



## **REPUBLIC OF KENYA**

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

**ELC NO. 132 OF 2017**

**JOSEPH WAINAINA GATHIRU.....PLAINTIFF**

**VS**

**ANTHONY NJOROGE GATHIRU.....DEFENDANT**

### **JUDGMENT**

1. By an amended Complaint dated 21/6/17 and filed on 22/6/17 the Plaintiff sued the Defendant seeking the following orders;

- a. A declaration that the Defendant holds land parcel No Loc.1/Kiunyu/1416 in trust for the Plaintiff
- b. An order compelling the Defendant to transfer Land Parcel No LOC 1/Kiunyu/1416 to the Plaintiff failing which the Executive Officer of this Honourable Court be authorized to execute all the necessary documents to effect the transfer.
- c. Costs of this suit.
- d. Interest on (c) above.

2. In the complaint, the Plaintiff avers that LR No. Kiunyu/465 was owned by Gathiru Hunja now deceased. Gathiru Hunja was the father of the Plaintiff and the Defendant. The parties are brothers, the Defendant being the eldest. It is his evidence that their father had two wives; Kahaki and Njoki. That Kahaki had 5 children namely Nyiha, Wainaina, Kiruri, Ngendo and Njeri. Njoki on the other hand had 3 children namely Anthony Njoro Gathiru (Defendant), Julia Nyiha and the Plaintiff.

3. Further that during the land demarcation the suit land was registered in name of the Defendant to hold in trust for the family of Njoki. That on the side of Kahaki, Wainaina became registered as owner of the land allocated to the house of Njoki on behalf of that family.

4. He averred that he has lived on the suit land and occupies  $\frac{1}{2}$  of the original suit land Loc.1/Kiunyu/465. That he has planted coffee and mango trees and has built a permanent house. That his son has also built a 3 roomed permanent house on the land.

5. That in 1996 he summoned the Defendant before the village elders requiring him to dissolve the trust and transfer the half portion of the land to him. That the Defendant was reluctant and he reported him to the area chief who referred him to the D.O on whose intervention the land was finally subdivided in 2014 into 2 portions; Loc.1/Kiunyu/1416 and Loc.1/Kiunyu/1417. He stated that the Defendant failed to authorize transfer of Loc.1/Kiunyu/1416 to his name. That he lives on Loc.1/Kiunyu/1416 and the Defendant resides on Loc.1/Kiunyu/1417. He produced the original title for Loc.1/Kiunyu/1416 which he claims he collected in 2015 from the surveyor's office upon conclusion of subdivision.

6. PW 2 – stated in his testimony that he is the son of Wainaina Gathiru, the step brother of the parties and son of Kahaki. He confirmed the family lineage as given by the Plaintiff. That Gathiru Hunja had 2 parcels of land; one at Rukoroi and another at Rugaita. That the one of Rukoroi went to the children of Kahaki and was registered in the name of Wainaina Gathiru since he was the eldest son in the 1<sup>st</sup> house. That Rugaita (suit land) was given to Njoki and was registered in the Defendant's name. He gave two reasons why the land was registered in the name of the Defendant, firstly because he was the eldest son in the house of Njoki and secondly because he possessed an identification card at the time. He stated that he has known the land since 1946. That the Plaintiff has been trying to get his share of the land which the Defendant has refused to transfer to him.

7. The Defendant denied the Plaintiff's claim and stated that he held Loc.1/Kiunyu/465 as an absolute owner and similarly Loc.1/Kiunyu/1416 and Loc.1/Kiunyu/465/1417. That he does not hold the suit land in trust for the Plaintiff. He denied that Loc.1/Kiunyu/465 was initially owned by his father Gathiru Hunja. He further denied that Wainaina Gathiru caused the registration of the suit land in his name in trust for his family, the Plaintiff included. In Para 7 (a) he averred that the Plaintiff has been born and bred on the suit land and upon getting married he ought to have moved out and handed over vacant possession of the land to the Defendant.

8. The Defendant further denied that he was subdividing the land for the Plaintiff. That he wanted to give one portion to his children. He averred that the Plaintiff has his own land which he sold sometime back to raise funds to pay for hospitalization and education for his children. He stated that the Plaintiff has been living on his land for the last 2 years. He stated that he bought the original land from one Kagunya.

9. Parties elected to file written submissions which I have read and considered together with the evidence on record.

10. The Plaintiff submitted that it was customary among the Kikuyus to register land in the name of the 1<sup>st</sup> born sons and as per houses in a polygamous setting like in this case. That Kikuyu Customary Law recognizes the existence of trust in land. The Plaintiff urged the Court to find that there is trust in favour of the Plaintiff.

11. The Defendant on the other hand submitted that the suit is fatally flawed on account of being brought by way of a plaint instead of an originating summons as provided for under order 37 of Civil Procedure Rules. Relying on section 19 of Civil Procedure Act Cap 21, the Defendant averred that every suit shall be instituted in such manner as may be prescribed by the rules. That to the extent that this suit commenced by way of plaint instead of an originating summons should be dismissed.

12. Quoting section 24 (a); 25 (1) and 26(1) of Land Registered Act the Defendant submitted that the Defendant is the registered owner of the suit land and the tenure does not establish any trust on the title. That no trust has been established and therefore no breach of trust has been proved. He urged the Court to find that the Plaintiff has not proved any trust in evidence.

### **Determination**

13. I have considered the pleadings, the evidence adduced and the rival submissions and the key issues for determination are;

A. Whether the suit as filed is fatally defective.

B. Whether the Plaintiff held the suit land in trust

C. Who pays the costs of the suit.

14. The commonly acknowledged facts in this case are as follows; The Plaintiff and the Defendant are blood brothers. They are sons of the late Gathiru Hunja and his 2<sup>nd</sup> wife Njoki. The 1<sup>st</sup> Wife Kahaki had 5 children with the eldest son in that house being Wainaina Gathuri. Njoki begot 3 children, two sons and one daughter. The Defendant is the eldest son, then the Plaintiff and a sister Julia Nyiha.

15. Further it is not in dispute that the Plaintiff is registered as owner of the suit land. It is also not in doubt that both the Plaintiff and the Defendant together with their families reside on the said land (originally Loc.1/Kiunyu/465).

16. Whether the suit is fatally defective on account that it was commenced by way of a plaint instead of an originating summon. Section 19 of the Civil Procedure Rules provides that every suit shall be instituted in such manner as may be prescribed by the rules. Order 37 of the Civil Procedure Rules defines the matters that are to be filed by way of originating summons, one of them being a claim for trust. Rule 19 of the said order also permits the Court to convert an originating summons into a plaint as the case may require. This is especially where the need for viva voce evidence is critical to the hearing of the matter. This being a land case, is such matter that would fit a conversion to allow evidence to be tendered at the hearing.

17. I have examined the pleadings and I find that the cause of action as pleaded was unambiguous as to allow the Defendant to know with certainty what was being placed before him for rebuttal. Order 2 rule 14 of the Civil Procedure Act Provides that no technical objection may be raised to any proceeding on the ground of any want of form. I agree that parties must comply with Section 19 of the Civil Procedure Act. Rules are the handmaidens of justice and must be complied with. I am also fortified by Article 159(2)(d) of the Constitution and in my considered view I hold and find that this suit is not fatally defective. I will proceed to determine the issues therein.

18. The Defendant has submitted that he is an indefeasible and absolute owner of the suit land pursuant to sections 24 and 25 read together with 26 of the Land Registration Act, 2012. That the Defendants title cannot be challenged except on grounds of fraud or misrepresentation for which the Defendant is a party. That no trust is noted on the register of the Defendant's title. That the land the Plaintiff is claiming is incapable of being ascertained and since no trust has been proven breach of trust cannot be founded. The Plaintiffs case is that the Defendant was registered as owner as trustee for the family, him included. That the land was family land.

19. The suit land is registered under the Land Registration Act Cap 300 (now repealed). Section 28 of the said Act provides that the rights of a proprietor, whether acquired on first registration or whether acquired 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register: Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee. Section 30 (g) of the Act reads;

“ 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”.

20. The import of the above sections is to show that the Land Registration Act Cap 300 recognized customary trust as an overriding interest

in land.

21. In the current Land Registration Act, 2012 section 28 (b) expressly provides 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

22. In the case of **Kanyi Vs Muthiora 1984 KLR 712 CA**, the Court held that the registration of land in the name of a proprietor under the Land Registration Act did not extinguish rights under Kikuyu Customary law and neither did it relieve the proprietor of the duties or obligations as trustee. A customary trust need not be registered on the title. It is an overriding interest that subsists on the land. It is binding on the land. The evidence of the Defendant that there is nothing on the register of the suit land to denote trust is not based on any sound principle of law.

23. 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.

24. Similarly in the case of **Peter Gitonga Vs 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”.(emphasis is mine)

25. In his evidence in chief the Plaintiff stated that their father Gathiru Hunja died in 1962 or thereabouts, that is to say, before the land demarcation and registration. PW2 stated that Gathiru Hunja had two parcels of land; one at Rukoroi and the other at Rugaita. He led evidence that the Rukoroi land was given to the 1<sup>st</sup> Wife Kahaki and was registered in the name of the 1<sup>st</sup> son of Kahaki, Wainaina Gathiru in trust for his family while the land at Rugaita was given to the 2<sup>nd</sup> wife Njoki and registered in the name of the Defendant to hold in trust for his family. The Defendant in his evidence stated that he is the eldest brother to the Plaintiff. That evidence is consistent with the evidence of the Plaintiff and PW2. They all attest to family lineage of the late Gathiru Hunja.

26. In the case of **Njuguna Vs Njuguna (2008) 1 KLR 889** the Court held that under Kikuyu Customary law the eldest son inherits land as a Muramati to hold in trust for himself and the other heirs. In the case at hand evidence has been led that the land was registered in the name of the Defendant because he was the eldest son in the house of Njoki. Under Kikuyu Customs it was normal to register land under houses, that is in accordance with the wives the land owner had. In this case the two parcels of land owned by Gathiru Hunja were given to his two wives Kahaki and Njoki. Wainaina the eldest son in the house of Kahaki became registered as owner in trust for that house while the Defendant the eldest son in the house of Njoki took the responsibility. PW2 added that the second reason why the suit land was registered in the name of the Defendant was because at the time of land registration the Defendant held an Identification card (ID) that was required for registration. The third lesser reason is because the Plaintiff was still young at the time of registration. All these factors considered together lend credence to a conclusion that the land was not registered in the name of the Defendant in absolute ownership as he wants the Court to believe. The Defendant averred that he bought the land from one Kagunya. No evidence was led to support this allegation.

27. The Plaintiff led evidence that he has lived on the land all his life and in 2016 constructed a permanent house. That he has made developments on the land such as planting avocados and coffee trees. This evidence is supported by the Defendant in his statement of Defence on para 7 where he stated;

“The Defendant in reply to paragraph 6a of the Plaintiff’s amended plaint avers that the Plaintiff was born and bred on the suit land and upon getting married, he was duty bound to over to vacant possession of the suit property No. Loc 1 /Kiunyu/1416 which belonged to the Defendant and his continued occupation and utilizing half of it together with his family was and is illegal and without consent and authority of the Defendant and shall put the Plaintiff to strict proof.”

28. In his statement and evidence in chief on trial the Defendant stated as follows;

“ I have only very reluctantly verbally allowed him ( the Plaintiff) to till and cultivate a small portion of L R NO Loc 1/Kiunyu/1416 which belongs to me since he sold his land parcel given to him by our late father which money he used for his eye treatment and balance thereof he used for his education, a fact known to him and at that time education was a luxury”.

29. Given the evidence above it is therefore not true that the Plaintiff moved onto the land two years ago as claimed by the Defendant. He was born, raised and married on the suit land and now resides thereon with his family. The only conclusion that can be drawn from these set of facts is that the land was and is still family land. That is the probable reason why the Plaintiff has not vacated the suit land to the chagrin of the Defendant. In his submissions the Defendant stated that the land being claimed by the Plaintiff is unascertainable. Going by the Defendant’s own admission as set out above, it follows that the land being occupied and claimed by the Plaintiff is the suit land that is to say L R NO Loc 1/Kiunyu/1416. Needless to state that with the subdivision having been done the demarcations, delineations and boundaries of the land are ascertainable.

30. The Defendant has averred that he subdivided the land in 2012 because he wanted to give it to his children. Uncontroverted evidence has been led by the Plaintiff that the subdivision was done to give him his share of the land, the suit land. That through his persistent efforts and

the intervention of the elders, area chief and the District Officer, the land was subdivided but the Defendant changed his mind in taking the necessary steps by transferring the land to his name. He produced the original title of the suit land in Court in the name of the Defendant which he claimed was released to him by the Surveyor. The Defendant did not explain the circumstances under which the original title to the suit land is in the custody of the Plaintiff. It is probable that there was intention to indeed transfer the share of the land being the suit land to the Plaintiff.

31. 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 Defendant in trust for himself and the Plaintiff. I find and hold that customary trust has been proved and established on the suit land by the Plaintiff.

32. The Court makes the orders as follows;

a. It is hereby declared that the Defendant holds LR NO LOC 1/KIUNYU/1416 in trust for the Plaintiff.

b. The Defendant be and is hereby ordered to transfer the said LR NO LOC 1/KIUNYU/1416 to the Plaintiff in default the Deputy Registrar of this Court be and is hereby authorized to execute all the necessary documents to effect the transfer.

33. The parties being brothers, each to bear their own costs.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 26<sup>TH</sup> DAY OF JULY 2018.**

**J.G. KEMEI**

**JUDGE**

**Judgment read in open Court in the presence of;**

Mr. Mwaniki for the Plaintiff

Defendant – Absent

Ms Irene, Ms Njeri and Mr. Wainaina, Court Assistants.