



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 151 OF 2014**

**(FORMERLY EMBU HCC NO. 21 OF 2009)**

**(CONSOLIDATED WITH EMBU HCCC NO. 132 OF 2009)**

**LAURENZIA WANJUKI.....1<sup>ST</sup> PLAINTIFF**

**FLORENCE WANJA MWANIKI.....2<sup>ND</sup> PLAINTIFF**

**VIRGINIA RWAMBA NJOKA.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**ELIAS MUGENDI NJERU**

**CATHERINE MARIGU MWANIKI (*The legal representatives of the***

***estate of SIMEON NJERU DIFATHA.....DEFENDANTS***

**JUDGEMENT**

1. By a plaint dated and filed on 23<sup>rd</sup> February 2009 the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs sought the following reliefs against the original Defendant, Simeon Njeru Difatha;

*a. A declaration that the Defendant holds land parcel No. Kagaari/Kanja/397 in trust for the members of the family of the late Njanga Kagwi and specifically for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs.*

*b. An order that the trust held by the Defendant in respect of land parcel No. Kagaari/Kanja/397 be determined and that the said land be transferred and registered in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs Laurenzia Wanjuki, Florence Wanja Mwaniki and Virginia Rwamba Njoka.*

*c. Costs of this suit.*

2. It was pleaded in the plaint that during the land demarcation and adjudication process the original Defendant, Simeon Njeru Difatha (hereinafter the *deceased*) was registered as proprietor of Title No. Kagaari/Kanja/397 (hereinafter the *suit property*) on behalf of and as trustee of the family of the late Njanga Kagwi (hereinafter *Kagwi*) who was the grandfather of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs and the father-in-law of the 3<sup>rd</sup> Plaintiff.

3. The Plaintiffs further pleaded that in breach of the said trust the deceased had threatened to evict them from the suit property which they had occupied for a long time. The Plaintiffs enumerated several particulars of breach of trust against the deceased in paragraph 7 of the plaint.

4. The instant suit was consolidated with *Embu HCCC No 132 of 2009* in which the deceased had sued the current Plaintiffs for the following reliefs in respect of the suit property.

*a. The Defendants, their agents, servants and or employees be forthwith evicted from the Plaintiffs' parcel of land number Kagaari/397.*

*b. General damages for trespass.*

- c. *Costs of the suit.*
- d. *Interest on (b) and (c) at court rates.*
- e. *Any other relief that this honourable court may deem fit to grant.*

5. The basis of the said suit was that the Defendants, who are the Plaintiffs in the instant suit had trespassed into the suit property without the authority of the deceased who was the registered proprietor thereof. It was further pleaded that the deceased had offered them alternative land elsewhere but they had declined the offer.

6. The Defendants in the aforesaid suit filed a defence in which they pleaded that they were in occupation of the suit property as of right. They further pleaded that the deceased was holding the suit property in trust for the family of Kagwi. It was further pleaded that the deceased was allocated his own parcels of land by the clan which he was occupying and utilizing.

7. At the commencement of the hearing hereof, the court directed that the instant suit shall be considered as the main suit whereas the *Embu HCCC No. 132/2009* was to be treated as the counterclaim.

8. At the hearing hereof, the 1<sup>st</sup> Plaintiff, Laurenzia Wanjuki, testified on her own behalf and on behalf of her Co-Plaintiffs. She adopted her witness statement filed on 29<sup>th</sup> September 2017 as her sworn testimony. It was her evidence that the family of the late Kagwi moved into the suit property in 1962. It was her further evidence that the deceased was merely registered as a trustee on behalf of Kagwi because he (the deceased) had paid the purchase price on behalf of Kagwi.

9. The 1<sup>st</sup> Plaintiff's evidence was that the purchase price was Kshs 1800/- which was to be refunded to the deceased together with an additional sum of Kshs 1,000/- for a traditional goat. It was her contention that the sum of Kshs 2800/- was duly paid to the deceased during his lifetime.

10. During cross-examination, the 1<sup>st</sup> Plaintiff stated that the late Kagwi had some sons apart from her father but they were now deceased. The last one to die was said to have died in December 2017. However, the 1<sup>st</sup> Plaintiff's father was said to have died in 1968.

11. The Defence called three (3) witnesses in this suit. The first two were the administrators of the estate of the deceased who were joined in the suit upon the death of the deceased who was the original Defendant. They filed a joint witness statement dated 13<sup>th</sup> October 2017 which they adopted as their sworn testimony at the trial. They both maintained that the deceased was the absolute registered proprietor of the suit property. They refuted any suggestion that he was holding it in trust for the family of the late Kagwi. They stated that the deceased had bought the suit property from one Mukono Kangaru in his own right. They also denied knowing or being related to the Plaintiffs in any way.

12. The Defendants' third witness was Ezekiel Ndwiga Njeru who testified as DW 3. He adopted his witness statement dated 13<sup>th</sup> October 2017 as his sworn testimony. He stated that he was one of the elders involved in land demarcation and that he was aware that the suit property was allocated to one Mukono Kangaru who in turn sold it to the deceased. He wondered why the 1<sup>st</sup> Plaintiff's elder brother called Njagi and her uncle called Njagi Njaga were not claiming the suit property.

13. When the hearing of the suit was concluded on 30<sup>th</sup> May 2018 the Plaintiffs were given 30 days to file and serve their written submissions whereas the Defendants were granted 30 days upon service to file and serve theirs. The record shows that the Plaintiffs filed their submissions on 18<sup>th</sup> June 2018 whereas the Defendants filed theirs on 27<sup>th</sup> June 2018.

14. The court has considered the pleadings on record, the evidence tendered by the parties as well as the documents on record. The court has also considered the respective written submissions of the parties. There is no indication on record of the parties having filed an agreed statement of issues. The court is of the opinion that the following issues fall for determination in this suit;

- a. Whether the deceased was registered as absolute proprietor of the suit property or in trust for the family of the late Kagwi.
- b. Whether the Plaintiffs are entitled to the reliefs sought in the plaint dated 23<sup>rd</sup> September 2009.
- c. Whether the Defendants are entitled to the reliefs sought in their plaint dated 22<sup>nd</sup> July 2009 which was treated as the counterclaim.
- d. Who shall bear the costs of the suit and counterclaim.

15. The court has carefully considered the entire evidence on record on the first issue. The Plaintiffs' contention was that the deceased bought the suit property from Irimba clan on behalf of the Kagwi family. He paid the purchase price on their behalf and so he was registered as proprietor merely for the purpose of securing a refund of the purchase price after which he was to transfer it to the rightful owner(s). The claim was not strictly based upon the conventional customary trust whereby one member of a family unit or house would be registered as proprietor on his own behalf and on behalf of the rest of the members of that family unit or house.

16. The court has noted that none of the members of the larger Kagwi family were called to corroborate the existence of the unusual arrangement between the deceased and the late Kagwi. The evidence on record showed that such members were still alive. The court appreciates that some of the elders in the know at the material time may have died but surely some younger members of the extended Kagwi family must have known of such arrangement.

17. The court was not told when and how the sum of Kshs 1800 or Kshs 2800 was paid to the deceased. The court was also not informed what steps were taken to convey suit property to the family of Kagwi over the several decades which have lapsed since the registration of the deceased in 1961.

18. The copy of the green card for the suit property shows that the deceased charged the suit property on at least 3 different occasions to secure repayment of various loans from financial institutions between 1973 and 2000. The first time the suit property appeared to be in dispute was in 2006 when the 1<sup>st</sup> Plaintiff registered a caution claiming an interest as a beneficiary. Thereafter, a court order was registered to prohibit further dealings pending conclusion of proceedings before the Land Disputes Tribunal in 2008.

19. There is no indication in the register of any of the members of the Kagwi family having encumbered the suit property between 1961 and 2006 which is a period spanning 45 years. There was evidence on record that the late Kagwi had at least 3 sons besides the 1<sup>st</sup> Plaintiff's father. How come none of them sought recovery of the suit property from the deceased for such a long time? How come none of the other blood relatives of Kagwi showed interest in the recovery of the suit property?

20. The court is truly in serious doubt whether or not the deceased was registered as proprietor of the suit property in trust for the family of the late Kagwi. The court is far from satisfied that the Plaintiffs have proved the existence of the alleged trust to the required standard. There is simply no sufficient evidence on record to satisfy the court as to the existence of the trust. The court consequently finds that the particulars of breach of trust have not been proven as well.

21. The 2<sup>nd</sup> issue is whether the Plaintiffs are entitled to the reliefs sought in their plaint dated 23<sup>rd</sup> September 2009. The reliefs sought are based on the existence of the trust. The court has found and held that the Plaintiffs have failed to prove the existence of the trust. It would, therefore, follow that the Plaintiffs are not entitled to the reliefs sought or any one of them.

22. The 3<sup>rd</sup> issue is whether the Defendants are entitled to the reliefs sought in the plaint dated 22<sup>nd</sup> July 2009 which was treated as the counterclaim. The court having found that the Plaintiffs have failed to demonstrate the existence of a trust, it would follow that the deceased was registered as absolute proprietor of the suit property in his own right. In that case, the Defendants being the administrators of the estate of the deceased would be entitled to the reliefs sought in their counterclaim. Accordingly, the answer to the 3<sup>rd</sup> issue is in the affirmative.

23. The 4<sup>th</sup> and final issue is on costs. Although the costs of an action are at the discretion of the court, the general rule is that costs follow the event. **See section 27 of the Civil Procedure Act (Cap 21)**. As a result, a successful litigant should be awarded costs of an action unless the court, for good reason, directs otherwise.

24. The Plaintiffs in this suit contended that the deceased was their relative. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants who are the children and administrators of the estate of the deceased denied the existence of any relationship between the parties. The evidence of DW 3, however, was to the effect that the warring parties herein are relatives. He stated that he knew the Plaintiffs, the Defendants as well as the deceased. The court is satisfied that the litigants herein are relatives. The court is of the view that the appropriate order to make on costs is for each party to bear his or her own costs.

25. The upshot of the foregoing is that the court finds that the Plaintiffs have failed to prove their case to the required standard. The same shall consequently be dismissed. The Defendants shall be entitled to the orders sought in their plaint dated 22<sup>nd</sup> July 2009. Consequently, the court makes the following orders;

- a. The Plaintiffs suit be and is hereby dismissed.
- b. Judgement be and is hereby entered for the Defendants against the Plaintiffs in terms of prayer (a) only of the plaint dated 22<sup>nd</sup> July 2009.
- c. The Plaintiffs shall have a grace period of ninety (90) days within which to vacate the suit property in default of which any execution shall be conducted in strict compliance with the applicable laws including the **Land Laws (Amendment) Act 2016**.
- d. Each party shall bear his or her own costs.

26. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 22<sup>ND</sup> day of NOVEMBER, 2018.**

In the presence of the 1<sup>st</sup> Plaintiff in person and Mr Gachuba holding brief for Mr Kathungu for the Defendants.

Court clerk Muinde.

**Y.M. ANGIMA**

**JUDGE**

**22.11.18**