



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 252 OF 2017

MWAMBURA GIKURU.....PLAINTIFF

VS

JOHN MUCHUNU GIKURU.....DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendant on 16.3.13 seeking the singular order for the removal of the caution lodged on Loc 19/Gacharageini/1042 (hereinafter called the suit land). In his plaint the Plaintiff averred that he is the registered owner of the suit land and the action of the Defendant in cautioning the said suit land is clogging his legal right to the enjoyment of the land.

2. In a quick rejoinder, the Defendant filed a defence on 24.3.14 in which he denied the Plaintiffs claim and averred in his counterclaim that the suit land is family land registered in the name of the Plaintiff to hold in trust for himself and his siblings. That the said trust on declaration should be dissolved and the land subdivided into 6 equal parts amongst the siblings, the parties included. That the Defendant and his siblings have demanded the dissolution of trust and the division of the suit land a request that the Plaintiff has adamantly refused.

The Plaintiffs case

3. The Plaintiff stated that he and the Defendant are the sons of one Gikuru Mwambura who had two wives; Njambi Gikuru and Milka Nyambura. That Milka Nyambura, his mother had 6 children, 5 boys and 1 girl. That the 1st born son of the house of Njambi (1st house) was Robin Macharia Gikuru. That he and the Defendant are brothers and sons of Milka Nyambura. That except for Peter Macharia, all the other siblings live on their own lands. That it is he and Peter Macharia who occupy the suit land. That the Defendant lives in Nakuru on land that the Plaintiff bought and caused it to be registered in the name of the Defendant.

4. That the suit land was initially part of Loc 19/Gacharage-ini/857. It was registered in the name of Robin Macharia Gikuru. That he was the first one to live on the land in 1963 and planted tea in 1971. This was before the land was subdivided. That Robin Macharia entered the land in 1963 and later moved out. He avers that the Defendant built a house for their mother Milka Nyambura on the land but the mother did not relocate from Molo to the suit land and therefore the house was occupied by his mother in law who lived with him. That his mother was buried on the suit land.

5. That the land was subdivided in 1972 into two portions; Loc 19/Gacharage-ini/1042 and 1043. That the subdivision was agreed between him and Robin Macharia. That he bought the suit land from Robin Macharia at the price of Kshs 3000/-. That Loc 19/Gacharage-ini/1043 remained in the name of Robin Macharia and is now occupied by his son. That at the time of purchasing the suit land he did not involve his brothers. That he does not hold the suit land in trust but as an absolute owner.

The defence case

6. The Defendant stated in his statement that the Plaintiff is his elder brother and both are the sons of Milka Nyambura, the 2nd wife of the late Mwambura Gikuru. That the suit land was originally comprised in Loc 19/Gacharage-ini/857. That his father gathered the fragments during land consolidation and demarcation and caused the land to be registered in the name of Robin Macharia, his step brother born of Njambi Gikuru, his step mother. That the reason why his father was not registered as owner of the Loc 19/Gacharage-ini/857 was because he hoped to be more allocated land in Nyandarua and therefore could not hold two parcels in his name, as was the practice then. One could not get land if he had other parcels under his name. That he did not succeed to get another allocation. That he was the first to settle on the original land and built two houses; one for himself and another for their mother. That when he left for work at Maji Mazuri in Baringo, the said house was occupied by the Plaintiff and her mother later relocated and lived in the house that he had built for her.

7. That after his father failed to secure another allocation of land in nyandarua, he returned and caused the original land to be subdivided into two parts; Loc 19/Gacharage-ini/1042 and Loc 19/Gacharage-ini/1043. The former was registered in the name of the Plaintiff on behalf of the house of Milka Nyambura and Loc 19/Gacharage-ini/1043 remained in the name of Robin Macharia on behalf of the house of Njambi Gikuru, his step mother. He avers that his father was disabled to the point that he was crawling and could not attend to the land processes and

found it easier to register the lands in the names of the Plaintiff and Robin to hold for the two wives. That Robin settled his biological brothers elsewhere and remained with Loc 19/Gacharage-ini/1043 which is now occupied by his son.

8. That in 1974 their father passed away. That his brother Daniel Muchunu died in 2003 and was to be buried on the suit land but the Plaintiff obtained an injunction. He was however buried on another land belonging to the Plaintiff with his consent. That he lives in Nakuru in a piece of land jointly acquired and owned by himself and the Plaintiff. That it is not true that the Plaintiff assisted him to acquire his share.

9. That they have tried to resolve the dispute as a family to no avail.

10. DW2- Peter Muchunu testified that the Plaintiff and the Defendant are his brothers. That they moved to the land in 1965 where the Defendant built two houses for the Plaintiff and one for their mother, then the land was Loc 19/Gacharage-ini/857. That the Plaintiff was working in Thika and he left his wife, mother and DW2 living on the land. That he still lives on the land with the Plaintiff. That the Plaintiff executed the tea growers permit for him to plant tea on the land since he is the registered owner of the land. That the Plaintiff has refused to divide the land for the siblings on the grounds that he bought it and despite the dispute being heard before the area chief and the land tribunal, the Plaintiff has remained adamant. That the Plaintiff planted tea before the land was subdivided and lived there just like all the family members. That the land is family land. That he did not buy the land from Robin Macharia. That it is subject to trust. That the Defendant has his authority to pursue the claim on his behalf as well.

11. DW3- stated under oath that she is the wife of Robin Macharia and she currently lives in Kisii town where she carries on business. That she got married in 1965. She stated that Robin Macharia did not sell the land to the Plaintiff. That the land was registered in the name of her husband in trust for the two houses; that of Njambi and Nyambura, the wives of Mwambura Gikuru. That the two portions were registered in the names of the Plaintiff and Robin Macharia to hold for the two houses respectively. That Loc 19/Gacharage-ini/857 was an inheritance from her father in law from the Anjiru a Mbari ya Munga clan, where he was a member.

12. The Plaintiff submitted that he bought the suit land from his step brother Robin Macharia after subdivision of the original parcel Loc 19/Gacharage-ini/857. That the Plaintiff holds a title in his name entitling him to absolute ownership of the suit land. That any claim of customary trust will fail. That the caution lodged by the Defendant ought to be withdrawn.

13. The Defendant on the other hand submitted that the Plaintiff's claim that he bought the land from Robin Macharia is untrue because Robin had no land of his own. He was initially registered as trustee of his father's land for both houses. This evidence was contradicted by the wife of Robin who stated that the land registered in the name of Robin Macharia was family land. He urged the Court to find that the Plaintiff holds the suit land in trust for himself, the Defendant, Daniel Muchunu Gikuru(deceased) Joseph Muraya Ngeru, Hellen Wanjiku and Peter Macaharia Gikuru equally.

Determination

14. I have considered the pleadings, the evidence adduced and the rival submissions and the key issue for determination is whether the Plaintiff held the suit land in trust; whether the trust should be dissolved and the suit lands shared equally; whether the caution lodged on the suit land should be removed; who pays the costs of the suit.

15. It is not in doubt that the suit land is registered in the name of the Plaintiff. The Plaintiff has explained that he bought the land from his step brother at the price of Kshs 3000/- then, which may appear a paltry sum now but was a big sum at that time. The Defendant has acknowledged his registration of the suit land but he states that he held the same under trust for himself and his siblings. That the suit land belonged to their father and was registered in the name of the Plaintiff to hold on behalf of the house of Milka Njambi their mother. That the Plaintiff like his step brother was a trustee for the children of Milka Njambi. That they were 6 in total; the Plaintiff, the Defendant, Daniel Muchunu Gikuru(deceased), Joseph Muraya Ngeru, Hellen Wanjiku and Peter Macharia Gikuru. That he lodged the caution to protect a beneficial interest arising from their share of the family land.

16. The Land Registration Act section 24 provides that a registered proprietor of land shall vests in that person the absolute ownership of the land together with all rights and privileges. Section 25 however states that those rights and privileges shall not be liable to be defeated except as provided by law but subject to interalia overriding interests outlined in section 28 of the Act. These provisions are similar to the ones found section 27, 28 and 30 of the Registration of Land Act Cap 300 (now repealed). Section 28(b) provides that all registered land shall be subject to overriding interests as may for the time being subsist and affect the title without their being noted on the register.

17. From the above provisions of the law, it is clear that registration of one as owner of a parcel of land does not relieve the proprietor from any duty or obligations to which he subjected as a trustee and is also subject to overriding interests as set out under section 28(b).

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

19. In the case of **PETER GITONGA VERSUS FRANCIS MAINGI M'IKIARA MERU HC.CC NO. 146 OF 2000**- it was stated 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".

20. The Defendant led evidence that the land belonged to their father Mwambura Gikuru. That during consolidated he gathered the land and registered it in the name of his eldest son Robin Macharia to hold in trust for the family. That the reason why he did not register in his name was because he hoped to be allocated another land in Nyandarua and he did not want to spoil the chance of getting allocated a second plot.

That when their father failed to get another land in Nyandarua, he returned and caused the land Loc 19/Gacharage-ini/857 then registered in the name of Robin Macharia subdivided into two; Loc 19/Gacharage-ini/1042 and Loc 19/Gacharage-ini/1043. That Loc 19/Gacharage-ini/1042 was registered in the name of the Plaintiff in trust for the house of Milka Nyambura their mother. The Plaintiff has refuted this evidence and stated that he bought the land from Robin Macharia.

21. It would appear that from the evidence of the wife of Robin Macharia, Robin did not own land of his own. He held the land for the family. There is no evidence that was led to show how Robin acquired independently the land by say purchase. It is commonly acknowledged by the parties that the family land was registered in the name of Robin Macharia under a family trust. The Plaintiff did not help by tabling evidence to show that Robin Macharia owned the suit land absolutely to afford him the right to sell the land to the Plaintiff. Evidence was led that Robin Macharia settled his blood brothers elsewhere in lieu of his owning the Loc 19/Gacharage-ini/1043 wholly. That his son Paul now lives on the land.

22. Further the Plaintiff has not led any evidence how he bought the land. In his testimony he stated that he did not involve any of his brothers in the transaction. That land control board consent was not obtained. He did not lead any evidence either testamentary or viva voce to support the purchase of the suit land from Robin Macharia. The Court finds this evidence shaky and unsupported.

23. The cogent evidence led on trial is that the family settled on this land before it was subdivided. The Plaintiff even planted tea before the alleged purchase. That when the family returned from Rift Valley they settled on the suit land and the Defendant even built two houses; one for Plaintiff and one for their mother. Further that their mother was buried on the land. DW2, his brother Peter Macharia testified that he lives on the suit land with the Plaintiff on account of it being a family land. The Plaintiff did not contradict this evidence. He did not explain why Peter was living on the land since the 1960s to date if indeed it was not family land. It was also stated in evidence by the Defendant that their father was crippled and as his condition would dictate he would not have been able to attend to the land offices to process the titles and hence the reason why the two titles were registered in the name of the 1st born sons of each house to hold in trust.

24. Finally the Plaintiff gave himself away in his evidence on trial when he stated under oath as follows;

“Robin Macharia was the 1st born in our family; from the house of the 1st mother. The original land was Loc 19/Gacharage-ini/857. It was registered in the name of Robin Macharia on instructions from our father. It was our fathers land”.

The Court understands that evidence to say that the land belonged to their father and was registered in the name of Robin Macharia to hold for the family. It then follows that Robin Macharia clearly had no land of his own capable of being conveyed to the Plaintiff by way of sale or any other way. Even if there was a sale, which has not been proved, Robin Macharia did not have any interest to convey and the Plaintiff could not have acquired any valid title as he would have received nothing from Robin Macharia as the suit land was encumbered with a customary trust. The Plaintiff later in his evidence gives a rather contradicting piece of evidence when he states that the subdivision of Loc 19/Gacharage-ini/857 was by agreement with Robin Macharia. He did not tender any evidence however to support this. This evidence was controverted by Robin Macharia’s wife who categorically stated that the land that Robin Macharia held was family land. He did not have any absolute interest in it”.

25. The totality of the evidence adduced leads this Court to draw the conclusion that the suit land was family land that was registered in the name of the Plaintiff on behalf of himself and his siblings. That indeed customary trust has been proved and established on the suit land and as such the Plaintiff held the land under trust.

26. Based on the above reasoning, it therefore follows that the lodging of the caution on the land was well founded to protect the beneficial interest of the Defendant and in his words that of his other siblings. The Plaintiff’s claim is therefore dismissed and the counterclaim succeeds accordingly.

27. The Court makes the orders as follows;

- a. That the Plaintiff holds the suit land in trust in equal shares for himself, the Defendant, three brothers and a sister.
- b. That the trust be and is hereby dissolved and the suit land shared equally amongst them.
- c. That the Deputy Registrar of the Court be and is hereby mandated to execute all the documents to ensure compliance with orders a and b above.
- d. Parties being brothers, each to meet their own costs of the suit.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 10TH DAY OF MAY 2018.

J.G. KEMEI

JUDGE