



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 5 OF 2017

JUSTUS MAINA MURUKU PLAINTIFF

VS

JANE WAITHIRA MWANGI DEFENDANT

JUDGMENT

1. The Plaintiff commenced the instant suit vide a plaint dated 26/1/17 and later amended it on 27/6/17. In the plaint, the Plaintiff is seeking the following orders against the Defendant;

- a. An order that the Defendant, her servants and/or agents do forthwith exhume the body of the deceased (ACHPORD MWANGI KUNGU) from land parcel No. Loc.10/Gatheru/656.
- b. A permanent injunction restraining the Defendant by herself, servant, agents, family members or otherwise whosoever be restrained from interfering with the Plaintiffs ownership and quite possession of land parcel No. Loc.10/Gatheru/656.
- c. An order for eviction of the Defendants from the Plaintiffs land parcel no. Loc.10/Gatheru/656.
- d. Mesne profits.
- e. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to order be awarded to the Plaintiff.
- f. Any such other or further relief as this Honourable Court may deem appropriate to be made.

2. The Plaintiff avers that at all material times to this suit he is the sole registered proprietor of the suit land. That the Defendant has trespassed on the suit land. That on 27/1/17 she illegally buried the remains of her husband, Archpord or Archford Mwangi Ndungu (hereinafter called Archford) on the suit land without his consent.

3. The Defendant denied the Plaintiffs claim and filed a statement of defence on 9/10/17 which was amended on 2/11/17. In her Counterclaim the Defendant pleaded customary trust on the suit land. She has pleaded particulars of trust in the Counterclaim. She seeks the following orders in her Counter claim;

- a) A declaration that the registration of the Plaintiff's father Muruku Mwangi as the owner of Loc.10/Gatheru/656 encumbered by customary trust and the subsequent registration of the Plaintiff as the proprietor of the suit land did not in any way affect or dissolve the trust.
- b) Costs of the Counter claim.
- c) Any other relief may deem fit just and fit to grant.

The Plaintiff's case

4. The Plaintiffs evidence is set out in the plaint, the witness statement and the evidence as given on trial. In the Plaint, the Plaintiff averred that his father Muruku Mwangi and Kung'u Mwangi (both deceased) were brothers. Kung'u Mwangi was the father of the Defendant's husband Archford Mwangi Kung'u also deceased (herein called Archford). Both Muruku Mwangi and Kung'u Mwangi owned their separate lands where they resided with their children.

5. That the Plaintiff succeeded the suit land from his father vide Succession Cause No. 118 of 1984. See certificate of confirmation of grant issued on 13/8/2003. He became registered as owner of the suit land on 21/4/04.

6. That at the request of Archford, the Plaintiff allowed the Defendant's husband to cultivate the suit land until such time that he would need it back. The Plaintiff averred that at this time he worked in Nairobi and lived on another parcel of land at Loc 10/Mukangu/7 hence he obliged to Archford's request. That later he verbally demanded that Archford stops cultivating the land and vacate the suit property as he wanted to subdivide the same for his 3 children, a request that was adamantly declined by Archford.

7. He further stated that Archford died on 19/1/2017 and the Defendant buried him illegally on the suit land on 27/1/17. He has pleaded particulars of illegality on the part of the Defendant. The Plaintiff averred that the Defendant is a trespasser and has continued trespassing on the suit land illegally without his licence and authority. Likewise, he has pleaded particulars of trespass on the part of the Defendant. He contended that the interment of the body of Archford creates a false impression that the land is open for distribution/inheritance by the estate of Archford thus occasioning loss to Plaintiff that cannot be compensated by an award of damages.

8. In his witness statement the Plaintiff stated that Archford had other parcels of land in Gikandu and a 3 acre parcel at Githambara within Kahuhia location. That in the past Archford had buried his mother at the Githambara land. That the Defendant should move to that land.

9. At the trial the Plaintiff testified and relied on his witness statement and list of documents both filed on 26/1/17. He led evidence and denied that the suit land was subject to customary trust. That he owned the suit land absolutely having succeeded it from his late father. He stated that his grandfather had 3 sons; Muruku Mwangi (eldest), Romano Kung'u (Defendant's father in-law & father of Archford) and Kimamo. That each brother was given family lands of their own.

10. He stated that the father of Archford, Romano Kungu had his own land at Loc 10/Mukangu/7, where the Defendant's husband and mother were cultivating. That they did not built any house therein. The Defendant is also cultivating it. On cross-examination he stated that he did not know when the Defendant entered the suit land as he noticed her and Archford on the land in 1984. He stated that she has a temporary house but was not aware that there was a stone water tank. That the land has a quarry. Though he is aware that one David Mwanthi Mwangi is buried on the land, he did not know when he was so buried nor does he know who he was. That the Defendant's husband is also buried on the land. That he is aware coffee is grown on the land but did not know when it was planted by the Defendant. That the Defendant and her family reside on the land. That though he lived at the family land at Mukangu, he became aware of the suit land from 1960s. By then it had not been subdivided. He denied knowledge that the Defendant entered the land with her husband Archford in 1968. That he did not allow the Defendant and Archford to live on the land. That they entered by force. That by the time he became registered owner of the land in 2004 the Defendants were residing on the land. That the Defendant's husband Archford filed a caution on the suit land claiming licensee's interest on 12/8/09 which came to his knowledge in February 2017. That he did not sue Archford during his lifetime.

The Defence case

11. The Defendants evidence is set out in the statement of Defence and Counter claim, the witness statement and the evidence adduced on trial.

12. In her defence and Counterclaim, the Defendant stated that she occupies the land by dint of customary trust since 1968 and she has pleaded particulars of trust on the suit land on para 19 of the Counter claim. That she has developed the land with permanent structures with full knowledge of the Plaintiff and without his consent. That the Plaintiff has not occupied/utilized the suit land ever. That her and late husband Archford have been in exclusive use and control of the suit land and cultivated the land and carry out commercial activities. That she is not a trespasser and is in occupation as of right as the land belongs to her late husband through customary trust.

13. In her witness statement the Defendant gave the family history of the suit land as thus; that the family Patriarch Mzee Mwangi had 3 sons namely Muruku Mwangi (eldest), Kimani was the second born and Romano Kung'u was the youngest. The Plaintiff is the son of Muruku Mwangi and Archford was the son of Romano Kung'u Mwangi. That Romano Kung'u died before the state of emergency and demarcation and registration of land. That he therefore did not have his own land. During land registration Archford was still young and hence the land was registered in the name of the Plaintiff's father – because he was the eldest in the family to hold in trust for Archford.

14. That she and Archford have occupied the suit land since 1968 and the Plaintiff has never raised any claim on the land until the death of her husband. That they entered the land on their own because they knew it belonged to Archford as of customary trust. That they needed no permission to do so.

15. She stated that the Plaintiff secretly filed Succession cause No. 184 at Thika without involving her and her husband. That the Plaintiff abandoned the prosecution of an earlier cause No. 212/1984 filed at SRMCC Murang'a. That the Plaintiff did not disclose the existence of trust in the suit in the Succession Proceedings. That in 2009 Archford registered a caution on the suit land upon learning that the suit land had changed ownership from Muruku Mwangi to the Plaintiff. That she is the legal administrator of the estate of the late Archford Mwangi Ndungu vide grant *ad litem* issued on 31/10/17.

16. During trial the Defendant testified and relied on her witness statement filed on 13/11/17 and list of documents dated 13/11/17. She informed the Court that her husband was born in 1945 and she got married in 1968 and lived on the suit land.

17. That she has carried out developments on 3 acres of the land; built a house, water tank and a shop; planted coffee, avocado, bananas, trees and runs a quarry on the suit land. She testified that her husband informed her that the land belongs to him. That the land was registered in the name of Muruku Mwangi to hold in trust for her husband who was then a child.

18. On Cross-examination she informed the Court that she was aware that LR No. Loc.10/Mukangu/7 and the suit land exist. She stated that the Mukangu land belonged to her mother in law being an inheritance from her father (mother in-law's father).

19. Challenged on cross-examination she stated that she has no evidence to show that she entered the land in 1968; no evidence of any legal step taken by her husband to assert his claim on the suit land in his lifetime. That her husband filed a caution as a licensee but denied that he was a licensee on the land that he occupied as of right pursuant to a Customary right in trust. That he did not seek the Plaintiff's permission to bury her husband on the land.

20. Further she informed the Court that she derives income from the land as follows;

a) Quarry basis - Kshs. 3000/= annually.

b) Fruit - Kshs. 2000/- annually.

That she planted coffee in 1972 but abandoned it 4 years ago.

Written submissions

21. On the 26/2/18 the Parties through their Learned Counsels on record on 26/2/18 elected to file written submissions.

22. The Plaintiff submitted that he is the registered owner of the suit land measuring 1.24 Ha having been registered through transmission from his late father's estate. Upon registration he is therefore absolute and indefeasible owner. That the Defendant had no right to bury the remains of her husband on the suit land without his prior consent and authority. That the deceased should have been buried him on LR No.10 Mukangu/7. That the remains ought to be exhumed as the Plaintiff has made out a prima facie case for grant of injunctive orders.

23. That Plaintiff further submitted that the Defendant is in continuous trespass of the suit land thus depriving the Plaintiff the use and enjoyment of the suit land. That the Plaintiff is entitled to mesne profits.

24. As to whether the Defendant has proved trust in her Counter claim, the Plaintiff submitted that the Defendant led evidence that the husband filed a caution claiming licensee interest in the suit land. That a licensee's interest is not a right in trust. He averred that the Defendant's husband did not pursue any customary trust claim during his life time. That the Defendant did not show evidence that he took possession of the land in 2004. He relied on the case of **Mbui Mukangu Vs Gerald Mutwiri Mbui CA 281 of 2000**.

25. The Defendant submitted that her claim is through her husband who is entitled to the land by way of customary trust. That the Defendant and her husband have been in occupation since 1968 and the Plaintiff has never asked them to leave. That the Defendant has a right to occupy the land as the legal representative of her husband's estate.

26. The Defendant submitted that it is customary among the Kikuyu for the 1st born son to be registered as trustee for his siblings in the family thus the Plaintiff's registration of title does not make him an absolute owner in his own right as the registration is encumbered by a customary trust. She relied on the case of **Kanyi vs Muthiora (1984) KLR 712 & Henry Mwangi vs Charles Mwangi CA 245 of 2004**.

27. The common facts in this case are that the Plaintiff is the registered owner of the suit land having become so registered on 21/4/2004 vide a confirmed grant of administration issued on 13/8/2003.

28. The parties are related, sharing a family Patriarch, one Mwangi. Mzee Mwangi had 3 sons; the first born was Muruku Mwangi, the second namely Kimani & the third was Romano Kung'u. It is commonly acknowledged in evidence that Romano Kung'u, the youngest died in 1940s before the demarcation and/or registration of land. It is also acknowledged that the Kimani was given his own land which he settled with his family. That the younger Romano had no land of his own. That the land was registered in the name of Muruku Mwangi the father of the Plaintiff and the uncle of the Defendant's husband.

29. It is not in dispute that currently the Defendant is in occupation of the land.

30. Having read and analysed the evidence, as set out in the pleadings and given on trial, together, with written submissions, the following issues are set down for determination by the Court;

A. Whether the Defendant has proved customary trust in her Counter claim?

B. Whether the Plaintiff is the absolute owner of the suit land?

C. Whether the body of Defendant's husband should be exhumed?

D. Whether the Plaintiff is a trespasser on the suit land?

E. Who meets the cost of the suit and counterclaim?

A: Whether the Defendant has proved customary trust in her Counter claim

31. Customary trust is one of the overriding interest hinged on the land that is currently recognized in the Land Registration Act, 2012. The suit property was registered under Registered Land Act Cap 300. The provisions of Section 27 & 28 of Registered Land Act state that the rights of a registered proprietor of registered land under the Act are absolute and indefeasible and only subject to rights and encumbrances

noted on the register or overriding interests which are set out under section 30 of the Act. The provisions of 27 & 28 are similar to the provisions set out in section 24,25 26 & 28 of the Land Registration Act, 2012. Section 107 of the Land Registered Act (now repealed) provides for transitional clauses and is quoted for specifics as follows;

(1) “Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

(2) “Unless the contrary is specifically provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act.”

It is now accepted by the Courts in this country that Section 30(g) of Registered Land Act provided for customary trust. Section 28 (b) of the Land Registration Act, 2012 specifically provide for overriding interests as may subsist on the land and affect it without it being noted on the register such as customary trusts.

32. In this case the Defendant has pleaded customary trust in the suit land. The Plaintiff’s case is that he is the absolute registered owner of the suit land pursuant to a grant of administration. The provisions of the law above are to the effect that the overriding interest such as customary trust need not be noted on the Register of the suit land. It therefore follows that registration of a person as a proprietor of land does not preclude him from holding an interest in trust for another. Customary trust is an encumbrance on land. These are non registrable rights which run with the land. They are overriding. They subsist on the land.

33. In the case of **Kanyi vs Muthiora (1984) KLR 712** the Court stated that;

“The registration of the land in the name of the appellant under the Registered Land Act (Cap 300) did not extinguish the respondents rights under Kikuyu Customary Law and neither did it relieve the appellant of her duties or obligations under section 28 as trustee.....The trustees referred to in section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under Customary law, if the Act had intended to exclude Customary law rights it would have been clearly so stated.”

34. **Justice Khamoni in Gathiba vs Gathiba Nairobi HCCC No. 1647/84** stated that;

“The position as I see it is therefore as follows: Correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interest under section 30 of the Registered Land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to section 28 and section 126(1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary law has the piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to the proviso to section 28 of the Registered Land Act such registration does not “relieve a proprietor from any duty or obligation to which he is subject as trustee”.

35. In the case of **Mbui vs Mukangu vs Gerald Mutwiri Mbui C.A No. 281 of 2000** the Court of appeal stated that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. The Court also held that possession and occupation are key elements in determining the existence of a customary trust.

36. In the present case it is important to examine the root of the suit land. The parties share an ancestor Mzee Mwangi who was the father of the 3 sons, one of whom is the Plaintiff and the other is the father-in law of the Defendant. Evidence was led that the suit land was inherited by the Plaintiff from his father Muruku Mwangi who in turn got it from the family Patriarch. There is evidence which is admitted by the Plaintiff that he did not buy the property. It was family land by virtue of ancestry.

37. The Defendant has stated that the land was registered in the name of Muruku Mwangi to hold in trust for Romano Kung’u Mwangi as he was the eldest in the family. The said Romano had died before demarcation and therefore it fell on the eldest son Muruku Mwangi to hold the suit land in trust for the son of Romano, Archford Mwangi who was a child then. This evidence has not been controverted by the Plaintiff. This state of affairs is what the Court of Appeal noted in **Henry Mwangi vs Charles Mwangi CA 245 of 2004** that under Kikuyu Customary Law, to which both parties are subject to, the eldest son inherits land as a Muramati to hold in trust for himself and other heirs. It would follow that even when the suit land was under the name of the Plaintiff’s father it was subject to customary trust. The registration of the Plaintiff pursuant to the grant of administration did not extinguish the trust on behalf of the lineage of Romano Kung’u. The land was already subject to customary trust.

38. It is trite that customary trust must be proved by way of evidence. The Defendant led evidence that she and her husband entered the land in 1968 at the time she got married to Archford. That they have developed the land significantly with the knowledge of the Plaintiff. She adduced uncontroverted evidence that she had planted coffee, bananas and avocado trees on the land. In his plaint the Plaintiff states that he allowed the Defendant’s husband to cultivate the land at his request because he was not utilizing it. That he lived in Nairobi as well as on the land at Mukangu at that time. That the Defendant would return the land when he needed it back. On trial the Plaintiff contradicted that evidence and stated that the Defendant and her husband forcefully entered the land. He did not show any acts of force by the Defendant and her husband. That evidence is not consistent with his pleading and is contradictory and shaky. It is disregarded. The Defendant explained that she entered in 1968 and has never left to date. The Plaintiff stated that he noticed the Defendant and her husband were on the land in 1984. This is when Muruku Mwangi passed away. He stated that he does not know exactly when the Defendant entered the land. He appeared unsure of the description of what is on the land meaning he is not familiar with the land. The Plaintiff admitted he got registered as owner in

2004. The Defendant had been on the land as early as 1984 (according to the Plaintiff) and 1968 according to the Defendant. The evidence of the Defendant is probable and believable. The Plaintiff on the other hand gave contradicting evidence in respect to how the Defendant and her husband entered the land.

39. From Para 38 above it is clear that the Defendant has had long stay and possession consistent with a claim under customary trust. In the case of **Mbui Mukangu v. Gerald Mutwiri Mbui, C.A No. 281 of 2000** the Court stated

“that for one to establish a claim in customary trust, one had to prove that they are in actual physical possession or occupation of the parcel of land.”

40. The Plaintiff has averred that the Defendants husband filed a caution claiming licensees interest and therefore no trust existed. I have examined this caution and I fail to relate it to the evidence on record. Even if it was claiming licensees interest it does little to dislodge the evidence of the Defendant that she has occupied the land by virtue of trust since 1968.

41. The Plaintiff has asserted that the Defendant has another land at Mukangu which she should settle in. The Defendant has stated that the said land belongs to her mother-in law which was gifted to her by her father. This evidence was not controverted. Both parties did not provide evidence to show who the registered owner of this land for the Court to assess this evidence.

42. From the above analysis and based on the evidence adduced and weighing it on a balance of probabilities, the Court finds and holds that customary trust subsists on the suit land in favour of the Defendant.

B: Whether the Plaintiff is the absolute owner of the suit land?

43. Having found that there exists trust on the suit land issue No. B has been answered by issue No. A. I find and hold that the Plaintiff is holding the suit land in trust for the estate of Archford Mwangi and the Defendant.

44. It follows that issue No. C & D are fully addressed and I need not delve into them.

45. The Defendant having succeeded in her Counter claim I see no reason to deny her costs.

46. Final orders;

a) The Plaintiff's case is dismissed.

b) It is hereby declared that the registration of the Plaintiff's father Muruku Mwangi as the owner of Loc.10/Gatheru/656 was encumbered by customary trust and the subsequent registration of the Plaintiff as the proprietor of the suit land did not in any way affect or dissolve the trust.

c) The Plaintiff shall pay the costs of the suit and the Counter claim to the Defendant.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 19TH DAY OF JULY, 2018.

J G KEMEI

JUDGE

Judgment read in open Court in the presence of;

Mr Ndegwa for the Plaintiff

Mr Malenya HB for Mr Mwaniki for the Defendant

Ms. Irene, Court Assistants.