



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 630 OF 2014**

**(Formerly NYERI HCCC NO. 26 OF 2012 (O.S))**

**IN THE MATTER OF THE ESTATE OF**

**EPHANTUS MWANGI WAWERU (DECEASED)**

**FRANCIS GICHOHI KAMBO.....APPLICANT**

**-VERSUS-**

**ESTHER WANJIKU MWANGI.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Francis Gichohi Kambo, hereinafter referred to as “the applicant”, took up the summons dated **6th February, 2012** for determination of the following questions:-

**(i) Whether or not Ephantus Mwangi Waweru (deceased) was registered as proprietor of land parcel Nyeri/Watuka/622 (the precursor to Nyeri/Watuka/ 1569), to hold in trust for himself and for his nine siblings namely:**

**(a) Phyllis Njoki Kambo**

**(b) Susan Waithera Machohi**

**(c) Jerioth Nyambura Waweru (now deceased but represented by Simon Kibiro Kimani);**

**(d) Grace Muthoni Ngigi**

**(e) Rose Wachuka Ngigi**

**(f) Naomi Wambui Waweru**

**(g) Regina Wairimu Waweru (now deceased but represented by Charles Kariuki Gachoya).**

**(h) Mercy Wanjiru Waweru**

**(i) Jane Waitherero Waweru (now deceased).**

**(ii) Whether or not the nine families listed in (1) above together with the family of Esther Wanjiku Mwangi, the respondent herein, are entitled to an equal share of the parcel of land known as Nyeri/Watuka/1569, after determination of the said trust.**

**(iii) Whether or not the family of Jane Waitherero Waweru (deceased) is entitled to any further share of the said parcel of land after acquiring 1.62 hectares (approximately 4 acres) out of the said land which is now land parcel No. Nyeri/Watuka/1175.**

**(iv) Who should be condemned to pay the costs of the suit/proceedings.**

2. In support of the application, the applicant has deposed that he is a co-administrator of the estate of the deceased person herein (Ephantus Mwangi Waweru) the other administrator being Esther Wanjiku Mwangi, the respondent herein; that the proceedings herein were commenced following an order issued in Nyeri Succession Cause No. 217 of 2008 for determination of the question as to whether the estate of the deceased is subject of trust in favour of the persons mentioned herein above.

3. It is pointed out that the deceased person herein who was the registered proprietor of the parcel of land known as Nyeri/Watuka/1569 (the suit land) was a brother to the persons named in prayer (1) herein above; that the suit land, which was formerly Nyeri Watuka/622 belonged to the father of the deceased person herein, Samuel Waweru, (also deceased).

4. It is contended that the father of the deceased person herein had on several occasions before his demise, stated that all his children are beneficiaries of his land and that the deceased person herein secretly obtained letters of administration of the estate of his father and subsequently got registered as the proprietor of suit land.

5. It is pointed out that the deceased only informed one of his siblings, Jane Waitherero Waweru (deceased) when seeking letters of administration of the estate of his father and that upon obtaining title to the suit land, the deceased sub-divided it into several portions which he sold to third parties, some of whom have since obtained titles to the portions sold to them.

6. Maintaining that the deceased person herein was registered as proprietor of the suit land to hold on his own behalf and on behalf of his siblings, the applicant urges the court to declare and determine the pleaded trust in order to enable the sharing of the suit land amongst the families of Samuel Waweru (deceased).

7. In reply and opposition to the application, the respondent has admitted that the deceased person herein was registered proprietor of the suit land; that the persons listed in paragraph 4 of the affidavit sworn in support of the application are siblings of the deceased person herein and that the original parcel of land from which the suit land was carved belonged to their grandfather (Samuel Waweru).

8. The respondent has further deposed that the deceased person herein was the only son of his father and pointed out that the estate of Samuel Waweru was distributed between the deceased person herein and one of his siblings, Jane Waitherero through court process, in accordance with the wishes of their grandfather and in conformity with Kikuyu customary law. In this regard, it is pointed out that the deceased was the only son of their grandfather and Jane Waitherero the only unmarried daughter and contended that administration of their grandfather's estate as such put to rest any trust over the original land.

9. It is further deposed that the deceased dealt with the interest in the suit land freely by selling portions of the suit land to third parties.

10. In view of the foregoing, it is contended that registration of the deceased person herein as the proprietor of the suit land was not subject to the pleaded trust in favour of his siblings.

## **EVIDENCE**

### **The applicant's case**

11. The applicant, who testified as P.W.1, informed the court that their grandfather, Samuel Waweru Karibei had 10 children out of whom the late Ephantus Mwangi Waweru, was the only son; that they have all along been tilling the suit land. He faulted the deceased for having obtained letters of administration of the estate of their grandfather without informing them.

12. He informed the court that his uncle called him sometime in 2004 and told him that he wanted him to ensure that the remaining 44 acres of the suit land are not interfered with by outsiders and that the land was to be divided amongst his sisters.

13. He further informed the court that his uncle instructed the respondent to give him all the original title deeds and the agreements he had entered into with potential buyers.

14. Concerning the contention by the respondent that his Aunties were not entitled to a share of the suit property because they were married, he stated that his grandfather held all his children as equal.

15. Maintaining that most of his aunties are landless, he urged the court to order that the suit land be distributed equally between the children of their grandfather.

16. He explained that his mother and aunties did not file a claim to their father's estate because they knew their brother held it in trust for them.

17. He informed the court that some of the persons who bought land from his uncle have occupied it for over 10 years.

18. **P.W.2 Susan Waithera Machohi**, informed the court that her family has always cultivated on the suit land and that they did not know that after their father passed on, the suit land was registered in the name of their brother. When they learnt about his registration, they protested because their father had refused any family member to sell the land.

19. She urged the court to order distribution of the land fairly amongst her siblings, in accordance with their father's wishes.

20. She admitted that she was married and that she had gone back to the suit property recently after her husband passed on. She told the court that when her father was alive, he had allowed her to cultivate a portion of the suit land.

21. She stated that she has no problem with the buyers who have acquired title to the portions sold to them.

22. **P.W.3 Mercy Wanjiru Waweru**, told the court that she cultivates and lives in the suit land and has also built therein. She urged the court to order subdivision of the suit land amongst her siblings as per the wishes of her father. She admitted having moved to the suit land with her husband after her brother passed on.

23. She explained that although their father had not said how the land should be shared, she was of the view that it should be shared equally amongst her siblings.

24. Like P.W.2, she stated that the sold land should remain with the purchasers.

25. **P.W.4 Phyllis Njoki Kambo Mugecha**, testified that she cultivates about 1/2 acre of the suit land with one of her children but does not live there. She told the court that the portion she cultivates was given to her by her father which her brother had refused to give her.

26. **P.W.5 Grace Muthoni Ngige**, claims 1 or 2 acres of the suit land because her father had said that his land belonged to all his children. She would have no objection even if she is given 1 acre as her inheritance. She was of the view that all persons who had bought land from their brother should be ordered to return the land to them.

### **The defence case**

27. **D.W.1 Esther Wanjiku Mwangi**, reiterated the contents of her replying affidavit. Concerning the allegation that their grandfather had said his land belonged to all his children, she stated that she is unable to testify on what her grandfather stated about his land because he died the year she was born.

28. Contrary to the allegation by her aunties that they live in the suit land, she stated that she has never seen any of them coming to cultivate the suit land.

29. She denied knowing P.W.4's husband or having met him but stated that she had heard her father talk about him.

30. With regard to the meeting referred to in the witness statement of P.W.1, she stated that she cannot recall whether her father called the meeting or not. She stated that she was also unaware of the whereabouts of the title deed of the suit land and the sale agreements shown to her by the plaintiff's advocate.

31. She denied the contention that her father returned ownership documents of the land so that it could be subdivided among his family and the families of his siblings.

32. She stated that although she had no objection to her father selling the suit land, she had registered a caution to restrict dealings with the suit land because she did not want her siblings to become destitute. She did so on advice of her Aunt, Waitherero.

33. According to her, all the persons laying claim to the suit land should have done so when her father was alive.

34. She disagreed with the allegation that her aunties were not aware of the succession cause filed by her father and that her father held the suit land in trust for himself and his siblings.

35. **D.W.2 Samuel Maina Gatuiri** stated that he is a cousin to the parties in this suit. He explained that his mother, Rose Wachuka and his siblings do not lay claim to the suit land because their mother is married. According to him, the sisters to his mother, save for Jane Waitherero, are also not entitled to any portion of the suit land because they too are married.

36. He admitted that most of the family members cultivated the suit land before their uncle passed on including his Aunties

37. On cross examination, he stated that he has no authority of his mother to testify on her behalf or act as her next friend. He also stated that he has never seen or met P.W.4's husband but has always heard that she was married.

38. He admitted that his Aunt Wambui lives on the suit land and has a mental problem. He also admitted that she has no land but stated that she should be taken care of by her children.

### **Submissions**

39. On behalf of the applicant, a brief overview of the cases of the respective parties is given and submitted that the whole of the estate of Samuel Waweru Karibii was to be inherited by all his children, as per his wishes.

40. Reference is made to **Section 38** of the Law of Succession Act, Cap 160 Laws of Kenya, and submitted that despite the deceased person herein having registered himself as the proprietor of the suit land, he did so for himself and as a trustee of his siblings. In that regard reference is made to the cases of **Mbulwa Maingi v. Veronica Nthamba (2015) eKLR; Njenga Chogera v. Maria Wanjira Kimani & 2 Others (2005) eKLR; Muthuitha v. Muthuitha (1982-1988)1KLR 42** and submitted that the applicant has made up a case for being granted the orders sought.

41. On behalf of the respondent, a brief overview of the cases of the respective parties is given and submitted that from the nature of the claim and the available evidence, the issues for determination are as follows:-

- a) Whether the suit land was at any time subject of a trust, and if yes, the nature of the trust and the beneficiaries thereof;
- b) Whether the trust, if any, was still subsisting over the suit land at the time of the deceased's death.

42. With regard to the first issue, reference is made to **Section 2(2)** of the Law of Succession Act and submitted that the administration of the estate of the original owner of the suit property was to be governed by the applicable customary law. The court is urged to take judicial notice of the applicable Kikuyu customary law on distribution of intestate estate under **Section 60** of the Law of Evidence Act.

43. Reference is made to the cases of **Mwathi v. Mwathi (1995-1998) E.A 229; Gatuanja v. Gatuanja (1983) KLR 575; Kanyi v. Muthiora (1984) KLR 712, Wambugi W/O Gatimu v. Stephen Nyaga Kimani (1992) KAR 292 and Kanyi vs Muthiora (2008) 1KLR (G&1)1032** and submitted that none of the married siblings of Ephantus Mwangi Waweru is entitled to a share of their fathers' estate.

44. On whether the applicant's mother was married, it is submitted that the defendant's evidence to the effect that she was married remains uncontroverted.

45. From the totality of the evidence and the conduct of the applicant's mother, (she never lived in the suit land or objected to the sale of the land by the respondent's father), it is submitted that she ought to be treated as one of the married sisters of the defendant's father.

### **Analysis and determination**

46. It is common ground that the suit property belonged to the grandfather of the parties to the suit herein before it was registered in the name of the respondent's father.

47. It is also common ground that the respondent's father was the only son of the parties' grandfather.

48. From the pleadings, evidence and the submissions made in respect of the cases of the parties in this case, the sole issue for determination is whether the registration of the respondent's father as the proprietor of the suit property was subject to a trust in favour of his siblings?.

49. In determining this question, I will be guided by the decision of the Court of Appeal in the following cases cited by the respondent:-

- i) **Gituanja v. Gituanja** where it was held that among the kikuyu a woman has no rights over "ng'ondo" or land, except in the case of an unmarried daughter and widows who have a life interest in the land given them for cultivation.

ii) **Kanyi Muthiora v. Maritha Nyokabi Muthiora** (1984), where the Court of appeal held that it is true among the Kikuyu that land is inherited by sons to the exclusion of married daughters, but as the learned judge correctly held, unmarried daughters are entitled to inherit land, save that if they have no child their share is for life, but if they have an illegitimate child, then that child inherits their share. In the latter case the unmarried daughter acquires an absolute and not life interest.

50. I wish to point out that the plaintiff has not classified the basis of his claim for trust, whether customary or otherwise. That notwithstanding, from the evidence adduced in this case, I gather that the plaintiff's claim is premised on alleged wish by his grandfather that all his children should benefit from his land. Unfortunately none of the persons who testified in support of that claim, led evidence capable of showing that the original owner of the suit land did not want his land to be subjected to the law applicable to distribution of his estate, which in the circumstances of this case is kikuyu customary law.

51. The evidence on record, namely the conduct of the claimants, shows that they did not have any other interest in the suit land. There is no evidence that they considered themselves to be in equal footing with their brother when it came to inheritance of the suit land. There is evidence that they ceased using the suit land upon being married. They only returned to the suit land for purposes of cultivation after something went wrong with their marriages. Those who are still married like P.W.5, told the court that they just wanted to inherit their father and did not mind whether they got 1 acre or two (not interested in equal share of their father's land).

52. It is trite law, that the estate of an intestate kikuyu man is inherited by his sons and unmarried daughters. See the above cited cases.

53. With regard to the claim that the respondent's father held the property in trust for his siblings, that claim should be gauged on the basis of the test enunciated by the Court of Appeal in the case of **Salesio M'itonga v. M'ithara & 3 Others (2015)eKLR** thus:-

**“It is trite law that trust is a question of fact and has to be proved by evidence. In Gichuki - vs- Gichuki – Civil Appeal No. 21 of 1981, this Court held that a party relying on the existence of a trust must prove through evidence the existence of a trust.....We concur with the following findings by the High Court:-**

**“Trust must be proved by credible evidence adduced by the person claiming that a trust exists. See Wambugu vs. Kimani supra....”**

54. Upon review of the evidence adduced in this case and the law applicable to administration of the property herein, I find and hold that the plaintiff has failed to prove to the required standard that the deceased held the land in trust for himself and his siblings, more so the married ones. For that reason, I return a negative verdict to questions 1 and 2 of the originating summons herein.

55. With regard to question 3, I find and hold that no case has been made for interfering with the sharing of the estate between the deceased person and his unmarried sister, Waitherero.

56. With regard to costs, this being a family dispute, each party shall bear their own costs of the suit.

**Dated, signed and delivered in open court at Nyeri this 15th day of March, 2017**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mr. C. M. King'ori for the respondent

N/A for teh applicant

Court clerk - Esther