(g) of the Registered Land Act aforesaid and the decisions of the Court of Appeal cited above, it is my finding that the suit land was subject to overriding interest such as trust, including customary trust.

23. The 1st Defendant has explained that the land was transferred to her as a gift by her mother in her lifetime. That it was in consideration of her caring for the mother in her old age/sickness. That unlike the Plaintiff she on the request of the mother did not get married. The Plaintiff stated that their mother called them and expressed her desire to transfer the land to them in equal shares. That it was then agreed between the three of them that the suit land be registered in the name of the 1st Defendant who was educated then to hold in trust for herself and the Plaintiff with an understanding that when she gets finances to process her share of the title into her name. She (Plaintiff) states that she did not go to school herself unlike her younger sister (1st Defendant). The 1st Defendant did not provide evidence of the quid pro quo for the financial assistance /care of the mother that would entitle her to a reward in the land over and above the Plaintiff. The Court finds this evidence shaky.

24. It is the evidence of the Plaintiff that the land had been physically subdivided on the ground into 2 equal portions; the 1st Defendant was in possession of ½ portion on the easterly side. She carried out her developments including building a house. The Plaintiff had possession of the westerly side. That the land was divided by a barbed wire fence on the ground. This evidence is consistent with the evidence of PW1 and PW2 that stated that the 1st Defendant cultivates her portion which has a permanent house occupied by her sons with some portions of the land under lease to third parties. While the westerly side is the portion that they cultivated with the permission of their mother. Uncontroverted evidence was led that the 1st Defendant's portion is more developed and is currently occupied by her children (the 2nd, 3rd and 4th Defendants). Among the documents produced in the case is the record of evidence and decision of the Land Dispute tribunal in 2001. This record and finding was not objected by any of the parties. The Tribunal visited the suit land and made a finding that it was occupied by the Plaintiff and the 1st Defendant as testified by the Plaintiff in this case. It is the Plaintiff's evidence that even in the lifetime of their mother she used to pick the tea and receive tea sales receipts from the tea bushes on her westerly portion of the land. She contends that the 1st Defendant stopped her at a certain point.

25. The Plaintiff led evidence that sometime in 2014, the 1st Defendant through her children who are the 2nd, 3rd and 4th Defendants in this case interfered with her quiet possession and enjoyment of her portion of the land through intimidation, threats to violence and verbal abuse. That despite warnings from the local administration to desist and written warning from her advocate on record through the letter dated the 16.1.2017, they did not stop. That the advocate on record advised her to halt the cultivation until the determination of the case to avert further acrimony on the ground.

26. The import of this evidence is that both the Plaintiff and the 1st Defendant held possession of the land in equal shares. This can only lead to the conclusion that the land was intended to be owned by both contrary to the assertion by the 1st Defendant that she held the title absolutely to the exclusion of the Plaintiff.

27. It is not in dispute that the mother to the Plaintiff and 1st Defendant was the registered owner of the land. It is, however, doubtful that she would have wanted to disentitle the Plaintiff in the land. It has been alluded by the 1st Defendant that she was given the land because she was unmarried while the Plaintiff was. The 1st Defendant did not lead any evidence as to who the Plaintiff was married to, where and when. Nevertheless, that may have been the practice then but in this era of the new constitutional dispensation, it would be discriminatory to disentitle one of a beneficial interest in land on account of marital status. On trial when asked whether her sister the Plaintiff had equal rights to the land, she (1st Defendant) stated that "we do not have equal rights as sisters". Article 27 of the constitution states as follows;

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4)

28. There is evidence that the Plaintiff placed a caution in 2001 on learning that the 1st Defendant was in the process of selling the suit land. It is doubtful that a person with no interest would encumber another's land with no reason. In the Court's view this evidence is consistent to a person asserting a right in the land. It is also consistent with the timing of the subdivision and transfer of the land by the 1st defendant to the 2nd, 3rd and 4th Defendants which took place between years 2012-2013.

29. The Court has found as a fact that indeed there existed a trust on the suit land. The Court observed the demeanor of the parties in Court and came to the conclusion that the Plaintiff who is illiterate and in her 70s, unlike the 1st Defendant, appeared cogent and believable in her testimony which was consistent.

30. The 1st Defendant did not dislodge the contention that the land was ancestral land. She did not present any cogent evidence to support her contention that the land was a gift to her. Her title is being assailed. It is under siege. It is not enough to shield oneself with indefeasibility of title as then provided under the Registered Land Act. She has a duty to rebut that the title is not encumbered with an overriding interest in the nature of a customary trust. Trust is a fact of evidence. The Court is satisfied that the Plaintiff has discharged her duty and proved customary trust.

31. Having found that a trust existed on the land, the Court now turns to the question whether the resultant titles in the names of the 2nd, 3rd and 4th Defendants should be cancelled. The Plaintiff led evidence that when she got information that the 1st Defendant was intent on selling the land, she lodged a caution and filed a dispute with the Land Dispute Tribunal which decided in her favour. Aggrieved with the decision, the 1st defendant filed a judicial review in the High Court at Nyeri vide Misc Case No 163 of 2001. The High Court reversed the decision of the tribunal on grounds that it had no jurisdiction to determine rights in land the decision was rendered on 16.12.2013. The 1st Defendant admitted subdividing and transferring The suit land to the 2nd, 3rd and 4th Defendants whilst the case at Nyeri was pending. She contended that she did it as of right as there was no order preventing her from so doing. She also argued that the Plaintiff removed the caution lodged in 2001 on her own volition. The Plaintiff has explained that she was prevailed upon by the Defendants to remove the caution so that she would be given her portion of the land. This evidence is consistent with the conduct of the Plaintiff at this point. The acts of filing suit and lodging caution are acts of a person asserting a right by legal means. There is no other evidence that she did this on her own volition except with the expectation that the 1st Defendant was going to transfer her portion to her. That explains why she later lodged another caution on the resultant titles registered in the names of the 2nd, 3rd and 4th Defendants. The explanation given in evidence by the 1st Defendant in transferring the titles to her children (2nd, 3rd and 4th Defendants) was "I subdivided the land to avoid land disputes in future". The question is why the haste to transfer the land while the case was pending? Could it be to defeat the claim of the Plaintiff in the event that the Judicial Review was not decided in her favour? What disputes were being anticipated in future? Was this an unconscious acknowledgment of the Plaintiffs claim? The only inference is that the 1st Defendant wanted to defeat or frustrate the claim of the Plaintiff. It is also noted that she did not leave any land in her name; perhaps to ensure that the land is tugged away from the reach of the Plaintiff.

32. The Court finds that the 1st Defendant dealt with a trust asset in an improper and unlawful manner by transferring it to her children (2nd, 3rd and 4th Defendants) who were not entitled under the trust and to the exclusion of the Plaintiff. In the end she cannot be said to have transferred a good title to the 2nd, 3rd and 4th Defendants. The title was encumbered by a customary trust which was incapable of being conveyed to the 2nd, 3rd and 4th Defendants. The 2nd, 3rd and 4th Defendants therefore cannot be said to have acquired a better title than that of the 1st Defendant.

33. The Court is satisfied that section 80 of the Land Registration Act does not offer any protection to the 2nd, 3rd and 4th Defendants. It states as follows:-

"Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default".(emphasis mine)

It is the finding of fact by the Court that the 2nd, 3rd and 4th defendants acted in concert with the 1st Defendant to take away a trust property without following the law.

34. In the upshot the Court makes the following orders:

- a. It is hereby declared that the 1st Defendant was registered as the owner of Loc 3/Gituru/72 in trust for herself and the Plaintiff.
- b. That all the resultant titles arising from the subdivision of Loc 3/Gituru/72 and the subsequent registration thereof being Loc 3/Gituru/1131, Loc 3/Gituru/1132 and Loc 3/Gituru/1133 in the names the 2nd, 3rd and 4th Defendants respectively are hereby declared null and void and shall be cancelled.
- c. The Land Registrar, Murangá is hereby ordered to cancel and remove from the land register the titles, namely Loc 3/Gituru/1131, Loc 3/Gituru/1132 and Loc 3/Gituru/1133 issued to the 2nd, 3rd and 4th Defendants respectively and revert the land back to Loc 3/Gituru/72 in the name of the 1st Defendant.
- d. That the trust subsisting on Loc 3/Gituru/72 be and is hereby dissolved and the land be divided into two equal portions between the Plaintiff and the 1st Defendant along the existing delineations and actual possession on the ground (easterly and westerly occupation).
- e. That the Deputy Registrar of this Court be and is hereby mandated to sign all the documents required to actualize demarcation, delineation, boundary and/ or transfer or other thing in the nature of administrative or land transaction so as to ensure and/or facilitate compliance with order No d above.
- f. Costs of the suit payable by the 1st, 2nd, 3rd and 4th Defendants jointly and severally to the Plaintiff.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 12TH DAY OF APRIL 2018.

J.G. KEMEI

JUDGE