



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA
ELC CASE NO. 704 OF 2013

ELIZABETH WAITHIRA WATARI.....1ST PLAINTIFF
ISAAC MBUGUA.....2ND PLAINTIFF
SABINA WAMBUI.....3RD PLAINTIFF
HANNAH WANJIRU.....4TH PLAINTIFF
BENJAMIN WATARI RWIMBO.....5TH PLAINTIFF
MARY NJERI.....6TH PLAINTIFF
JEREMIAH GITHINJI MAHUGU.....7TH PLAINTIFF
SOLOMON MURAYA MAHUGU.....8TH PLAINTIFF
TABITHA WAKONYO MAHUGU (Suing thro' next friend
ELIZABETH WAITHIRA WATARI.....9TH PLAINTIFF

VERSUS

JEREMIAH GITHUI MAHUGU.....DEFENDANT

JUDGMENT

The plaintiffs moved this Court by their plaint filed herein on 10th September 2013 seeking judgment against the defendant in the following terms:-

- a. The name of the defendant be cancelled and/or deleted from land parcel No. LOC 19/GACHARAGEINI/1402 and the name of the 1st plaintiff be registered as the proprietor in trust for the eight plaintiffs.*
- b. The trusteeship of the defendant in the land be terminated and the plaintiffs be declared the right full owners of the parcel.*
- c. The costs of the suit.*

The 1st plaintiff is the mother to 2nd to 9th plaintiffs and a step-mother to the defendant. The nine (9) plaintiffs all live on land parcel No. **LOC 19/GACHARAGEINI/1402** (the suit land) which measures two (2) acres and which was previously registered in the names of **MOSES RWIMBO MURAYA** (deceased) who was the husband to the 1st plaintiff. It is the plaintiffs' case that in 1999, the deceased registered the suit land in the names of the defendant to hold in trust for the plaintiffs. The defendant was to transfer the suit land to the plaintiffs upon the 2nd to 9th plaintiffs attaining the age of majority since he has his own land. However, in or around 2005, following the demise of the deceased, the defendant started interfering with the plaintiffs quiet possession of the suit land and this necessitated the 1st plaintiff filing **MATHIOYA LAND DISPUTES TRIBUNAL CASE No. 15 of 2004** and the Tribunal directed the defendant to transfer the suit land to the plaintiffs. However, that decision was quashed by the High Court in Embu. It is therefore the plaintiffs case that the defendant is in breach of trust and has even threatened to dispose the suit land to unsuspecting buyers and has on many occasions summoned the 1st plaintiff to appear before the area Chief to make her commit herself to vacate the suit land.

In response, the defendant filed a defence and also a counter-claim in which he denied being a step-son to the 1st plaintiff and pleaded that she is infact married to one **SIMON NDUNGU** in a marriage solemnized on 4th November 1979 in accordance with the Christian Marriage and Divorce Act. He added that the plaintiffs are trespassers on the suit land and ought to be evicted therefrom. He added that the original land parcel No. **LOC 19/GACHARAGEINI/1161** was registered in his late father's name before it was sub-divided into the parcels being **LOC 19/GACHARAGEINI/1401** and **1402** the former being registered in the names of the defendant's brother **SOLOMON MURAYA MAHUGU** while the defendant retained the suit land. The defendant denied that he holds the suit land in trust for the plaintiffs adding that on 23rd May 2013, the 1st plaintiff voluntarily agreed to vacate the suit land by 31st December 2013. The defendant therefore, vide his counter-claim sought the eviction of the plaintiffs from the suit land.

The trial commenced before me on 6th October 2016 with the 1st and 7th plaintiffs testifying on behalf of the plaintiffs while the defendant did not call any other witness apart from himself.

The 1st plaintiff asked the Court to adopt her statement as part of her evidence together with the list of documents. She reiterated that she is the mother to the other plaintiffs and step-mother to the defendant. She added that while the male plaintiffs live on the suit land, the defendant has his own land being parcel No. **LOC 19/GACHARAGEINI/1161**. She told the Court that the deceased had two other wives being **RUTH WANGUI** (the 1st wife) and **LOISE WANJIKU** (the 2nd wife and biological mother to the defendant). She denied that she was not the deceased's wife adding that she was married to him under customary law. She produced the Green Card to the suit land and the award in the Tribunal Case (Plaintiffs Exhibit 1 and 2) and asked the Court to grant her the orders sought in the plaint.

The 7th plaintiff also testified that the 2nd to 9th plaintiffs are his siblings while the defendant is their step-brother but does not live on the suit land as he has his own land elsewhere. He added that since he and his siblings did not have Identity Cards, the suit land was registered in the defendant's names to hold it in trust on their behalf but following the death of their father, the defendant started evicting them yet that is the only land they own.

The defendant denied that the 1st plaintiff was married to the deceased adding that the deceased had only two wives **RUTH WANGUI** and his mother **LOISE WANJIKU** who had one other son and daughter. He said that he only knew the 1st plaintiff as his late father's worker and produced a marriage certificate showing that the 1st plaintiff was infact married to one **SIMON NDUNGU** (Defence Exhibit 1). The defendant told the Court that the original land parcel No. **LOC 19/GACHARAGEINI/388** was registered in his names in 1963 before being sub-divided in 1978 into **LOC 19/GACHARAGEINI/1161** to **1164**. **LOC 19/GACHARAGEINI/1161** was registered in the names of his father, **LOC 19/GACHARAGEINI/1162** in the names of his brother **SOLOMON MURAYA**, **LOC 19/GACHARAGEINI/1163** in the names of the other brother **CHARLES MURAYA** while **LOC 19/GACHARAGEINI/1164** was registered in his names. The defendant added that land parcel No. **LOC 19/GACHARAGEINI/1161** was later sub-divided into two portions one of which (the suit land)

was registered in his names while **LOC 19/GACHARAGEINI/1401** was registered in the names of his brother **SOLOMON MURAYA**. He produced the Green Card for land parcels No. **LOC 19/GACHARAGEINI/388** and **LOC 19/GACHARAGEINI/1161** (Defence Exhibits 2 and 3). He testified how the plaintiff has been visiting the Chief's office claiming land from him and even filed a case at the **MATHIOYA LAND DISPUTES TRIBUNAL** and he directed his lawyer to write to her to vacate and she agreed to do so by 31st December 2013 (see Defence Exhibits 4 and 5). He therefore urged the Court to order for the plaintiffs' eviction from the suit land.

Submissions have been filed both by the firm of **BETH NDORONGO** Advocate for the plaintiffs and **J.M. KAGWI** Advocate for the defendant.

I have considered the evidence by both parties and the submissions by counsel.

The plaintiffs' case is that the defendant, though the registered proprietors of the suit land, holds it in trust for them. The 1st plaintiff has testified that she was married to the deceased who had two other wives and that the defendant is her step-son an allegation that the defendant refutes stating that the 1st plaintiff was infact only a worker on the deceased's farm. That the suit land is registered in the names of the defendant is not in dispute. It is also not in doubt that the plaintiffs, except for the married daughters, live on the suit land. Indeed a consent order was filed in this Court on 7th November 2013 to ensure their continued stay thereon and that also explains why the defendant seeks their eviction in his counter-claim. It is also clear from the defence Exhibit 1 that on 4th November 1979, the 1st plaintiff was married to one **SIMON NDUNGU**. She told the Court in cross-examination that the marriage ended in separation after which she married the deceased under customary law.

As indicated above, the plaintiffs claim is based on trust. Trust is an issue both of law and fact which needs to be proved through proper evidence. The onus is therefore on the party alleging the existence of trust to lead evidence to prove that fact. As was held in the case of **MBOTHU & OTHERS VS WAITITU & OTHERS 1986 K.L.R 171**, the Court never implies a trust save to give effect to the intention of the parties and such intention must be clearly demonstrated before a trust is implied. That is the duty that falls upon the plaintiffs in this case. On the other hand, the defendant denies that he holds the suit land as trustee for the plaintiffs and his twin assault to their case, as I can glean from his testimony, is firstly that the 1st plaintiff is not his step-mother and neither are the other plaintiffs his siblings and secondly, that the suit land is his property since it is registered in his names and the plaintiffs are infact trespassers thereon whose eviction he seeks. It is however now well settled that the registration of land in one's names does not relieve the proprietor thereof of his duty as a trustee nor extinguish the rights of other parties who are entitled to it under the law including customary law.

The defendant placed much premium on the fact that the 1st plaintiff was infact married to one **SIMON NDUNGU** and could therefore not be the deceased's wife or the defendant's step-mother. In the circumstances, so I understand the defendant to be stating, the plaintiffs would have no basis upon which to lay a claim to the suit land. The 1st plaintiff on her part testified that her marriage to **SIMON NDUNGU** ended although it was not clear under what circumstances that union was terminated. She then said that she was married to the deceased under customary law. There is however no evidence that any Kikuyu customary law rites relating to marriage were even performed. But the law also recognizes what is called marriage by repute. In the case of **HORTENSIA WANJIKU YAWEH VS PUBLIC TRUSTEE C.A CIVIL APPEAL No. 13 of 1976**, it was held inter alia, that:

“Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence to the contrary can rebut such presumption”.

In **NJOKI VS MUTHERU (1985) K.L.R 874**, NYARANGI J.A addressing the same issue said:

“The presumption does not depend on the law of systems of marriages. The presumption is an assumption based on very long affiliation and repute that the parties are husband and wife”.

The Judge then went ahead to give examples of what may demonstrate long cohabitation by stating that a

couple having a child or children together, is good enough. The presumption of marriage is not alien to our legal system. **Section 119 of the Evidence Act** captures it in the following terms:

“The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particulars case”

In view of the above, is there evidence upon which this Court can determine that the 1st plaintiff and the deceased cohabited as man and wife so that the doctrine of presumption of marriage can be applied? I think such evidence is found firstly in the undisputed fact that the 1st plaintiff and deceased had children together. The 1st plaintiff has indicated in her statement which was adopted as part of her evidence that she and the deceased had three (3) children while five (5) were from her previous union. This is what she stated in paragraphs 3, 4 and 5 of that statement.

3: “In 1989, I got married to MOSES RWIMBO MURAYA A.K.A MOSES MAHUGU MURAYA”

4: “I have eight (8) children three (3) of them from our union with RWIMBO MURAYA and five (5) were fostered by my husband”

5: “All my children were minors and have been brought up, educated by my deceased husband. My deceased husband, myself and children live on parcel No. LOC 19/GACHARAGEINI/1402”.

In cross-examination, the defendant, while conceding that the 1st plaintiff lives on the suit land, he nonetheless denied that she lived with the deceased. He said in cross-examination by **MS NDORONGO** advocate for the plaintiffs that:

“The 1st plaintiff lives on LOC 19/GACHARAGEINI/1402 but I don’t know who else lives with her there. I don’t know if she ever lived with my father. I only came to hear about her living with my father after he had died”.

That statement cannot possibly be true because in the same testimony, he conceded that the 1st plaintiff accompanied him and the deceased to the Lands office when the suit land was being registered in the defendant’s names. In those circumstances, the defendant cannot feign ignorance of the fact that the deceased had sired children with the 1st plaintiff who for all intents and purposes, is the deceased’s wife. The 1st plaintiff indeed testified that the deceased built her the house in which she lives. It is also not lost to this Court that the 7th plaintiff and the defendant share similar names. This Court therefore finds that there is cogent evidence, which has not been rebutted, that a presumption of marriage can be assumed in the circumstances of this case between the 1st plaintiff and the deceased. Therefore, if the defendant’s case is that he cannot be a trustee to strangers, that has now been rebutted by evidence which show that the 1st plaintiff lived with the deceased as man and wife and both she and her children are within their rights to lay a claim to the suit land as part of the deceased’s family.

There is also other evidence upon which a constructive trust can be presumed in the circumstances of this case. In **GODFREY GITHERE VS GEORGE KAGIA & OTHERS (2008) e K.L.R.**, the Court adopted the definition of constructive trust from **EQUITY AND THE LAW OF TRUST by PHILIP H. PETTIT 4th Edition page 46** where it is stated:

“..... a constructive trust is one imposed by a Court of equity regardless of the intention of the owner of the property. In HUSSY VS PALMER (1972) 3 ALL E.R 744, LORD DENNING held that a constructive trust “is a trust imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the Court can enable any aggrieved party to obtain restitution”.

In the circumstances of this case, taking into account that the plaintiffs have lived on the suit land even during the life time of the original owner thereof, it would be an act of great inequity for this Court to

decide otherwise than that the defendant holds the suit land in trust for them.

It is also clear from the evidence that the original land parcel No. **LOC 19/GACHARAGEINI/388** was registered in the names of the defendant at a time when, according to the 1st plaintiff, the deceased was away in the Rift Valley. Upon the deceased's return, that land was transferred back to him (deceased) who then distributed it among his children. That is clear from the Green Cards herein. Therefore, at no time was the original land from which the suit land was hived ever the sole property of the defendant. Rather, it was family land which, under the principles of inter and intra generational equity which are enshrined in **Section 18 of the Environment and Land Court Act**, is held for the benefit of the family to benefit the present and future generations. The defendant conceded in cross-examination that when the suit land was registered in his names, the 1st plaintiff was present but only in her capacity as a worker. He said:

“When the sub-division was being done, the 1st plaintiff, myself and my father went to the Land Board and the 1st plaintiff never complained. She could have said that the land be registered into her names. The sub-division was done in 1989 and at that time, my father was living with my mother. The 1st plaintiff only accompanied my father to the Lands office as his worker”.

The Green Card shows that the land parcel No. **LOC 19/GACHARAGEINI/1161** was actually subdivided in 1984 to give rise to the suit land and another parcel and it cannot possibly be true, as the defendant would like this Court to believe, that the 1st plaintiff's presence at the Lands office during that exercise was only as a “**worker**” of the deceased. The 1st plaintiff was clearly there in her role as the deceased's wife and that was done deliberately by the deceased so that all the persons present, including the defendant, would know that the registration of the suit land in the names of the defendant was only for him to hold it in trust for the 1st plaintiff and her children. A worker would not ordinarily have any role to play in such transactions and nothing would have been easier for the deceased to exclude the 1st plaintiff from the trip to the Lands office if he did not want her to know what was going on with respect to the suit land.

Further evidence on which this Court can rely to make a finding that the defendant holds the suit land in trust for the plaintiffs is found in the testimony of the 1st plaintiff that the defendant has his own land. The defendant himself conceded in his evidence in chief that land parcel No. **LOC 19/GACHARAGEINI/1164** is registered in his names while parcels No. **LOC 19/GACHARAGEINI/1162** and **1163** are registered in the names of his brothers **SOLOMON MURAYA** and **CHARLES MAHUGU** respectively. That means therefore that the deceased catered for all his children. It could not have been the intention of the deceased to take care of one half of his family while rendering the other half destitute. Certainly his conduct does not demonstrate that trait in him and this Court is not inclined to believe the defendant's testimony when he tries to lead it along that path.

The defendant appears to have placed much premium on the fact that the 1st plaintiff signed an agreement dated 23rd May 2013 before area Chief undertaking to vacate the suit land by 31st December 2013 – Defence Exhibit 5. But that action alone, in my view, did not mean that the 1st plaintiff ceded her right to the suit land. It is clear from her own testimony that she did not intend to do so. She said as follows in cross-examination by Mr. Kagwi advocate for the defendant:

“I recall signing saying I would vacate the suit land in 2014. I did not vacate. Instead, I filed this suit”

Filing this suit in September 2013 was the clearest indication that she intended to retain the suit land. The defendant's claim that the plaintiffs be evicted from the suit land cannot therefore be up-held in the circumstances of this case. It is clearly for rejection by this Court as there is cogent and overwhelming evidence in support of the plaintiffs' claim that the defendant holds the suit land in trust for them. The defendant's counter-claim is devoid of merit and must be dismissed which I hereby do.

The up-shot of the above is that, upon considering all the evidence herein, I enter judgment for the plaintiffs against the defendant in the following terms:

- 1. The defendant holds land parcel No. LOC 19/GACHARAGEINI/1402 in trust for the plaintiffs.*
- 2. The trust is terminated and the plaintiffs declared to be the rightful owners of the land parcel No. LOC 19/GACHARAGEINI/1402.*
- 3. The names of the defendant be cancelled from the register of land parcel No. LOC 19/GACHARAGEINI/1402 which shall then be registered in the names of the 1st plaintiff as proprietor thereof in trust for the other plaintiffs herein.*
- 4. The defendant's counter-claim is dismissed.*
- 5. Each party to meet their own costs as they are family.*

B.N. OLAO

JUDGE

31ST MARCH, 2017

Judgment delivered, dated and signed in open Court this 31st day of March 2017

1st Plaintiff – present

2nd Plaintiff – present

3rd to 9th Plaintiffs – absent

Defendant – absent

Right of appeal explained.

B.N. OLAO

JUDGE

31ST MARCH, 2017