



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 490 OF 2017

LUCY WATIRI MUBURI (legal representative and administrator

of the estate of Mathews Muburi Muya deceased).....PLAINTIFF

VS

NJOROGE F.A WACHIRA.....1ST DEFENDANT

ALOIS MWANGI MUBURI.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendants on 18/7/14 seeking the following orders;

- a) That the Honourable Court do make a declaration that Julius Wachira alias J. Wachira Mateo Mururi (Deceased) held the Land Parcel Number LOC.9/KANYENYAINI/574 in trust for the Plaintiff's husband Mathews Muburi Muya (Deceased) and that the Plaintiff be registered as the sole proprietors.
- b) That the District Land Registrar Murang'a be directed that the order herein shall be the instrument of transfer of ownership of the LOC.9/KANYENYAINI/574 as a whole or as the Court may decide, to the Plaintiff.
- c) That the Honourable Court to grant any other or better relief it may be deem fit to resolve the dispute amicably and/or finally.
- d) That the Defendants do pay the costs of the suit.

2. In the Plaint, the Plaintiff's claim on LR NO LOC.9/KANYENYAINI/574 (suit land) is based on customary trust. She is claiming under her late husband Mathew Muburi Muya. The suit land is at Kanyenyaini location within Murang'a County measuring 4.86 acres. It is registered in the names of Julius Wachira alias J. Wachira Mateo Mururi (deceased). The original land was LOC.9/KANYENYAINI/392. It was subdivided into two parcels; LOC.9/KANYENYAINI/574 & LOC.9/KANYENYAINI/575.

3. The Defendants have denied the Plaintiff's claim and aver interalia that the land is not held under trust in favour of the Plaintiff and sought to put the Plaintiff to strict proof.

The Plaintiff s case.

4. The Plaintiff stated that she is the legal wife of Mathew Muburi Muya (deceased), who was the son of Zakaria Muya Mwangi (deceased). She avers that the land LOC.9/KANYENYAINI/392 belonged to Mwangi Mutambuki (deceased) who had 2 sons; Mathew Muburi and Zakaria Muya Mwangi (both deceased). She stated that the land LOC.9/KANYENYAINI/392 was registered in the name of Mathew Muburi Mwangi to hold in trust for himself and his brother Zakaria Muya Mwangi in equal shares. That the said Mathew Muburi Mwangi subdivided the land into 2 portions LOC.9/KANYENYAINI/574 & LOC.9/KANYENYAINI/575. That he sold his share in LOC.9/KANYENYAINI/575 and relocated to Karati in Naivasha leaving parcel No. LOC.9/KANYENYAINI/574 being the share of Zakaria Muya Mwangi. That LOC.9/KANYENYAINI/574 remained registered in the name of Mathew Muburi Mwangi.

5. The Plaintiff alleges that the said Mathew Muburi Mwangi fraudulently transferred LOC.9/KANYENYAINI/574 to his son Julius Wachira alias J. Wachira Mateo Muburi (now deceased) while the family of Zakaria Muya Mwangi (deceased) were in occupation. She stated that her late husband Mathew Muburi Muya was brought up on the land and lived there with his family. That he and his father Zacharia Muya Muburi are buried on the suit land. She avers that she and her family live on the land and has developed the land without interference from the Defendants. She claims the whole of LOC.9/KANYENYAINI/575.

6. She stated that Zakaria Muya Mwangi was old and uneducated and the land was registered in the name of Mathew Muburi Mwangi who other than being the last-born son was also educated.

7. That in 1977 the Defendants settled on the land LOC.9/KANYENYAINI/574 and they now occupy the land together. She stated that the Defendants land was LOC.9/KANYENYAINI/575 which was sold by their grandfather and therefore have no claim on the suit land, LOC.9/KANYENYAINI/574.

8. She stated that her husband did claim the land during his lifetime from Mathew Muburi Mwangi. The discussions were through the clan elders and some of the relatives. She and her husband made trips to Naivasha to seek the land from the said Mathew Muburi Mwangi. She stated that her husband had other siblings which siblings left the suit land to her husband. That her claim is based on trust in respect to LOC.9/KANYENYAINI/574.

9. She stated that she filed LDT case where the Court ordered both parties to file Succession Cause over the land. The Succession Court however ruled that she was not a proper claimant in the Cause and dismissed her protest. She denied that her husband had been offered and accepted to purchase one acre of the land by the Defendant's mother at Kshs. 30,000/=.

10. PW 2 – Joseph Macharia Mwangi stated that he is the Chairman of Mbari ya Mbogo clan. That the land LOC.9/KANYENYAINI/574 was left to Zakaria Muburi Muya and his family when his younger brother Mathew Muburi relocated to Naivasha. That Mwangi Mutambuki the father of Mathew Muburi Muya and Zakaria Muburi Muya owned LOC.9/KANYENYAINI/392 which was subdivided into 2 plots; LOC.9/KANYENYAINI/ 574 & LOC.9/KANYENYAINI/575: Mathew sold his portion LOC.9/KANYENYAINI/575 and relocated his family leaving the family of Zakaria on the land LOC.9/KANYENYAINI/574. He averred that the land belongs to the Plaintiff's husband.

11. PW 3 – Wachira Muya Mutambuki stated that he is the brother of the Plaintiff's husband. He recounted evidence as given by PW 2. He stated that his younger brother took possession of LOC.9/KANYENYAINI/574 when Mathew Muburi Mwangi left for Naivasha. He stated that Zakaria Muya Mwangi had 5 sons and one daughter. That the 4 sons have settled in Rift valley on their own lands and LOC.9/KANYENYAINI/574 was left for Mathew Muburi Muya, their last born brother. He stated that the suit land belongs to the Plaintiff.

12. The Defendants denied that the land LOC.9/KANYENYAINI/574 was registered in the name of Julius Wachira alias Wachira Mateo Muiruri. They stated that the Plaintiff is not the legal wife of Mathew Muburi Muya. They also denied that LOC.9/KANYENYAINI/574 was family land and it belonged to Mwangi Mutambuki. They claim that the Plaintiff's husband was accommodated as a licensee. That the Plaintiff and her husband were offered an option to purchase 1 acre at Kshs. 30000/= but they managed to pay Kshs. 3,000/= only. That they are the legal administrators of their father's estate. They confirmed that the Plaintiff occupies 2.5 acres and has slowly been annexing it to her one acre.

13. DW 1 – Mathew Muburi Wachira states that he is the 1st born child of Julius Wachira Muburi. That the suit land belongs to his father. That his father got the land from his grandfather Mathew Muburi Mwangi in 1970. That Wairimu lived on the land where she built a permanent house and lived there until her demise in 1976. He stated that her mother agreed to sell the Plaintiff's husband 1 acre at Ksh. 30,000/= in 1983 which he only paid 3000/= leaving a balance of Kshs. 27,000/=. He stated that his grandfather bought the land. When pressed to table evidence of purchase, he stated that he had none.

14. DW 2 – Peter Ngari Muburi stated that he is son of Mathew Muburi Mwangi. He averred that Zakaria Muya Mwangi came from Rift Valley with one of his sons Mathew Muburi Muya and requested his father to give him a place to put up a shelter and he was showed a place to build a hut. That Zakaria came with his wife and young son Mathew Muburi Muya. That they were settled on the lower part of LOC.9/KANYENYAINI/575 (now sold). That Zakaria Muya Mwangi had other sons who were left in Rift Valley. That in 1970 Mathew Muburi Muya married and by then he had moved to the upper part of the land (LOC.9/KANYENYAINI/574) since the lower portion had been sold. The Plaintiff's husband died in 2002 without claiming the land from the Defendant's father who died in 1990.

Submissions.

15. The Plaintiff submitted that the original intention of Mwangi Mutambuki was that Mathew Muburi Mwangi and Zakaria Muya Mwangi were to hold the land in equal shares. That the Plaintiff's has established an overriding interest (Section 28/30 of Registered Land Act) in land as a person in possession and occupation of the land. That the Plaintiff's equitable rights are on the land and the land is subject to those rights even under registration of current owner. That the absence of any reference to the existence of a trust in the title documents did not affect the enforceability of trust since the provisions of Section 126 (1) of the Registered Land Act as to reference to a trustee are merely permissive and not mandatory.

16. Relying on the **Supreme Court of Kenya at Nairobi – Application No. 46 of 2014 between Isack M'Inanga Kiebia Vs Isaya Theuri Milintari & Isack Ntongai M'Lintali ; Alan Kiama vs Ndia Muthunya & Others – Civil Appeal No. 42 of 1978; Kanyi vs Muthiora (1984) KLR 712 and Mbui Mukangu vs Gerald Mutwiri Mbui – HCCA No. 281 of 2000** where the Learned judge held that a claim of interest by the Respondents was one of the trust emanating not as a result of possession or occupation of the suit property but from the fact that the property was an ancestral land passed on from generation to generation thus qualifying as an intergenerational trust.”

The Plaintiff submitted that a claim of trust need not be based on occupation and possession of the suit property but from the fact that the property was an ancestral land passed down from generation to generation thus qualifying as an inter-generational trust.

17. The Defendants submitted that Julius Wachira became the absolute owner of the suit land pursuant to transfer by his father in 1970. That the Plaintiff and her deceased husband entry into the land was by consent of the Defendants parents and not customary trust. That the Plaintiff sought 1.5 acres of land in the Land Dispute Tribunal. If indeed, there was customary trust he would have sought the whole land.

18. The Defendants submitted that Zakaria Muya Mwangi was the eldest in the family. Kikuyu Customary Law would require that land is registered in the name of the 1st son. The land was registered in the name of the young son meaning that there was no trust. The deceased husband never claimed any customary trust in his lifetime. That infact he was ready to purchase 1 acre of which he paid 3000/= leaving a balance of 27,000/=. If indeed customary trust existed, he did not need to buy the land. Finally, the Defendant submitted that the Plaintiff has failed to proof trust on the suit land and the suit should be dismissed and the Defendant's counter claim be granted.

Analysis and Determination.

19. I have considered the pleadings, the evidence adduced and the rival submissions and the key issues for determination are; Whether Mathew Muburi Mwangi (deceased) from whom Julius Wachira alias J. Wachira Mateo Mururi (Deceased) derives title held Land Parcel Number LOC.9/KANYENYAINI/574 in trust for the Plaintiff's husband; Mathews Muburi Muya (Deceased) in the lineage of Zakaria Muya Mwangi; Whether the Plaintiff should be evicted from the suit land; Who meets the cost of the suit.

20. It is not in dispute that the parties are related. They all share an ancestor one Mwangi Mutambuki. Mwangi Mutambuki had two sons; Mathew Muburi Mwangi and Zakaria Muya Mwangi. Zakaria was the eldest while Mathew was the youngest son.

21. It is also commonly acknowledged that Mathew Muburi Mwangi was the father of Julius Wachira alias J Wachira Mateo Muburi. The said Julius Wachira was the father of the Defendants in this case. On the other hand, Zakaria Muya Mwangi was the father of Mathew Muburi Muya, the husband of the Plaintiff. Zakaria Muya Mwangi died in 1965.

22. It is not in dispute that the said Mathew Muburi Mwangi became registered as owner of the suit land No LOC 9/Kanyenyaini/392 in 1962 as per the copy of the green card on record. In 1966 the said land was subdivided into two portions to create LOC 9/Kanyenyaini/574 and LOC 9/Kanyenyaini/575 all registered in the name of Mathew Muburi Mwangi. He sold LOC 9/Kanyenyaini/575 to Geoffrey Godfrey Gachiri in 1966 and retained LOC 9/Kanyenyaini/574 in his name. He then bought another land in Naivasha (presumably with the proceeds of the sold land) where he settled with his family leaving the family of Zakaria Muya Mwangi on the LOC 9/Kanyenyaini/574 (suit land). This line of evidence is consisted with the evidence of PW1 and PW2. It is also consisted with the findings of the Land Disputes Tribunal which findings formed part of the evidence in this case.

23. It is this land that the Plaintiff is claiming by way of customary trust. It is the Plaintiff's case that the suit land was the share of her father in law, Zakaria Muya Mwangi which devolved to her husband and to herself by customary trust.

24. It is further recorded in the uncontested evidence adduced by the parties that in 1970 Mathew Muburi Mwangi transferred the suit land to his son Julius Wachira alias J Wachira Mateo Mururi. In 1973 Julius Wachira settled his family on the suit land where it is said that he built a permanent house where he and his wife Melania lived until her death in 1996. It is this action of settling his family by Julius Wachira that made Mathew Muburi Muya realize in 1976 that the suit land had been transferred to Julius Wachira without his knowledge. In 1976, he and the Plaintiff therefore paid a visit to Mathew Muburi Mwangi in Naivasha to discuss the issue of the land. The said Mathew Muburi Mwangi promised to respond to his request. Again in 1981 they went to see the old man with Mary Ann but he did not respond. He died in 1990. In 1991 the matter was referred to the Mbari ya Mbogo clan but no decision was reached.

25. Mathew Muburi Muya, the husband of the Plaintiff married the Plaintiff in 1970 and she entered the suit land where she lives up-to today.

26. In 1981, Julius Wachira died and his family filed for Succession of the estate. Mrs. Melania Wachira was appointed as a representative of the estate of her husband on 3/6/1992. When Melania died in 1996, the grant was amended and on 30/9/2003 she was substituted with her children, the Defendants. The grant was confirmed in 2004.

27. On 25/3/2011 the Plaintiff filed a case at LDT at Kangema claiming the whole of the suit land belonged to her father in law Zakaria Muya Mwangi. The tribunal concluded that the Plaintiff and the Defendants be allowed to file a fresh Succession Cause and revoke the Succession Cause No 214/1992 of 29/9/2004 and the grant be confirmed to the Plaintiff and the 1st Defendant. It was noted that the Plaintiff's only interest was the suit land and not any other properties owned by the late Julius Wachira.

28. On 28/10/2011 the Plaintiff filed summons for revocation of the grant on the ground that the estate did not disclose that Mathew Muburi Muya, her husband was entitled to a share of the family land LOC 9/Kanyenyaini/574, the suit land herein. The Court dismissed the summons on grounds that the claim of customary trust was not sustainable to warrant consideration by the Court. It is then that the Plaintiff filed this suit

29. It is the case of the Plaintiff that land reference No LOC 9/Kanyenyaini/392 was family land and belonged to Mwangi Mutambuki. The land measured 25 acres. It is also stated in evidence that the said land was registered in the name of Mathew Muburi Mwangi to hold in trust for himself and Zakaria Muya Mwangi in equal shares. This is clearly stated in the evidence of PW2 and PW3. PW2 Joseph Macharia P Muburi stated that he is the chairman of the Angari Mbari ya Mbogo Clan and that he is the son of Peter Muburi the step brother of Mwangi Mutambuki. He testified as follows;

“ Mwangi Mutambuki(Deceased) owned the land parcel Number LOC.9/KANYENYAINI/392 measuring Twenty five (25) acres which was registered in the names of Mathew Muburi(Deceased) for himself and his brother Zakaria Muya Mwangi (Deceased).

Mathew Muburi (Deceased) later subdivided the said parcel without the knowledge of the Zacharia into two portions. The said Mathew Muburi sold his share and relocated to Naivasha. The other portion that is Number LOC.9/KANYENYAINI/574, was left in his names. The dependants/beneficiaries of Zakaria Muya Mwangi (Deceased) took possession of the land parcel number LOC.9/KANYENYAINI/574 and continued residing thereon to date.

The said land belongs to the Plaintiff's husband, Mathew Muburi (Deceased) after his brothers surrendered the same to him. The said land was transferred to Julius Mateo (Deceased) without the knowledge of the family and clan“.

30. PW3 -Wachira Muya Muthambuki on the other hand testified that he is the 2nd born child of Zacharia Muya Muthambuki and the brother of the Plaintiff's husband now deceased. He stated that the suit land, being family land was left to the Plaintiff's husband, who happened to be the last born in the family. That the other siblings settled in Rift Valley. This very witness also testified at the Land Tribunal where he stated that Mathew Muburi Mwangi sold his portion of the original land LOC.9/KANYENYA-INI/575 and relocated to Naivasha where he settled with his family. The remaining plot 574 was left to Zachariah Muya Muburi and his dependants. He stated that he was born on the suit lands and therefore his parents lived there long before consolidation. This evidence was not controverted by the Defendants. He informed the tribunal that his parents (Zacharia Muya Muburi) are buried on the land. Asked by the elders where the two parcels of land originated from, he testified that the two parcels of land belonged to Mwangi Muthambuki, the family patriarch.

31. PW2 aforementioned testified at the tribunal and stated that the Plaintiff settled on the land in 1970 upon marrying Mathew Muburi Muya todate. That she had grown tea bushes and other crops. He explained how the quest to have the land transferred to the Plaintiff and his late husband started in 1976 when they realized that the title of the suit land had been transferred to Wachira, the father of the Defendants. At this time Mathew Muburi Mwangi was still alive but despite many meetings and undertaking to resolve the matter, he died before doing so. His recommendation to the tribunal was that the land be shared into two equal parts. This may well have been in recognition that the land was family land.

32. Further evidence adduced at the tribunal shed light on whether or not there was indeed a trust in favour of the lineage of Zakaria Muya Muburi. The 1st Defendant testified and stated as follows;

“My prayer to this tribunal is to be given time to go to the High Court to correct the error in the Succession Cause and include the Plaintiff Lucy Waitiri Muburi in the Succession of the land because her name was omitted.”

My reading of this disclosure or request to the tribunal is that it was made in recognition of the ownership of the suit land to the lineage of Zacharia Muya Muburi and his dependents. If indeed there was no trust the 1st Defendant would not have agreed to have the Plaintiff be included in the Succession of the land if she was a trespasser as they want the Court to believe in their Counterclaim. The Counterclaim in my view is an afterthought.

33. It is in evidence that the Plaintiff has made developments on the land to wit 5000 tea bushes, houses for self and her 3 sons, water tanks and electricity connection to the residence. The 1st Defendants brother DWI too acknowledged at the tribunal that one acre of the suit land should be given to the Plaintiff. He was alluding to some contested agreement to sell one acre to the Plaintiff and her husband. No documentary evidence was adduced to support this averment and given the totality of the evidence it is not plausible that the Plaintiff would have wanted to buy land that she knew belonged to her father in law. It is on record that she resisted and her evidence in that respect is believable.

34. I have referred to the testimonies given in the tribunal proceedings because it is evidence given freely under oath before elders by the same witnesses. At the time, they had the most recent knowledge of the facts relating to ownership of the suit land. Its purposes is to test the veracity of the evidence on both sides of the dispute. The tribunal's observations were as follows;

a) “The land in dispute is a family land. It was originally LOC.9/KANYENYA-INI/392 comprising 2.5 acres which was registered in the name of Mathew Muburi Mwangi, as a trustee for him and his brother Zakaria Muya Mwangi.

b) In 1966 Mathew Muburi Mwangi sub-divided the land into two parcels LOC.9/KANYENYA-INI/574 and 575.

c) Mathew Muburi Mwangi the registered trustee sold 13 acres parcels No. 9/KANYENYA-INI/575 without the knowledge of Zakaria Muya family.

d) In 1970 Mathew Muburi Mwangi transferred land No. LOC.9/KANYENYA-INI/574 to his son Julius Wachira Muburi the land in dispute.

e) After selling the Land No. LOC.9/KANYENYA-INI /575 he left for Naivasha and settled there. Zakaria Muya's family continued to live in this disputed land LOC.9/KANYENYA-INI/574 until in 1973 when Julius Wachira brought his family in the same disputed land.

f) In 1976 Mathew Muburi Muya the late husband to the Plaintiff discovered that the land in dispute had been transferred to Julius Wachira Muburi without the knowledge of other family members.

g) Mathew Muburi Muya late husband of the Plaintiff Lucy Watiri assembled the clan members to solve this problem. He died before the clan solved the problem.

h) 3 members of Mbari ya Mbogo clan testified at Kangema Land Dispute Tribunal where their prayer was “The land in dispute No. LOC.9/KANYENYA-INI/574 be sub-divided equally between the Plaintiff Lucy Watiri Muburi and Defendants.

i) The 1st Defendant Njoroge F.A. Wachira and the 2nd Defendant Aloise Mwangi Wachira filed the Succession case at the Court leaving out Lucy Watiri Muburi and they admitted before the land dispute tribunal that it was an error”

35. The Defendants have stated that the land is not subject to trust and they have stated that it was held by their grandfather Mathew Muburi Mwangi in absolute and indefeasible state. DW2, Peter Ngari Muburi, one of the sons of Mathew Muburi Mwangi, in his evidence alleged that in around 1952 during the emergency, Zakaria Muya Mwangi arrived from Rift Valley with his wife and young son, Mathew Muburi Muya and requested his younger brother Mathew Muburi Mwangi to give him a place to put up a shelter on his land. That he was showed a place on the lower part of the land to build a hut, which he did. That upon his death in 1965, his family made up of his wife and son continued living there but when the lower part of the land (LOC 9/Kanyenyaini/575) was sold they moved up to the upper one, that is LOC 9/Kanyenyaini/574. That Zakaria Muya Mwangi had other sons that were left behind and settled in Rift Valley. The Defendants have not explained why the said Zacharia and his dependants continued to live on the land for that long upto date if they had no interest in the land by way of customary trust. No explanation has been tendered to explain why the registered owner Mathew Muburi Mwangi did not remove them from the land. Their quest for the land had been made long before he died. He was therefore aware of the claim by the Plaintiff and her husband. Again the reason could have been because the land belonged to the lineage of Zacharia.

36. The Defendants have led evidence that under Kikuyu Customary law that the eldest son is registered as owner of the land for the family. They have argued that if the land was family land it ought to have been registered under the name of Zakaria Muya Mwangi and not Mathew Muburi Mwangi as is the case herein. 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, the land was registered in the name of the youngest son. The explanation given for such change from the norm is that the youngest son was educated whereas the first-born was old and illiterate. A customary trust is created when one or more persons hold land for the benefit of another or other persons who are the beneficiaries under the relevant custom. In the face of the evidence placed before the Court, it would be illogical and unfair to hold that because the suit land was registered in the name of the youngest than the elder son as is the norm, a customary trust was thereby extinguished.

37. 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.

38. 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. The burden of proving the existence of the alleged trust in the suit land lay with the Plaintiff. The evidence given in this case is clear in pointing out the route of the customary trust from Mutambuki to his two sons, Zakaria and Mathew and now the Plaintiff. The evidence of the Plaintiff has clearly established that indeed an overriding interest in the form of customary trust existed. She did lead evidence to proof that the original land 392 belonged to Mwangi Mutambuki, the family patriarch. She did proof that Mathew Muburi Mwangi held the land in trust in favour of Zakaria Muya Mwangi for whom she is claiming under. She got married into the family in 1970 and lived in the suit land among other relatives upon which she would be competent to state that the land was under trust at acquisition.

39. The Defendants have claimed that there is no evidence on record that Zakaria Muya Mwangi nor Mathew Muburi Muya ever claimed land under customary trust during their lifetime and that of the registered owner Mathew Muburi Mwangi. There is evidence that points that Mathew Muburi Muya visited Mathew Muburi Mwangi twice in Naivasha seeking peaceable resolution of land question.

40. The Defendants have tabled evidence that they are the legal administrators of the estate of Julius Wachira. In their Counterclaim, they have sought the removal of caution by the Plaintiffs as well as her eviction from the land. There is evidence on record which is admitted by the DW1 that when he went to the suit land he found the Plaintiff and her husband had settled on the land. According to the evidence it is not true as alleged in para 9 of the Defendants' Complaint (in PMCC No 232 of 2014) that the Plaintiff trespassed on to the suit land in 2007. It is clear from the evidence that the Plaintiffs' father in law (Zacharia) lived on the land before consolidation and the Plaintiff's husband grew up on the land. The Plaintiff herself has settled on the land since the 1970 when she got married into the home. The Plaintiff therefore has acquired possessory and equitable rights having occupied the land in pursuance of customary rights on the suit land. The caution registered by the Plaintiff was to safeguard her interest in the suit land.

41. The totality of the facts and evidence on record leads this Court to the conclusion that the Plaintiff has discharged the burden of proof on the required balance of probability that the suit land is ancestral land of Mwangi Mutambuki and ought fairly to have been shared between his two sons Zakaria and Mathew. It is on record that Mathew Muburi Mwangi sold his portion (LOC.9/KANYENYA-INI/575) and relocated to Naivasha. It would be unjust for the Defendants to hold onto the suit land and yet the Defendant's share was appropriated by way of sale to one Geoffrey Gachiri by their grandfather, Mathew Muya Muburi.

42. The Court makes the orders as follows;

a. A declaration that Julius Wachira alias J. Wachira Mateo Mururi (Deceased) held the Land Parcel Number LOC.9/KANYENYAINI/574 in trust for the Plaintiff's husband Mathews Muburi Muya (Deceased) and that the Plaintiff be registered as the sole proprietor.

b. The Defendants' Counterclaim be and is hereby dismissed.

c. That the District Land Registrar Murang'a be and is hereby directed to rectify the register to reflect the Plaintiff as owner of the LOC.9/KANYENYAINI/574 as a whole.

d. The Defendants, their servants and/or agents do vacate the suit land within 90 days from the date hereof failing which execution do issue in compliance with the provisions of section 152 of the Land Act, 2012.

e. The parties being relatives, each to bear their own costs.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 27TH DAY OF SEPTEMBER 2018.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Odawa HB for Kinuthia for the Plaintiff

T M Njoroge HB for Mwaniki for the Defendant

Ms.Irene and Ms Njeri, Court Assistants