



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MURANG'A**

**ELC NO. 474 OF 2017**

**PETER WAINAINA MACHARIA.....PLAINTIFF**

**VERSUS**

**MBURU MACHARIA alias**

**SIMON MBURU MACHARIA.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff took out the Originating Summons filed on 10/11/2011 for determination of the following questions;
  - a) Whether L.R. NO LOC.17/IGANJO/34 is registered in the names of the Defendant for himself and in trust for the Plaintiff.
  - b) Whether the trust subsisting in respect of L.R. NO. LOC. 17/IGANJO/34 registered in the name of the Defendant for the Defendant and the Plaintiff should be determined and the beneficiary be granted his respective share.
  - c) That the costs of the suit be paid by the Defendant to the Plaintiff.
2. On the 10/7/2015 the original Plaintiff was substituted with his wife Alice Wanjiru Wainaina.
3. In her supporting affidavit filed on even date the Plaintiff averred that the land is family land. That it was bought by her father in law who caused it to be registered in the name of the Defendant to hold in trust for him and his other sons. She is claiming  $\frac{1}{2}$  of the suit land.
4. The Defendant denied the Plaintiffs claim by asserting that he purchased the suit land after his father namely Macharia Gachache failed to conclude the purchase.
5. In her evidence in chief, the Plaintiff stated that the Defendant, his elder brother-in-law holds  $\frac{1}{2}$  share of the suit land in trust for her. Her husband lived on the suit land until 1971 when he was violently removed by the Defendant. It is her averment, that the suit land belonged to her father in law Gachache Macharia who caused it to be registered in the name of the Defendant during consolidation and demarcation to hold it in trust for himself and his siblings in accordance with Kikuyu Customs and the prevailing state of unrest at the time. Further that it was to forestall the intentions of a neighbour intent in grabbing the land.
6. She testified that upon the demise of her father in law the Defendant evicted her and her husband from the suit land. She stated that she lives in Makuyu on a piece of land acquired by her late husband. On cross-examination she informed the Court that she got married in 1970 and her father in law died in 1975. She explained that she does not know how the suit land was acquired.
7. PW 2 - Ndungu Wainaina stated that he knew from personal knowledge that the suit land was acquired through purchase by Macharia Gachache from Mumo wa Miatu and registered it in the name of the Defendant. That he testified before the LDT Tribunal in 2008 where the Plaintiff was to get 3 acres out of suit land. Commenting on the copy of agreements of sale dated 5/5/61, 13/8/61 & 27/12/61 the witness initially stated that he knew the signature and handwriting of one of the witnesses Muchoki wa Nganga. He stated the signature alleged to belong to Muchoki wa Nganga was incorrect. He referred the Court to the signature on the adjudication register dated 7/5/62 as the correct signature. That Muchoki wa Nganga was his uncle.
8. PW 3 – Robinson Gachare Macharia, 73 years old, testified that he is step brother of the Defendant. That the land was purchased by the Defendant's father Macharia Gachachi from Mumo Miatu when he was a child. He stated that his father had 4 wives and the parties to the suit were sons of Wamaitha. That the 4 wives lived on the said suit land. He stated that his other siblings bought land for themselves and so have no claim on the suit land. He testified that the Defendant was older than the Plaintiff's husband. That the Defendant duped his father to

register the land in his name. He stated that his father lived on the suit land and was buried thereon. That he himself bought his own land where he resides with this family. That his 9 brothers except for the Plaintiff's husband are not claiming any land. They have all purchased land for themselves including the Plaintiffs husband.

9. PW 4 – Agnes Njoki Kirera informed the Court that she is the sister of the parties to the suit, she being the eldest. She stated that she is 90 years old. She stated that her father bought the land from Wa Miatu at the cost of 1000/=. That she was present during the negotiations and even assisted the seller in fetching firewood(?). That the balance of the purchase price was paid to Wa Miatu's son named Mumo. She stated that her family lived on the suit land before the emergency period, but their parents Macharia Wamaitha, Mburu & other siblings came back and settled on the land. That her other brothers acquired their lands and never claimed a share of the suit land. She stated that their father was aging and decided to register the land in the name of the Defendant to safeguard it. That the Defendant was employed as a policeman and was expected to safeguard the land on behalf of the family. She confirmed that Mburu never contributed to the purchase of the land.

10. The Defendant informed the Court that his father had 4 wives. That he and the Plaintiffs husband were sons of the house of Wamaitha. That in 1943 his father purchased the suit land from a neighbour namely Mumo @ 1000/= but only managed to pay 300/= before the purchase fell through because his father could not raise the balance of Kshs. 700/=. The seller offered the said land to a neighbour one Gathaiya Gibson. He stated that the old man summoned all his sons including the Plaintiff's husband to buy the land but none was interested. He testified that he paid the purchase price of 1000/= to the seller who in turn refunded Kshs. 300/= to his father. The suit land was then registered in his name in 1962 whereupon he has made extensive developments.

11. The Defendant further added that his father's land was at Igikirio village L.R. LOC. 17/IGANJO/50 measuring 0.4 Ha. That the land was swampy. That his parents lived on his land and were buried there because their land was swampy and uninhabitable.

12. He further testified that the Plaintiff's husband has never resided on the suit land. That at that time he was schooling at Kabati Primary School and lived at his Aunt Wairimu Wamanji and would only visit during the weekends. That in 1968 he worked at his retail shop at Kamahuha until 1970 and lived at the shop. In 1969 he married and continued living in the shop. That the Plaintiff's husband inherited land at Makuyu (Punda Milia Cooperative) which shares belonged to his mother. He stated that he paid for the necessary expenses in respect to the transfer of the land to the Plaintiff's husband.

13. He produced agreements dated 5/5/61, 13/8/61 & 27/12/61 to support his averments that he purchased the land. He stated that parcel No. 50 was inherited by Ngige Macharia and Dorcas Wanjiku Macharia.

14. DW2 – Peris Njoki Muchungu testified that she is the step sister to the Defendant and the Plaintiffs husband. That her mother was Njeri. He reiterated the evidence of PW 1 in respect to how the land was acquired. That his father's ancestral land was at Igikiro and not Iganjo, which land was swampy, uninhabitable and unfit for burial and that explains how her father was buried in the Defendant's land. That the Plaintiffs husband was given the land as an inheritance in 1971 at Pundamilia.

15. DW3 – Ephantus Ng'ang'a Gathuku testified and reiterated the evidence of PW 1 & PW 2. He stated the ancestral/ family land was at Igikiro and not Iganjo, that the suit land was acquired by the Defendant. He stated that he was born in 1947 and he knows the history as given by the Defendant. He moved into the area in 1990 and therefore was not present when the land was acquired and or registered. He did not witness any agreement in relation to the land.

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

17. The key issue for determination is whether the Plaintiffs has proved trust on the suit land. There is another issue that the parties have invited the Court to address in their submissions although was never raised in the pleadings which is whether the suit is Resjudicata.

18. It is trite law that trust is a question of fact. It needs to be proved on a balance of probability by the person asserting the same. Section 107 of the Evidence Act, Cap 80 provides as follows;

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

It is the duty of the Plaintiff to prove trust on a balance of probabilities. He who asserts must prove.

19. In the instant case the Plaintiff has testified that the land was family land. That it was acquired by her father in law and that she and her late husband lived on the land until 1971 when they were evicted. That the land was registered under the Defendants name to hold in trust for the family. In her evidence she claimed to have gotten married to the family in 1970 and therefore could not have known how the suit land was acquired. Her evidence borders on hearsay and has little credibility. Her witnesses did not help the Court much. PW 2 was a child when the land was acquired. PW 3 was not yet born while PW 4 was only 15 years old then. It is unlikely that they had the requisite capacity to understand the alleged registration of the suit land in trust in the name of the Defendant. The evidence of the plaintiff as well as her witnesses cannot be relied on to prove the existence of trust on the suit land.

20. The Defendant has denied trust and averred that the land was purchased by him from the Wa Maitu family after his father failed to conclude the earlier transaction that commenced in 1943. He has demonstrated to the Court that he was employed in the police and therefore had the ability to pay the land. That he paid 1000/= to Mumo the son of the original owner and his father got his 300/= deposit refunded to him. He led evidence that their ancestral land is situated at Igikiro parcel No. 50 which was swampy and not habitable. This is the reason

why his parents lived with him after the emergency and were buried thereon on the suit land. He however informed the Court that that land (50) was inherited by his brothers who have settled there. This evidence was supported by DW 2 her step sister. He also led evidence that all his brothers bought their own parcels and settled on their own lands and have not laid any claim on the suit land. This evidence was supported by PW 2.

21. The Defendant stated that the Plaintiff's husband inherited the Pundamilia land. The Plaintiff averred that the Plaintiffs husband bought the land. No evidence was tendered to support this. It is the Courts view that the fact that a person is buried on a parcel of land does not necessarily mean that they own the land. Weighed on a balance of probabilities, the evidence of the Defendant is believable.

22. The issue of Resjudicata has been raised by both parties in Written Submissions. It was not pleaded. Parties are bound by their pleadings. However the Court will address it as follows; The LDT case 40 of 2008 was confirmed by the award of Magistrates Court as a Judgement of the Court in 2008. Aggrieved by the decision the Defendant filed an appeal against the Plaintiffs husband at the Provincial Tribunal which declined to entertain the matter on grounds of want of jurisdiction. It is the Plaintiffs case that the judgement of Court is valid and still in force having not been set aside varied or appealed. In that Judgement the Plaintiff was to get 3 acres out of the suit land. The Defendant on her other hand has termed the suit Resjudicata on account of the judgment of the lower Court. The Land Dispute Tribunal Act does not mandate the Land Dispute Tribunal to determine title in as far as the judgement arose from a tribunal that did not have jurisdiction. My view is that the same is a nullity and it matters not that it has not been set aside. I am guided by the decision in the case of **The Owners of the Motor Vessel Lilian 'S' v. Caltex Kenya Limited (1989) KLR 1**. The Court finds and holds that this matter is not Resjudicata.

23. In the end the Court finds and holds that the Plaintiffs case fails. It is dismissed with costs to the Defendant.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11<sup>TH</sup> DAY OF OCTOBER 2018.**

**J G KEMEI**

**JUDGE**

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

Plaintiff – Present in person./Advocate absent.

J B Kinuthia for the Defendant

Irene and Njeri, Court Assistants