



**REPUBLIC OF KENYA**

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

**ELC NO. 376 OF 2017(OS)**

**CATHERINE WANJIRU GACHERU - PLAINTIFF**

**VS**

**ROSEMARY WANJIRU WANYOIKE - DEFENDANT**

**JUDGMENT**

1. The Applicant brought an originating summons under Order 37 Rule 2 of the Civil Procedure Rules in her capacity as the administrator of the estate of Jecinta Wanja Kamau against the Defendant for the determination of the following questions;

a. Whether the Defendant holds 1.2 acres out of LOC 6/GIKARANGU/2639 in trust for the Plaintiff.

b. Whether an order should be issued to partition the said parcel to separate the title and 1.2 acres be registered in the names of the Plaintiff.

2. On the 13/2/2018 the parties through their learned counsels on record applied and the Court directed that the matter be heard viva voce. The pleadings of the parties were deemed to be the plaint and defence respectively.

3. At the hearing of the case, the Plaintiff reiterated the contents of her affidavit filed on the 6/11/14 as well as her witness statement filed on the 16/3/18. She stated that she was 13 years in 1995 when the dispute relating to the suit land begun and therefore does not know much about it. That she became aware of the case from the documents she obtained from her mother's house after her demise. She produced several documents documenting the history of the case marked as PEX No. 1-19. She stated that among the documents she found were an acknowledgement of receipt of monies in the sum of Kshs 163,600/- by Samuel Wanyoike Magondu from her mother Jecinta Wanja Kamau. She clarified to the Court that she did not find any purchase agreement for 1.2 acres in the documents she retrieved from her mother's house.

4. The Plaintiff further stated that she is the daughter of the late Jecinta Wanja Kamau who passed away on 31/12/14. That her mother was approached by Beatrice Njeri Magondu and her son Samuel Wanyoike Magondu to finance their succession cause for the estate of their deceased husband and father one Karuga Magondu. That her mother purchased land from the said Magondus and paid Kshs 163,600/- for the 1 acre which monies was acknowledged by Samuel Wanyoike Magondu. She has annexed an acknowledgement dated the 21/1/1995. She stated that her mother was put in possession of the land in March 1996. That after the burial of Samuel Wanyoike Magondu on the 15/9/1996 the Defendant threatened them from utilizing the 1.2 acres but was enjoined by the Court. That the 1.2 acres is in their possession today.

5. She further stated that subsequently Beatrice Njeri Magondu was appointed administrator of the estate of Karuga Magondu and upon confirmation of the grant the land was registered in the names of Samuel Wanyoike Magondu and Jecinta Wanja Kamau owning 1.0 acres and 1.2 acres respectively. Thereafter Samuel Wanyoike Magondu died before the partitioning of the land was done and his widow the Defendant filed a review of the grant vide Succession Cause No 315/95 in 2003 whereof the said grant was set aside. By then Beatrice Njeri Magondu had died in 2001. Aggrieved by the decision of the Magistrate's Court, Jecinta Wanja Kamau filed an appeal in Embu High Court vide Appeal No 30/2007 which appeal upheld the decision of the lower Court and therefore she lost the appeal. An appeal to the Court of Appeal vide CA No 181/2008 suffered the same fate. In particular the appeal was upheld on the grounds that Jecinta Wanja Kamau was not shown either as a creditor nor a beneficiary of the estate of Karuga Magondu. That no justification was given for allocating her 1.2 acres of the estate land. That she did not tender evidence to support evidence of the purchase of the land.

6. That the Defendant is now the administrator of the estate of Karuga Magondu and should be ordered to transfer 1.2 acres to the Applicant, the entitlement purchased by her late mother Jecinta Wanja Kamau. That the administrator is holding the said land in trust for her.

7. In resisting the Applicant's claim, the Defendant denied holding 1.2 acres in trust for the Applicant. She contends that the suit land belonged to the estate of Karuga Magondu. She refuted the Appellant's claim that her mother purchased the land. She contends that neither her mother in law, Beatrice Njeri Magondu nor her husband Samuel Wanyoike Magondu had capacity to sell the land before obtaining letters of grant for the estate and if indeed they did so, they were intermeddling with the estate of the deceased and committing a criminal offence.

8. She contended that no sale took place and indeed Jecinta Wanja Kamau and her advocate took advantage of the old age of her mother in law and the state of drunkenness of her husband to claim a sale when no consideration was made. She stated that the Applicant's mother and her advocate manipulated her husband to file for divorce when they had a simple disagreement due to his drunkenness. In any event, she argued the Applicant's mother's claim has been adjudicated all the way to the Court of Appeal and dismissed. She further pointed out the fact that if Jecinta Wanja Kamau had purchased 1.0 acre, how comes she claimed 1.2 acres. That if any monies were received by her husband on 21/1/1995, it was not received in his capacity as an administrator of the estate of Karuga Magondu as the rightful administrator was only appointed on 21/3/1996.

9. The Defendant on the other hand gave evidence and relied on her replying affidavit dated the 20/6/2017 and filed on 21/6/17. In addition, she produced the following documents; Ruling in Succession cause no 315 of 1995- Muranga; Judgement in HCCA No 30 of 2007 and Judgment in CA No 181 of 2008 marked as DW1-3.

10. Parties have filed written submissions which I have read and considered.

11. This case has been in our Courts for the last 2 decades. It is not in dispute that the suit land belonged to Karuga Magondu, deceased. He was survived by Beatrice Njeri Magondu and his son Samuel Wanyoike Magondu.

12. It is the Plaintiff's case that her mother Jecinta Wanja Kamau was offered land for purchase by Beatrice Njeri Magondu and Samuel Wanyoike Magondu. That she also financed succession of the estate of Karuga Magondu and the redemption of another title in a third party's hands. She produced an acknowledgment of Kshs 163,600/- which stated as follows;

“ACKNOWLEDGEMENT

I Samuel Wanyoike Magondu -ID 5938950/68 of P.o Box 13 SABASABA has upto now received Kshs. 163,600/- from Jecinta Wanja for purchase of one acre out of parcel No LOC 6 /Gikarangu/2639”

13. Beatrice petitioned for letters of representation in the estate as the widow of Karuga Magondu deceased, which grant was issued on 22/3/1996 and the land was to be shared by Samuel Wanyoike Magondu (1.0 acre) and Jecinta Wanja Kamau (1.2 acres). She then transferred the land through RL7 to Samuel Wanyoike Magondu and Jecinta Wanja which transfer was registered on 15/4/1996. In 1996 the registered owners of the land applied and obtained consent to partition the suit land and the same was granted on 14/5/1996. However, the partition was not completed as Samuel Wanyoike died on 15/9/1996.

14. Whilst all these were going on the Defendant had left her matrimonial home and her husband Samuel Wanyoike Magondu filed a divorce No 533/95 in 1995 but he died before the divorce was finalized. After his death, the Defendant returned to her matrimonial home.

15. Beatrice Njeri Magondu and the Defendant filed an application vide HCCC No 2730 of 1999 seeking a revocation of the grant made to her on 22/3/1996 on the grounds that, she, Beatrice did not petition for any grant and if one had been done, it was a forgery. As a result of the forged grant, she stated, one Jecinta Wanja Kamau was given a share of the suit land when she had no interest in the land. Beatrice Njeri died on 23/1/2001 and the application was withdrawn on 26/7/2004.

16. On the 4/4/2003 the Defendant filed for review and setting aside of the grant issued on 22/3/1996 before the PMCC Court in Murang'a, 315/95 and the application was allowed setting aside the grant. Being aggrieved, Jecinta Wanja Kamau filed an appeal at the High Court in Meru HCCA No 30 of 2007 where the appeal was dismissed. She moved the Court of Appeal vide CA 181 of 2008 and the appeal was also dismissed on grounds that she did not prove purchasers' interest in the suit land. The suit land effectively reverted to the estate of the deceased, Karuga Magondu.

17. The issues for determination are; Whether the Plaintiff has proved a purchaser's interest? Whether the Plaintiff has proved trust; who meets the costs of the suit?

18. The Plaintiff testified that she was 13 years in 1995 when the alleged purchase of the suit land by the mother took place. She relied heavily on the documents she claimed to have found in her mother's house and more particularly the acknowledgement stated above. She did not produce any agreement for sale nor bring evidence in form of witnesses who may have been aware of the alleged purchase. The Defendant has denied any sale by either her mother or the husband. Referring to the acknowledgement, she states that if indeed any monies were received by her husband, it was not done in his capacity as an administrator for reasons that he was not. That both her mother in law and her husband did not have capacity to sell the land as succession had not been done in 1995.

19. The Court has noted that the revoked grant was issued in 1996 and agree with the Defendant that the alleged sale of the suit land to the Plaintiff's mother (if any) would have been intermeddling with the deceased estate in contravention of Section 45 of the succession Act. In the considered view of the Court if any monies were paid to the said Samuel Wanyoike Magondu, then subject to proof the Plaintiff can seek a remedy against the estate of the said Samuel Magondu.

20. He who asserts must prove. The onus to prove that there indeed existed an agreement of sale between her mother and the administrators of the estate of Karuga Magondu rest with the Plaintiff. I have perused the acknowledgement of Kshs 163,600/- allegedly by Jecinta Wanja Kamau and Samuel Wanyoike Magondu and it refers to 1 acre of land in the suit land. The Plaintiff is claiming 1.2 acres. That claim cannot be supported by the acknowledgement. This is only an acknowledgement of the alleged sale and not evidence of contract of sale. The fact of sale is missing. Section 3 (3) of the law of contract states that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing, signed by all the parties and attested by a witness. Neither the Plaintiff nor her mother (in the earlier cases in Court) were able to produce any sale agreement between her and the Magondus. The basis of the Plaintiff's claim is anchored in an agreement for sale. The Plaintiff has failed to prove any purchase and consequently the Court is unable to conclude that there was any agreement of sale in the suit land.

21. The Plaintiff's counsel has relied on constructive trust to urge the Court to find for the Plaintiff. He submitted that the Plaintiff's mother was put in possession upon purchase of the suit land. The Defendant has denied that the Plaintiff is in possession of the suit land. The case of **Macharia Mwangi & 87 others Vs Danson Mwangi Kagiri** is distinguishable because in that case there were valid agreements of sale between the parties. Possession was also not in dispute. Purchase and possession having not been proved, it is difficult to infer a constructive trust in favour of the Plaintiff.

22. The Plaintiff sued the Defendant that she holds the 1.2 acres in trust for her. There is no evidence that the Defendant is a legal representative of the estate of Karuga Magondu. She filed suit for review as an interested party in the previous cases. It is not clear how, if trust, was proved, she could actualize the Plaintiffs claim.

23. Has the Plaintiff proved trust? The principles of proving customary trust are clear. 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. In the case of **PETER GITONGA VERSUS 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”.

The Plaintiff failed to prove any trust as guided by the above mentioned law precedents.

25. In the end the Plaintiff's case fails and is dismissed with costs to the Defendant.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31<sup>ST</sup> OCTOBER 2018.**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Mbugua HB for Gacheru for the Plaintiff

Defendant – Absent.

Irene and Njeri, Court Assistants