



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO.174 OF 2017

DOUGLAS MACHARIA WAIHAKA.....PLAINTIFF

VERSUS

SAMUEL MUGO NJOKI.....DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendant for an order that the Defendant withdraws the caution lodged on 4/7/01 in respect to the Loc.19/Gacharageini/1189 together with costs of the suit. The Plaintiff asserts that he is the registered owner of the suit land.
2. The Defendant denied the Plaintiffs claim vide a statement of Defence and Counterclaim filed in Court on 8/3/17. In his Counterclaim the Defendant asserted a claim of trust/customary trust on the land for which he urges the Court to determine on his behalf.
3. At the hearing of the case the Plaintiff informed the Court that he is the registered owner of the suit land. He produced a copy of certificate of official search dated 28/3/16 to support his averment. He stated that he has 10 Children in total: 7 from his first wife Njoki and 3 from his 2nd wife Wanjiku. He stated that he wants the caution lodged on the suit land removed to enable him use the suit land as security for a loan to fund his medical expenses. He informed the Court that he suffers from goitre which developed in 2017. He further stated that Njoki left the marriage and returned to her parents with his 7 children. Then he married Wanjiru whom he has 2 sons and a daughter from another marriage.
4. He stated that he inherited the land from his father. That he has not decided to subdivide the land amongst his children yet. He disclosed that there was a dispute between him and his sons at the LDT 20 of 2002 Kangema. Where he sued for removal of caution to enable him subdivide the land amongst his sons then. He clarified that if he was to subdivide the suit land he would not give land to his sons from the 1st wife. He however stated that all his children are generally entitled to inheritance of the suit land if he is willing to give them land.
5. DW 1 – Samuel Mugo Njoki relied entirely on his witness statement dated 7/3/17 and filed on 8/3/17. He stated that the Plaintiff is his father. His mother is Njoki the Plaintiffs 1st wife who is estranged. That he and his mother and 6 siblings live at his grandparents' home. That he and his siblings adapted the surname Njoki (his mother's) because the Plaintiff was not cooperative to give them a copy of his Identify card which was required for registration of Identity cards.
6. He explained that the Plaintiff neglected them while they lived with their mother and did not attend school due to lack of school fees. That in 2012 he filed a case at LDT Kangema against the Plaintiff. That the Plaintiff is seeking a share of land. The LDT case was dismissed. To protect the suit land from being sold he lodged a caution on the land on 4/7/01. He explained his apprehension that since the Plaintiff has married a 2nd wife, he is going to subdivide the land and share amongst the children of the 2nd wife to his and his siblings exclusion. He informed the Court that the Plaintiff does not recognize the children of the 1st wife as his children. He also stated that the Plaintiff is planning to sell the land and leave them destitute.
7. DW 2 Francis Waithaka Njoki testified that the suit land is ancestral, the Plaintiff having succeeded it from his father. He adopted the evidence of DW 1 and the Defendant closed his case.
8. The Plaintiff submitted that the Defendant cannot force the Plaintiff to share his land during his life time. That he should wait to file Succession proceedings after the demise of the Plaintiff. He submitted that the Defendant has claimed a licensee's interest in the caution which interest is incapable of protection in law by dint of Section 71 of the Land Registration Act No. 2012. Relying on the case of **Stephen Maina Kinyua vs. Rosemary Njoki Maina (2008) EKLR** the Plaintiff submitted that a licensee only stays and retains possession of the land at the mercy of the owner. Once the registered proprietor of the land claims it back his licensee is once and for all terminated.
9. The Defendant submitted that the new Constitution under Article 260 defined land to include any vested or contingent right to or interest in or arising from land or Permanent fixtures on or improvements to land. He argued that he has contingent rights in the suit land. Section 71 1 (a) of Land Registration Act gives him the right to lodge a caution for a claim of right whether contractual or otherwise. He urged the Court to be guided by Section 1A & 1B of Civil Procedure Act to see the justice of the case. He distinguished the case cited above by the Plaintiff

in his submissions as irrelevant to the dispute at land.

10. Citing Article 159 (2) (e) of the Constitution and Article 2 of the Constitution, he argued that the Constitution recognizes cultural customs that the head of the family is a trustee of the family's property. That Article 45 of the Constitution recognizes the place of the family in society. Members of the family, he argued, have rights and responsibility to cater for his children or wife.

That the head of the family must give access to economic and social rights to his family just like the Government of Kenya generates those rights in Article 43 of the Constitution. The Plaintiff he noted, should not leave his children as destitute. He urged the Court to grant his Counterclaim as he had proved his case on a balance of probability.

11. This case was consolidated with ELC 507 of 2016, Murang'a by consent of the parties on 7/3/18. The subject matter is the same and the parties are related.

12. Having considered the pleadings, the evidence adduced on record and on the hearing, the submissions by the Learned Counsels on behalf of the parties, the legal precedents where supplied, the issues for determination are as follows;

- a) Whether the land is subject to trust.
- b) Whether the caution should be removed.
- c) Costs of the suit.

13. It is not in dispute that the Plaintiff is the registered owner of the suit land. It is also not in dispute that the Defendant is the son of the Plaintiff. According to the evidence on record the Defendant lodged a caution on the suit land on 4/7/01 claiming interest as a licensee. On the 28/4/16 the Plaintiff wrote a demand letter to remove the caution which demand went unheeded hence the filing of this suit.

14. The Plaintiff produced a certificate of official search to support his averment that he is the registered owner of the land. The Defendant claim is based on trust. He has argued that the land was inherited by the Plaintiff from his father and therefore it is family land/ancestral land. It is his case that he should give him and his siblings a share of the land. At the very least he argued that the Plaintiff should not subdivide the land and bequeath it to the children of the 2nd wife Wanjiru to his and his siblings exclusion. That they too are entitled to the land and want their father the Plaintiff to give them a share. They also argued that the Plaintiff wants to sell the land to a tea factory for purposes of development of a tea shed and if that happens he and his siblings will be destitute as the 0.2 acre land they have settled on is small and in any event was given to their mother by her father. To protect his interest he therefore filed a caution on the suit land. The Plaintiff has responded to the above averments by arguing that he is the absolute owner of the suit land and he cannot be directed when and how to share the land among his children. While admitting and recognizing his 10 children both from his 1st wife Njoki (7) and his 2nd wife Wanjiru (3) he argued that though they are entitled to inherit the land, he will do it at his own time and in accordance to his will. He claimed that he wants the caution to be removed so that he may take a loan to fund his medical expenses as he is ailing. He admitted that the land belonged to his father which he inherited.

15. Section 24, 25 & 26 of Land Registration Act protects title to land. The same may be challenged on the basis of fraud misrepresentation inter alia to which the person is proved to be a party. In particular Section 25 of the Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided for under the Act and are subject to such liabilities, rights and interests as affect the same and are declared as overriding interests as under section 28 of the Act not to require noting on the register, unless the contrary is expressed in the register.

16. Khamoni J. in the case of **Gathiba v Gathiba, Nairobi HCCC 1647/84 (decided in January 2001 and reported in [2001] 2 EA 342) at Pg 368** stated:

“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 laws 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 a trustee”.

17. From the above case it is clear that Customary trust was recognized as part of the trusts stated under the repealed Land Registration Act section 27 28 and 30(g) under which the suit land was registered. The fact that the word trust was not denoted on the title does not relieve the registered owner from any obligation as a trustee under Kikuyu custom to which the parties subscribe to.

18. In the case of **Salesio M'Itonga Vs M'Ithara & 3 Others (2015) ECLR** the Court of Appeal stated that trust is a question of fact and has to be proved by evidence. In this case the Defendant led evidence which was admitted by the Plaintiff that the suit land was inherited by the Plaintiff from his father and therefore would follow that the suit land is both ancestral and trust land.

19. In the case of **Mbui Mukangu v Gerald Mutwiri Mbui [2004] eCLR** though the land registered in the name of Plaintiff, it was ancestral land that devolved to him on the death of his father. It is a concept of intergenerational equity where the land is held by one

generation for the benefit of succeeding generations. It has previously held that for one to prove trust possession and occupation is key. However in the case of **George Mbiti Kiebia & another v Isaya Theuri M'lintari & another [2014] eKLR** The Court of Appeal held that one need not be in possession or occupation to prove customary trust. In the current case it is on record that the Defendant resides on another land measuring 0.2 acres given to his mother by her parents. Even though the Defendant does not reside on the suit land, he has proved customary trust on the land.

20. The Plaintiff denied the Defendant's allegations that he wants the caution removed to pave way for the disposal of the suit land. He instead averred that he wants to secure a loan for purposes of medical expenses. There was no evidence led to support this position. The Defendant's claims in his counterclaim is for a portion of the land on account that he is the son of the Plaintiff. The Plaintiff has acknowledged the Defendant as his son together with all the children of his two wives. In case of **Marigi vs. Muriuki & 2 Others (2008) IKLR 1073** the sons and grandson of the Appellant wanted the Appellant to distribute land in a certain way. The Court of Appeal held that since the Appellant as owner of the property was still alive there was no law which he could be compelled to distribute his property. The Court of Appeal held that his property is not available for subdivision and distribution among his wives and children except if he personally on his own free will decided to subdivide and distribute it. He could not be urged directed or ordered to do so against his will. The rights of the Plaintiff to the suit land could only be extinguished on death.

21. Further the Court does not find for the determination of the trust of the suit property at this stage save to find that the suit land is encumbered by a trust. The land is ancestral land having devolved from the Plaintiff's father and it is expected that it will so devolve to his children in similar manner in accordance with the concept of intergenerational trust.

22. Having found that the suit land is trust land, this Court does not find any justification in the caution remaining on the title. It is hereby ordered to be removed.

23. Final orders;

- a. In the end the Defendants counterclaim partly succeeds to the extent that the land is declared to be held under customary trust by the Plaintiff for his family, the Defendant included.
- b. The caution registered on the title be and is hereby removed.
- c. Parties being related I make no orders as to costs.

It is so ordered.

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:

T M Njoroge HB for Mwaniki for the Plaintiff

Odawa HB for Mindo for the Defendant

Ms.Irene and Ms Njeri, Court Assistant