



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 202 OF 2014**

**DORIS WANGITHI MAINA.....1<sup>ST</sup> PLAINTIFF**

**KENEDY MUKURI MAINA.....2<sup>ND</sup> PLAINTIFF**

**MARTHA WANGARI.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**PERIS WANJIRU MAINA.....1<sup>ST</sup> DEFENDANT**

**MARK MURIUKI MAINA..... 2<sup>ND</sup> DEFENDANT**

**RULING**

[1] On 4<sup>th</sup> October 2017, this case was heard to its conclusion before **B.N. OLAO J.** and both parties were given three weeks to file and serve their submissions and the mention of the case was set for 20<sup>th</sup> November 2017 for submissions. Then on 17<sup>th</sup> October 2017 an application by way of Notice of Motion was filed by counsel for the defendants under a certificate of urgency. It prayed that the case be reopened for new emerging evidence and that the firm of Kirubi, Mwangi Ben & Co. Advocates to cease acting for the plaintiffs. It was alleged that Joseph Mwangi Ben an advocate of the High Court of Kenya and a partner at Kirubi Mwangi Ben & Co. Advocates, which firm has the conduct of this case for the plaintiffs was the registered owner of land parcel Kiine/Thingirichi/1242 as a co-owner of 0.81 Ha of the same together with Peris Wanjiru Maina the first defendant herein. It is argued that not having the 1<sup>st</sup> defendant Peris Wanjiru Maina enter appearance in this case is a machination by the plaintiffs (her children) and their counsel (Joseph Mwangi Ben) to ensure that the defendants claim against them is defeated and their suit succeeds.

[2] Joseph Mwangi Ben advocate filed a replying affidavit and admitted that he practices in the firm of M/S Kirumbi Mwangi Ben and that his firm has the conduct of this case. He averred that the application before this Court was malicious, misconceived, incompetent and an abuse of the process of the Court and a desperate kick of a dying horse meant to confuse issues and mislead the Court. He alleged that it was a reckless and unprofessional for counsel Ramadhan Abubakar to make wild allegations and that he would have him cross-examined on the basis of his document.

Mr. Ben admitted he bought 2 acres from the 1<sup>st</sup> defendant in 2005 a sale that was sanctioned by Court (Muranga Misc Application No. 3 of 2005 (O.S) when the first defendant family had difficulties. Counsel stated that he had known the plaintiffs for long having represented them in Karatina Succession Cause No. 10 of 1994 and Nyeri High Court Civil Appeal No. 6 of 2005. He stated that he acted for the plaintiffs vide a reference from Kituo Cha Sheria on probono basis.

[3] I have perused the file and all the documents filed in the matter. I note from the history of the matter that a Succession Cause No. 10 of 1994 was filed for the Estate of **DANSON MAINA CHURI**. A grant of representation was issued to **PERIS WANJIRU MAINA** on 11<sup>th</sup> December 2000 and confirmed pursuant to **Section 71 (1) and (3) of the Law of Succession Act** on 17<sup>th</sup> May 2001.

The Estate of the deceased was distributed as follows:-

- Peris Wanjiru Miana – Land parcel Kiine/Thingirichi/1242 comprising of 1.62 Hectares **to hold in trust for:**

1. Doris Wagithi Maina
2. Elijah Kamau Maina
3. Kenneedy Mukuri Maina

4. Marita Wangari

- Peris Wanjiru Maina – Land parcel Kiine/Rukanga/379 – 1 acre **to hold in trust for:**

1. Doris Wagithi Maina

2. Elijah Kamau Maina

3. Kennedy Mukuri Maina

4. Marita Wangari

- Peris Wanjiru Maina – Land parcel Kiine/Thingirichi/346 - 5 acres **to hold in trust for:**

1 Doris Wagithi Maina

2. Elijah Kamau Maina

3. Kennedy Mukuri Maina

4. Marita Wangari

- Parcel Kiine/Rukanga/349 3 acres was given to Joseph Gichoya Churi and Kiine/Thigirichi/346 of 5 acres was given to Joseph Gichoya Churi. These two parcels are not part of this dispute.

[4] From the proceedings, once the Magistrate Court at Karatina distributed the properties of the deceased, an appeal was preferred in Nyeri High Court which Mr. Mwangi Maina Ben advocate also represented the plaintiffs and their mother the 1<sup>st</sup> defendant herein. It appears from the pleadings that the appeal was dismissed in 2005.

[5] On 12<sup>th</sup> April 2005, an Originating Summons was filed in the Muranga Magistrate's Court by the 2<sup>nd</sup> defendant herein as trustee of the plaintiffs and another to have the trust subsisting on land parcel Kiine/Thingirichi/1242 be dissolved and that the said land be shared out as follows:

- Peris Wanjiru Maina - 0.181 Hectares

- Joseph Mwangi Ben - 0.181 Hectares

The application was supported by the affidavit of the 1<sup>st</sup> defendant Peris Wanjiru Maina who alleged that she was un-employed and was finding it increasingly difficult to provide general care and maintenance to the minors and that one minor Martha Wangari had a heart condition and needed urgent operation at Kenyatta Hospital and she needed Ksh. 180,000/= for the operation. That Joseph Mwangi Ben (counsel on record) had agreed to give that sum as part of the consideration of 0.81 hectares out of Kiine/Thingirichi/1142 and that she was unable to complete that sale transaction as the land was encumbered by the trust.

This is the pleading relied on to show that the Court determined the trust subsisting in Kiine/Thingirichi/1142. No Court order was annexed.

[6] It is worth of note firstly that this Originating Summons was filed in Muranga Court by a different firm of Advocates Mwaniki Warima & Co, **But** it singled out Joseph Mwangi Ben as a beneficiary of 0.81 hectares upon the dissolution of the trust. Secondly, the Originating Summons was filed in 2005 immediately after the dismissal of the appeal by the High Court (against the distribution by Karatina Succession Court,) where the High Court dismissed the appeal in 2005.

Thirdly, Joseph Mwangi Ben knew of the Karatina Succession Case and the subsequent appeal in the High Court at Nyeri. Counsel therefore ought to have known or knew that correct place to file the lifting of the trust was Karatina in Succession Cause No. 10 of 1994. I say this because the trust was being dissolved at Muranga for the first defendant and his own benefit. He was an interested party in the Originating Summons filed at Muranga Magistrate's Court.

[7] The applicant in this case says that there was authority vide a joint affidavit sworn on 23<sup>rd</sup> January 2012. The authority (if it is one) is signed by Peris Wangithi Maina, Kennedy Mukuri Maina and Martha Wangari. However, the land Kiine/Thingirichi/346 was held in trust for **four persons**. In the pleadings, that affidavit is disputed. The agreement for sale is signed by the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant.

[8] These are some of the emerging issues in this case. There is no demonstration that learned counsel Joseph Mwangi Ben is deeply involved in this case. He is firstly involved as a past and present advocate. Further, he is involved as a person who was there as counsel when the **TRUST** which is central to this case was created. Part of the trust was dissolved so that he can benefit in part of the trust property. The order doing so is absent in these proceedings. Counsel as a beneficiary will definitely be called to answer how that could happen on one property though not central to this case and not all the three properties held in trust for the plaintiffs. As counsel for the plaintiffs, he will definitely be in a compromised position when querying how and when the trust of the land sold to the 2<sup>nd</sup> defendant by the 1<sup>st</sup> defendant was determined while the counsel is in the same position.

To be able to determine this case fairly, once and for all, I am afraid counsel will in the interest of justice, have to step aside. I do not think the firm of M/S Kirubi Mwagi Ben Advocates need to be barred from the conduct of this case. Any other counsel in that firm can take the conduct of this case.

For the avoidance of doubt, I order that this case be reopened firstly to address the determination or lack thereof the trust issue raised herein on the suit properties and secondly to have the plaintiff appoint another advocate if they so wish to finalize this matter. Parties will have 30 days to do so.

**S.N. MUKUNYA**

**JUDGE**

**15<sup>TH</sup> JUNE, 2018.**