



**REPUBLIC OF KENYA**

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

**E.L.C NO. 512 OF 2017**

**JOHN KARANJA GITONGA.....APPLICANT**

(Suing on his behalf and on behalf of Rahab Wambui wife of David Maina (deceased)  
brother to Applicant Hannah Wanjiku sister to Applicant Regina Wanjiru wife of Isaac  
Kamau (deceased) brother to Applicant Gladys Wambui wife of Ephraim Kinyuru  
(deceased) brother to Applicant

**VS**

**PENINA KARIMA NJIHIA.....1<sup>ST</sup> RESPONDENT**

(Sued as the administrator SAMUEL NJIHIA KARANJA)

**REGISTRAR FOR LANDS MURANG'A.....2<sup>ND</sup> RESPONDENT**

**COMMISSIONER FOR LANDS.....3<sup>RD</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. John Karanja Gitonga took out Originating Summons under Order 37 Rule 4 of the Civil Procedure Rules section 3A of Civil Procedure Act against Peninah Karima Njihia for the determination of the following questions;

- a) That a declaration do issue that parcels LOC.2/KANGARI/4951 and LOC 2/KANGARI/4593 previously forming LOC.2/KANGARI/16 be declared trust property and Samuel Njihia Karanja deceased held it in trust for himself and other siblings.
- b) That parcels LOC.2/KANGARI/4952 and LOC.2/KANGARI/4593 previously forming LOC.2/KANGARI/16 be divided to the 5 trustees plus the Respondent in equal shares.

2. The Applicant has filed the grant on his own behalf and on behalf of Rahab Wambui wife of David Maina(deceased), Hannah Wanjikku, Regina Wanjiru (wife of Isaac Kamau (deceased) Gladys Wambui (wife of Ephraim Kinyuru).

3. The Respondent has been sued as the administrator of the estate of the late Samuel Njihia Karanja.

4. The application is premised on the ground that the 1<sup>st</sup> Respondent is the administrator of the estate of Samuel Njihia Karanja, who held the title of initial parcel of land LOC.2/KANGARI/16 which was later subdivided into LOC.2/KANGARI/4952 & 4593.

5. In his Supporting Affidavit the Applicant deponed interalia that the title was registered in the name of Samuel Njihia Karanja who died intestate in 1990. That he (Applicant) is the brother of the deceased who died in 1990 leaving behind his wife the Applicant and other siblings. That the deceased was registered as owner in trust of LR LOC.2/KANGARI/4952 & 4593 (formerly LOC.2/KANGARI/16) being the eldest son in the family of Gitonga Githiga. That upon his death his other brother Ephraim (Ibrahim?) Kanyuru was appointed the legal administrator but passed away before the completion of the Succession of the estate of the deceased Samuel Njihia Karanja.

6. That upon the death of Ephraim Kanyuru, the wife of Samuel Njihia Karanja, Peninah Karima Njihia, the Respondent herein took all

documents of ownership of the deceased properties and petitioned for letters of representation without informing the Plaintiffs. That the Respondent has subdivided the original parcel LOC.2/KANGARI/16 into LOC.2/KANGARI/4952 and LOC.2/KANGARI/4953 and registered them in the name of the Respondent and one Peter Gichana. That both parcels are trust property.

7. On 10/4/18 the Court issued directions that the Originating Summons be deemed as a plaint and defence where applicable and Plaintiff was directed to comply with Order II.

8. On 25/4/18 the Plaintiff sought and obtained Judgement in default of filing Memo of appearance as well as defence. The matter was therefore directed to proceed on formal proof.

9. On 25/7/18 the Plaintiff through his Advocate on record withdrew the suit against the 2<sup>nd</sup> – 4<sup>th</sup> Respondents under Section 25 rule 1 of Civil Procedure Rule, consequently leaving the Defendant as the only party.

10. At the hearing of the case the Plaintiff testified solely and relied entirely on his Supporting Affidavit. He informed the Court that his father was called Gitonga Githira. He died in 2002. The land belonged to his father but was registered in the name of his brother Samuel Njihia Karanja who was the 1<sup>st</sup> born in the family. That the suit land is family land. The original title was LOC.2/KANGARI/16. He produced a certified copy of green card showing the parcel is registered in the name of Njihia Gitonga on 22/5/62 and a land certificate issued on 30/11/1979 thereof.

11. He also produced a certificate of official search dated 21/11/01 in support of his averments.

12. He informed the Court that when his brother Samuel Njihia Karanja died, his other brother Ephraim Kinyuru Gitonga was appointed on 10/2/94 as administrator in Succession Cause No.139 of 1992 Murang'a but the said Ephraim Kinyuru Gitonga died on 17/5/2001 before the estate of Samuel Njihia Gitonga was full administered.

13. Upon the death of Ephraim Kinyuru Gitonga, the Defendant took all the documents of ownership of the property and proceeded to petition for Succession of the estate of Samuel Njihia in Kigumo without involving the other members of the family. She was finally confirmed vide a confirmation of grant issued on 15/5/13 in Succession Cause No. 61 of 2009 @ Kigumo. In the certificate of confirmation of grant the suit land was distributed as follows;

a) Peninah Karima Njihia - 3.7 acres

b) James Kimani Kariuki - 0.5 acres

4.2 acres

14. That the Plaintiff and the other beneficiaries of the estate of Samuel Njihia Gitonga filed objections and stay orders against the proceedings in Kigumo Succession Cause No. 61 of 2009. He stated that the Defendant has subdivided the land LOC.2/KANGARI/61 into 2 portions LOC.2/KANGARI/4952 and 4953 and that one Peter Gichana Ikinu has allegedly bought LOC.2/KANGARI/4952.

15. He informed the Court that the family had agreed to share the suit land amongst the children of Githiga Gitonga, the Defendant is a beneficiary.

16. The witness informed the Court that later the family withdrew the summons of grant in order to pursue the suit claiming trust herein.

17. The Plaintiff filed written submissions which I have carefully read and considered.

### **Analysis and determination**

18. Having considered the pleadings, the affidavit in support thereof and the evidence of the Applicant and the submissions tendered before this Court, the key question for determination is whether the Applicant has proved a customary trust on the suit land.

19. According to the evidence of the Applicant the suit land became registered in the name of Njihia Gitonga on the 22/5/1962. It is the Applicant's evidence that the said Njihia Gitonga also known as Samuel Njihia Karanja was his elder brother. From the record this suit is a representative suit brought on behalf of the Applicant as well as on behalf of his siblings namely David Maina (deceased), Hannah Wanjiku, Isaac Kamau (deceased) Ephraim Kinyuru (deceased). The Respondent has been sued as the legal representative of the said Samuel Njihia Karanja (deceased). It is the Applicant's case that the said Samuel Njihia Karanja held the suit land in trust for himself and his siblings and sought for a declaration as such. In addition, he sought the orders of the Court that the trust be dissolved to pave way for the distribution of the suit land into 5 portions and given to the Applicants as well as the Respondent.

20. According to the evidence led by the Applicant the said Samuel Njihia Karanja died on the 9/12/90. His brother Ibrahim (or Ephraim?) Kinyuru Gitonga was appointed administrator of the deceased estate vide SRMCC No 139 of 1991 on the 10/2/1994. He died on the 17/5/2001 before the administration of the estate was concluded. It would appear that Kinyuru was substituted by Herina Wanjiru Gitonga and Gladys Wambui Wachira on the 20/12/2002. These are the mother and sister of the Applicant respectively. Upon their substitution they embarked on the process of confirmation of grant of the estate of Samuel Njihia Karanja. In the affidavit dated the 19/5/2004, deposed by Herina Wanjiru Gitonga the estate of Samuel Njihia Karanja was proposed to be distributed as follows;

a) Herina Wanjiru Gitonga - 0.6 acres

- b) Peninah Karimi - 0.6 acres
- c) John Karanja Gitonga - 0.6 acres
- d) Gladys Wambui Wachira - 0.6 acres
- e) Rahab Wambui Njau - 0.6 acres
- f) Reginah Wanjiru - 0.6 acres
- g) Hannah Wanjiku - 0.6 acres

**Total - 4.2 acres**

21. Curiously though the Respondent was mentioned as beneficiary of 0.6 ha of the suit land, she did not sign the consent to grant dated the 19/5/2004. The said consent was signed by the Applicant, Gladys Wambui Wachira, Rahab Wambui Njau, Regina Wanjiru and Hannah Wanjiku. The Respondent was excluded from how the estate was going to be shared out. The Court notes that the proposal herein is at variance to the plea contained in the Originating summons that sought the suit land to be shared amongst 5 beneficiaries.

22. As the above was ongoing parallel activities regarding the administration of the estate was taking place led by the Respondent. She filed a succession cause in Kigumo vide Succession Cause No 61 of 2009 where she was appointed administratrix of the estate and a certificate of confirmation of a grant was issued to her on the 15/5/2013. In it the suit land was fully distributed as follows;

- a) Pennina Karima Njihia - 3.7 acres
- b) James Kimani Kariuki - 0.5 acres.

**Total - 4.2 acres**

23. It would appear that these orders are still in force. This Court wishes to say no more in respect to the succession of the suit as they do not form such matters that the Court has jurisdiction to adjudicate.

24. Section 28 of the Land Registration Act Cap 300 (now repealed) under which the suit land was registered provides that the registration of one as a proprietor of land while conferring on him all the rights and privileges shall not be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee. Section 28 of the current Registration of Land Act 2012, provides that unless the contrary is expressed in the register all registered land shall be subject to various overriding interest without their being noted on the register. Customary trust is one of such interests.

25. The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must prove that the suit properties were ancestral clan land; that during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; that the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. In essence one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.

26. 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. Trust is a question of fact which must be proved by whoever is claiming a right under customary trust.

27. In this case the Plaintiff led evidence and relied on his supporting affidavit dated the 27/1/2017 where he stated under para 4 as follows;

“ That my brother was registered as a trustee of parcel No.s LOC 2/KANGARI/4952 and LOC 2/KANGARI/4593 previously forming LOC2/KANGARI/16 being the eldest son of our family of Gitonga Githiga”.

28. In his evidence in chief he stated under oath that;

“My father was called Gitonga Githiga. He died in 2002. The suit land was registered in the name of Samuel Njihia Karanja. He was the 1<sup>st</sup> born in my family”.

29. I find that the Applicant has not discharged the burden of prove that there indeed exists customary trust in his and his siblings favour. The Applicant has not explained to the Court how the customary trust arose. All he has done is to make a statement that the suit land is registered in the name of the deceased brother in trust for the family. It was his responsibility to show how this was done. He failed to do so.

30. Consequently, the suit is dismissed with no orders as to costs.

**It is ordered accordingly**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 8<sup>TH</sup> DAY OF NOVEMBER 2018**

**J G KEMEI**

**JUDGE**

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

Kirubi HB for Kimani for the Plaintiff

Defendant 1

Defendant 2

Defendant 3     N/A

Defendant 4

Irene and Njeri, Court Assistant