



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO.468 OF 2017

LAWRENCE GACHAU KIHU.....1ST PLAINTIFF

ESTHER WAIRIMU KAGIRI.....2ND PLAINTIFF

HANNAH NJERI KIHU.....3RD PLAINTIFF

EUNICE MWIHAKI KAMAU.....4TH PLAINTIFF

ROSEMARY WAIGWE WAMWEA.....5TH PLAINTIFF

VERSUS

MARY WANGUI MAINA.....DEFENDANT

(sued on behalf of MAINA

KIHU deceased)

JUDGMENT

1. The history of the suit land dates back over a half a century ago in the 1950s. It has traversed the judicial landscape from the Land Disputes Tribunal (now repealed) at Kigumo Division of the present day Muranga County to the second highest Court in the land; the Court of Appeal and back. This is its 28th anniversary in the judicial system. Disputes over land can and do deprive parties the opportunity to derive economic production and benefit from the land, one of the key factors of production in an agrarian society like ours. I hope it will finally find eternal rest.

2. The Plaintiffs are the children of Kihu Nyanjui (family patriarch) who died on 8/1/1950. He had 9 children 4 of whom are deceased leaving 5 alive. The 5 alive are the Plaintiffs. Nyanjui Kihu was the 1st born son. He died in 2000. The Defendant is the wife of Maina Kihu, the second born son of Kihu Nyanjui. Maina Kihu died on 5/8/2008. The Defendant is sued as the administratrix of the estate of Maina Kihu.

3. The 2nd -5th Plaintiffs have authorized the 1st Plaintiff to act plead and swear all the affidavits and documents on their behalf. See the authority filed in Court on the 24/6/2017.

4. The Plaintiffs claim against the Defendant is for *inter alia* a declaration that the Defendants husband held LOC 2 /KANDERENDU/63 (The suit land) measuring 13.7 acres and registered in his name in trust for the 9 siblings of the Kihu Nyanjui, the Defendant included.

5. The history of the suit land unfolds in 1965 when at the behest and request of two brothers Maina Kihu (hereinafter referred to as Maina) and Clement Kiarie (hereinafter referred to as clement) approached the elder brother Nyanjui Kihu (hereinafter referred to as Nyanjui) to use the title as collateral for a loan. Nyanjui, who was the custodian of the title to the suit land agreed to give them the said title as collateral for a loan at Kenya Government (special loan Committee) to secure Kshs 4000/- for expanding the business of Pangani grocers shop, Nairobi. The business was owned and run by the two younger brothers, Maina and Clement. The Plaintiffs aver that this was done without their knowledge and consent. It is stated that this loan was repaid in full by Nyanjui, Kiarie and Maina. Come 1967 Clement being in need of cash to service a tender won at KNTC sought the same title to secure a loan from the same institution. Nyanjui and Maina agreed and on the 6/12/1967 Nyanjui signed the loan in the sum of Kshs 6000/- secured from the said lender Kenya Government (special loan Committee). As fate would have it Clement died in a road crash in 1972 leaving behind the debt unpaid with the aforesaid lender.

6. Consequently due to default in loan repayment, the bank advertised the property for sale through Maasai Auctioneers. The advert was brought to the attention of the 1st Plaintiff by his area Member of Parliament then. He sought the way forward from Maina Kihu in respect to the payment of the debt owed to the bank. It is stated that Maina Kihu informed him that the outstanding debt will be settled by Clement's

widow Hellen Wanjiru. This was not to be. It is on record that Maina finally settled the matter. The Plaintiffs state that they have made efforts (albeit unsuccessfully) to refund Maina the amount he paid the loan to enable them share the suit land as beneficiaries of the trust.

7. It is the Plaintiff's case that the two loans were taken for the benefit of their 3 brothers without their consent and knowledge and to their detriment in respect to their inheritance. They have adverted particulars of breach of trust and misrepresentation on the part of Nyanjui, Maina and Clement at para 13 of the amended plaint. Finally, the Plaintiffs sought orders as follows;

a) A declaration that Maina Kihu (Deceased) did not redeem the parcel of land LR.NO.LOC.2/KANDERENDU/63 in 1976/1977 as he together with Nyanjui Kihu(Deceased) and Clement Kihu (Deceased) intermeddled with the Estate of Kihu Nyanjui (Deceased) by allowing the parcel of land to be charged by one of them, Maina Kihu himself and later by Clement Kihu at the detriment of the rest of the other 6 beneficiaries with full knowledge and understanding that the parcel of land was held in trust by Nyanjui Kihu in trust of all the nine (9) beneficiaries of the Estate of Kihu Nyanjui.

b) A declaration that all the 9 beneficiaries of the late Kihu Nyanjui(Deceased) who died on 8th January 1950 intestate be considered as the beneficiaries in the estate of Maina Kihu in Nakuru Succession Cause No. 255 of 2015 in as far as land Parcel No. LR.NO.LOC.2/KANDERENDU/63 is concerned.

c) A permanent injunction do issue restraining the Defendant, her servants or agents from taking over possession, occupying, alienating, trespassing/interfering, selling or disposing of or dealing in any way whatsoever with the suit property being land parcel LR.NO.LOC.2/KANDERENDU/63.

d) An order of cancellation or rectification of the title over the suit property being land parcel LR.NO.LOC.2/KANDERENDU/63 and/or in the alternative, a declaration that the suit property registered in the name of the Defendant is partly held in trust for the rest of eight (8) beneficiaries of Kibui Nyanjui (Deceased).

e) Costs of this suit.

f) Any other or further relief that this Court may deem fit in the circumstances.

8. The Defendant denied the Plaintiffs claim in her defence filed on the 15/1/2018. She denied that the land was held under trust by Maina as trust property. She averred that she is a stranger to the loan allegedly taken by Maina and Clement and the associated default thereof. She pleaded that Maina purchased the property through private treaty without any contributions from the family members, the Plaintiffs included, when the suit land was advertised for sale by public auction by the bank. That he was therefore the sole purchaser for value.

Plaintiffs' evidence

9. The Plaintiff (on his behalf and that of 2nd -5th Plaintiffs) (PWI) gave evidence and stated that during land demarcation his father land, being the suit land was registered in the name of Nyanjui who was the eldest son and trustee of the family. That it his Uncle namely Ndichu who demarcated the land and had it registered in the name of Ndichu in trust for the 9 siblings.

10. He informed the Court that he was born in 1947 and worked for the City Council of Nairobi then in the 1970s as well as assisting Clement at his shop during his spare time. Upon the death of Clement he took unpaid leave to work at the shop but on disagreeing with Clements wife he returned to his job at Nairobi City Council.

11. That his two brothers Maina and Clement jointly owned and managed a retail shop styled Pangani Grocers shop in Nairobi. In 1965 Maina and Clement approached Nyanjui and requested for the title for the suit land as a collateral for a loan to expand their retail business. On 27/9/1965 the three charged the title to Kenya Government (Special Loan Committee) for Kshs 4000/-. Upon getting the loan they opened another shop at Eastleigh section 2 named Karegwa Provision shop and managed by Clement. The Pangani Grocers Shop became Pangani Distributors Limited. The loan was fully repaid by the three brothers. Earlier in 1964 the Plaintiff states that on getting wind that the title was to be used to secure a loan in favour of his two brothers he did register a caution against the property on the 17/8/1964.

12. As business thrived Clement took another loan from the same lender (this time alone) in the sum of Kshs 6000/- to service a tender to distribute KNTC products. In 1972 Clement dies in a road accident leaving the loan outstanding at the bank. The bank advertised the property for sale through a public auction in the daily newspapers and on learning this through his then Member of Parliament, he informed Maina who assured him that the widow of Clement Helen Wanjiru had promised to repay the loan. He stated that Maina later informed him that he obtained a loan of Kshs 27,000/- from National Bank Limited and used it to clear the loan left by Clement. Maina redeemed the loan on his own and never sought any assistance from the other brothers. He did it secretly. He admitted that if Maina had not repaid the loan the suit land could have been sold to any other person by the bank. He could not tell the Court how much the land was valued at the time it was redeemed. The suit land was finally transferred to Maina on 12/7/1977 and the suit land was charged on 28/11/1977. He later enquired from Maina how he and the other siblings could share the monies Maina had paid to redeem the title from the bank but Maina was unresponsive.

13. In 1983 he called a family meeting to discuss the same but only his mother attended hence resorted to calling the elders and the area chief. Maina avoided the meeting the second time, stated. The elders resolved to share the land by giving each sibling 2 acres and Maina got 4 acres to compensate him for the money he spent in repaying the loan (Clement's loan) to the bank. On learning this development Maina filed a case at the LDT at Kigumo and the elders returned a verdict on the sharing of the land. Maina being aggrieved filed an appeal at the Provincial Land Dispute Tribunal. Whilst the case was pending, he received credible information that Maina was intent on selling the land. To prevent this he cautioned the suit land on 17/8/2004. In 2008 Maina died before the Provincial Land Dispute Tribunal appeal was concluded. The matter went to Environment and Land Court Nyeri and being aggrieved the Defendant filed an Appeal which appeal was struck out for want of letters of representation.

14. It is the Plaintiff's case that Maina did not redeem the suit land for himself. The suit land was and is family land and the alleged redemption was a camouflage to disinherit the other siblings in the family. That charging the suit land prejudiced their share of family entitlement, the same having been done by the three brothers without their knowledge and consent. That it amounted to breach of trust and misrepresentation on the part of his three brothers.

15. Rosemary Waigwe Wamwea (PW2) informed the Court that she is the 5th Defendant and a sibling to the Plaintiffs. The Defendant is her sister in law. She informed the Court that she is aware that the suit land was trust land. That though Maina redeemed the land from the bank, he did not give the other siblings the opportunity to contribute to the repayment of the loan. She testified that she did not repay any of the loan. That none of the parties reside on the suit land.

Defendant's evidence

16. At the hearing the Defendant (DWI) informed the Court that the suit land belonged to her husband to the exclusion of the Plaintiffs. The property was initially registered in the name of Nyanjui, the brother of Maina. Nyanjui took a loan in the sum of Kshs 4000/- and 6000/- in 1965 and 1967 respectively from Kenya Government National Special Loan Committee. The suit land secured the loans. When the default occurred, the bank advertised the security for sale through a public auction. Maina bought it through a private treaty in the sum of Ksh 32,000/- as seen in entry No.2 of the green card. According to the green card Maina discharged the loan on 2/7/77. No contribution was received from his brothers albeit their capacity to do so. She informed the Court that the suit land was trust land before it was bought by Maina from the bank.

Written submissions

17. The Plaintiff submitted that on 12/7/77 the suit land was transferred to Maina and on 8/7/1977 a discharge was then registered against the suit land.

That on learning in 1989 that the land had been registered in the name of Maina, the Plaintiff did not get alarmed as he believed Maina still held the land under customary trust for him and his siblings. He submitted that Maina, Clement and Nyanjui breached their trust and misrepresented to the bank by failing to disclose that the suit land was being held in trust for the family members. He raised issue with the charge in 1965 which was registered despite a subsisting caution that he had lodged on 17/8/1964. Further he submitted that Maina intermeddled with the suit land in 1977 when the suit land was transferred to him before the loan was discharged.

18. As to whether Maina held the suit land under trust, the Plaintiffs submitted that a constructive trust had arisen from the conduct of the parties. That there was a common intention that the property was to be shared beneficially. That Maina had constructive knowledge that he was dealing with trust asset receipt of which was a direct breach of trust or fiduciary duty to all those entitled to the trust. That the 8 members of the family ought to be been involved in the private treaty to buy the suit land. He relied on the cases of; **NWK Vs JKM & Anor ELC 42 of 2011; Halsbury's Laws of England, 4th Edition at page 690; Equity and the law of Trust by Philip H Pettit 12th Edition at page 151-161;**

19. The Defendant submitted that the Plaintiffs curiously did not sue Nyanjui in his lifetime to recover the alleged trust land. Nyanjui died in 2000. The Plaintiffs were well aware of the transactions on the suit land but took no action. She argued that the claim for breach of trust is baseless as Maina is a purchaser for value and held the suit land free from any trust. That the Plaintiffs seek to frustrate the entitlement of Maina.

20. As to whether the suit is time barred, the Defendant submitted that it is trite that actions to recover trust property need to be brought within 6 years. The suit was filed over 12 years after the cause of action arose and no circumstances of disability has been demonstrated as to warrant an extension of time.

21. As to whether a trust was created the Defendant relied on the case of **Cook Vs Fountain (1676) ER 984 at page 987** which stated that the law never implies, the Court never presumes a trust, but in a case of absolute necessity. In the case she submitted that Maina sourced the funds singly through a loan and purchased the property without any contributions by the Plaintiffs. He therefore purchased the land as of right and therefore the issue of constructive trust does not arise. That there was no agreement whether before or after the redemption of the suit land that the property would be shared beneficially among the 9 children of Kihu Nyanjui. Neither was the contribution towards the repayment of the loan and redemption for the suit land.

22. She submitted that the Plaintiffs have failed to adduce evidence to support their claim. That the law protects the sanctity of title and the same is only removed when the same is procured by way of fraud or misrepresentation for which the person is proved to be a party or where it is procured illegally unprocedurally or through a corrupt scheme. That no evidence has been led to impugn the title of held by Maina deceased.

Issues for determination

23. Having analyzed the pleadings, the evidence and the submissions of the parties, the key issues for determination are;

- a. Whether the land was trust land
- b. Whether the suit is time barred
- c. Whether the transfer of the suit land from Nyanjui to Maina caused Maina to receive land as a trustee

- d. Whether the trust should compensate Maina for the monies spent in redeeming the trust property
- e. Who meets the cost of the suit?
- f. What orders should the Court grant

Whether the suit land was trust land

24. The Defendant has argued that the law never implies, the Court never, presumes a trust but in a case of absolute necessity. This was the holding in the **Cook Vs Fountain (1676) 36 ER 984 at page 987**. The Defendant has submitted that Maina singly sourced funds and purchased the suit land at a private treaty at Kshs 32,000/- without any direct contribution from the Plaintiffs. As such there is no basis for inference of a trust either from the conduct or agreement with the Plaintiffs. She argued that a constructive trust is one that arises where the following are present; there is a common intention that the parties should have a beneficial interest; a claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest; it is implied by the Court of equity where circumstances warrant regardless of intention of the owner of the property; in cases where property has vested in another through fraud or other unconscionable conduct so much so that the person who has obtained the property ought not in good conscience be allowed to keep it, equity treats the person as a constructive trustee of the beneficial owner.

25. It is the Defendants view that there was no common intention between the deceased and the Plaintiffs about sharing the property; the property was purchased by Maina for value; no intention on the part of Maina to create a trust; no evidence has been tendered by the Plaintiffs on all the above to prove trust.

26. The Plaintiffs have argued that the suit land is trust land and have accused Maina and his 2 brothers for breach of trust and misrepresentation by failing to disclose the suit land was held in trust for the other 6 members of the family.

27. It is commonly accepted that the suit land belonged to Kihu Nyanjui, the father and father in law of the parties in this suit. It is common ground that the suit land was registered under the name of Nyanjui upon demarcation and registration in 1962. PW1, PW2 and DW1 have stated as much in their evidence. DW1 stated in her evidence in chief that;

“the land was under trust before it was bought by Maina Kihu”.

She also stated in evidence that the land belonged to the family patriarch before. It was then registered in the name of Nyanjui. The import of this evidence is that the land was clan, family and/or ancestral land registered in the name of Nyanjui to hold in trust for himself and the household of Kihu Nyanjui. Evidence has been led by PW1 that when the 2 brothers wanted to use the land as collateral for the loans, they approached Nyanjui, the trustee to assist which he did.

28. It is the finding of the Court therefore that Nyanjui held the suit land at all times subject to trust. He held as a trustee as well as a beneficiary simultaneously. Maina was also a beneficiary so much so that the land could have been held in Maina’s name as well.

Whether the suit is time barred

29. This issue was not raised in the Defendants pleadings save that it is raised in the written submissions. The Plaintiffs have not responded to the issue either. I will address it as time bar is a jurisdictional issue. Section 20 (1) (a) and (b) of the Limitations of Actions Act provide as follows;

“(1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action—

(a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.”

(2) Subject to [subsection \(1\)](#), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued:

Provided that the right of action does not accrue to a beneficiary entitled to a future interest in the trust property, until the interest falls into possession.

(3) A beneficiary against whom there would be a good defence under this Act may not derive a greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

30. From the above provisions of Section 20 (1) of the Act , limitation does not apply to the following instances; where the action complained of is fraudulent; where the trustee has knowingly assisted or received a trust asset in breach of trust (knowing receipt); where the trustee has converted a trust property into his own; where the trustee has not given a proper account of the trust asset to the property because in every trust the right of the beneficiary accrues or crystalizes at a future date or of it has reached an account has not been rendered.

31. In the instant case Maina received trust asset for which he has not discharged the trust as trustee. Maina cannot be said to be a bonafide purchaser of land for value without notice. There was no seller in the land. The transfer is not subject to the existing charges. He had notice of the trust that encumbered the land. In the Courts view the provisions stated in para 23 exclude fraud or fraudulent breach of trust to which a trustee was a party. This suit is concerned with the recovery of trust property received and converted into personal use by Maina to the exclusion of the Plaintiffs.

32. The Court holds and finds that the suit is not time barred.

Whether the transfer of the suit land from Nyanjui to Maina caused Maina to receive land as a trustee.

33. It is on record that the default in repayment of the 2nd loan left by Clement led the bank to advertise the property for sale by way of public auction. According to the copy of the advert produced by PWI the public auction was slated for Thursday January 8, 1976 at 10.00 am. It would appear that the sale by public auction did not take place. There is no record tendered in this Court including at the impugned proceedings at ELC Nyeri that the suit land was sold by public auction. DWI has led evidence that the suit land was transferred from Nyanjui to Maina by way of private treaty. A perusal of the entries in the green card of the suit land reveals the following;

Proprietary section;

a. "Entry No 1- Maina became registered owner on 12/7/1977 against a value of Kshs 32,000/-;

Encumbrance section;

b. Entry No. 1 – charge to Kenya Government /Nairobi Special Loan Committee -in the sum of Kshs 4000/- was registered on 27/10/1965;

c. Entry No 2- charge to Kenya Government /Nairobi Special Loan Committee -in the sum of Kshs 6000/- was registered on 6/12/1967;

d. Entry No 3 – Discharge of charge No 2 above on 20/7/1977

e. Entry No 4 – Discharge of charge No 1 above on 20/7/1977

f. Entry No. 5 – Charge to secure Kshs 27,000/- to National Bank of Kenya Limited.

g. Entry No. 7- Discharge of charge No 5.

34. From the above entries on the title register it is clear that Maina received the land from Nyanjui through private treaty i.e. transfer. Under Section 28 of the Land Registration Act the suit land was therefore transferred with an encumbrance; trust. The result of which nothing is to be taken to relieve Maina, the new proprietor from any duty or obligation to which he was subject as a trustee. It also had another encumbrance which was Kshs. 6000/- loan or whichever amount outstanding at that time. The loan had not been discharged at the time the land was transferred to Maina. Maina could not have received a better title than Nyanjui in the land upon transfer. The title of the suit land was subject to customary trust. Much as Maina was a beneficiary on receipt of the land he stood in a position of trustee. In this case Maina received the suit land with full knowledge that it was trust land for the benefit of the 9 siblings of Kihu Nyanjui. Nyanjui transferred the suit land to Maina without first discharging the trust that he held. The claim of the Defendant is a clear testimony that trust property received with full knowledge of existing trust and in breach of trust is now being dealt with in a manner inconsistent with the trust.

35. **In Halsbury's Laws of England, 4th Edition.** Volume 48 at paragraph 690 as quoted defines constructive trust as thus :-

"A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate."

36. There was a clear common intention between the children of Kihu Nyanjuui that the suit land was trust property for their benefit. It is clear that constructive trust had arisen on the part of Maina. Maina as a beneficiary was at all times obliged that the trusts of the trust are discharged. In doing so he could undertake such a cause of action as beneficiary to ensure that the trust is enforced. In this particular case he did exactly that by acquiring title to the trust property and securing the funds to bail out the trust property from being sold by way of public auction by the lender.

37. In conclusion he received a trust asset and stood in a position of trustee albeit being a beneficiary before.

Whether the trust should compensate Maina for the monies spent in redeeming the trust property

38. Maina having secured the suit land, the Plaintiffs received a benefit from Maina's conduct; land was not sold by the bank. The Plaintiffs have not undertaken to compensate Maina for the funds he spent in redeeming the property for 29 years whilst the loan subsisted or thereafter. In their Pleadings they have not denied that Maina incurred the expense personally. Now that their claim is being raised on sharing

the property it would amount to unjust enrichment in failing to compensate Maina and at the same time receive equal shares of land with Maina. The Court must guard against this scenario.

39. In the Courts view if the suit land (13.7 acres) was to be shared equally each beneficiary including that of Maina would take 1.52 acres. The Plaintiffs have laid their claim to the land and filed the present suit on 2/10/2017, 40 years after Maina had become registered owner albeit to the trust. If the 9 siblings had made contributions for the redemption of the suit land, their share of the contribution would be Kshs 3555.50 each. For the whole of the period that Maina has redeemed the suit land the value of the monies spent (32,000/- then) has been devalued through inflation. Granted Maina has also lost the use of his money during such period. In the Courts view compensating Maina with land equivalent is the most reasonable and equitable way in the circumstance. Doing the best I can I award each beneficiary 1 acre of their entitlement and the balance to Maina's estate as compensation.

40. The Court finds that the remaining 8 beneficiaries are bound to compensate Maina for the use of his money in redemption and loss of use of such monies by him as a beneficially. The Court will make an appropriate order of compensation in the final orders.

Who meets the cost of the suit?

41. Costs follow the event however in this case parties being related each party to bear their own costs.

42. Final orders;

- a. It is hereby declared that the suit land LOC 2/KANDERENDU/63 was held by Maina Kihu subject to trust.
- b. The 9 beneficiaries being children of Kihu Nyanjui are entitled to a share each of LOC 2/KANDERENDU/63.
- c. The said trust be and is hereby dissolved and the Defendant is directed to subdivide the land and transfer 5.7 acres to the estate of Maina Kihu and 1 acre each to the following;
 - i). Estate of Nyanjui Kihu
 - ii). Esther Wairimu
 - iii). Hannah Njeri
 - iv). Estate of Clement Kiarie
 - v). Eunice Mwhaki
 - vi). Estate of Humphrey Mwaniki
 - vii). Lawrence Gachau Kihu
 - viii). Rosemary Waigwewithin 90 days from the date of this judgement.
- d. If the Defendant fails to comply with the orders above the Deputy Registrar of this Court is ordered to sign and execute all the documents to facilitate compliance with order c above.
- e. Parties being related, each to bear their cost of the suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 15TH DAY OF NOVEMBER, 2018.

J .G. KEMEI

JUDGE

Delivered in open Court in the presence of:

1st Plaintiff – Present in Person

2nd Plaintiff – Absent

3rd Plaintiff – Absent

4th Plaintiff – Absent

5th Plaintiff – Present in person

Mbuthia HB for Karanja for the Defendant

Irene and Njeri, Court Assistants