



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 143 OF 2016

LUCY NJERI KARABA.....PLAINTIFF

VERSUS

STEPHEN KIMENYI MURIITHI.....DEFENDANT

JUDGMENT

The plaintiff filed this suit on 16th September 2016 seeking judgment against the defendant in the following terms:

- 1. A declaration that the defendant was registered as owner of 1.96 acres (0.77 Ha) out of land parcel No. MUTIRA.KAGUYU/227 being MUTIRA KAGUYU/5262 in trust for the plaintiff and this Court do determine the trust by declaring that the plaintiff is entitled to half of 0.77 Ha (equivalent of 0.385 Ha) in MUTIRA/KAGUYU/5262 and order the defendant to transfer 0.385 Ha from MUTIRA/KAGUYU/5262 to the plaintiff in 7 days and in default the Executive officer of this Court do sign all documents to facilitate the plaintiff getting 0.385 Ha.***
- 2. Costs and interest.***

The basis of the plaintiff's claim is that she and the defendant are siblings and the only children of their deceased father **ASIAH KIMENYI KARUHI** who had three wives namely:

- 1. CHARITY KAGURE KIMENYI**
- 2. MARGARET MUTHONI KIMENYI and**
- 3. MUTHONI KIMENYI.**

During his life-time, the deceased was the registered proprietor of land parcel No. MUTIRA/KAGUYU/222 and following his death, **EMBU HIGH COURT SUCCESSION CAUSE No. 93 of 2009** was filed and the land parcel No. MUTIRA/KAGUYU/222 was sub-divided into three portions each measuring 1.96 acres being MUTIRA/KAGUYU/5261, 5262 and 5263 to be shared between the deceased's three houses. The defendant was therefore registered as the proprietor of parcel No. MUTIRA/KAGUYU/5262 (the suit land) to hold in trust for the plaintiff who occupies one acre where she has built a house. However, the defendant who had earlier agreed to have the land surveyed so that the plaintiff could get her portion of the suit land has now refused to do so hence this suit.

From the record, the defendant was duly served with the plaint and summons to enter appearance on 26th

October 2016 but did not enter any appearance nor file a defence. The case was therefore listed for formal proof on 4th April 2017 and although served with a Hearing notice, the defendant did not attend Court.

The plaintiff testified in support of her case and called her sister **MERCY KIMENYI** (PW2) as a witness.

The gist of the plaintiff's case is that the defendant is her brother and the two are the only children of **MUTHONI KIMENYI** who was one of the three wives of their late father **ASIAH KIMENYI KARUHI** (deceased) who owned land parcel No. MUTIRA/KAGUYU/222 and upon his death, that land was shared equally between the three houses following orders in **EMBU HIGH COURT SUCCESSION CAUSE No. 93 of 2009** (Exhibit 1). The portion No. MUTIRA/KAGUYU/5262 (the suit land) which was the share of their mother was registered in the names of the defendant to hold in trust for himself and the plaintiff. The defendant had initially agreed to give the plaintiff her share of the suit land and even asked her to pay Ksh. 6,400 being the survey costs which she did (Exhibit 3) but he later reneged yet the plaintiff continues to occupy and utilize half of the suit land hence this suit. The plaintiff has meanwhile moved to High Court to revoke the earlier grant issued with respect to their late father's property. Plaintiff's evidence was supported by her step-sister **MERCY KIMNEYI** (PW2).

I have considered the plaintiff's evidence as supported by her step-sister (PW2). That evidence is not rebutted as the defendant did not enter appearance nor file any defence and neither did he attend the Court for hearing on 4th April 2017 though duly served with a Hearing notice.

The plaintiff's case is premised on a claim of trust and the law required her to prove the existence of such trust. It is clear from the plaintiff's un-controverted oral evidence together with the pleadings in the **EMBU HIGH COURT SUCCESSION CAUSE No. 93 of 2009** that the defendant is the plaintiff's elder and only brother. It is also clear from the certificate of search in respect to the suit land (Exhibit 2) that the same is registered in the names of the defendant. The plaintiff's case is that such registration was to be in trust for both the plaintiff and the defendant. The defendant having opted not to defend this suit, the Court must believe the plaintiff's un-controverted evidence as supported by her step-sister. It is settled law that the registration of land in one's names does not extinguish the rights of others for whom such land is held in trust. Such trust includes customary trust – see - **MUMO VS MAKAU 2004 1 K.L.R 13, KANYI VS MUTHIORA 1984 K.L.R 712** and **MUKANGU VS MBUI 2004 2 K.L.R 256** among others. **Section 25 of the Land Registration Act 2012** is clear that the registration of land in one's names confers on him all the rights, privileges and appurtenances belonging thereto but with a provisos that such registration does not relieve the proprietor of any duty or obligation to which the person is subject to as a trustee. A similar provision is found in **Section 28 of the repealed Registered Land Act**. The plaintiff testified that she has always occupied half of the suit land and continues to do so. It is also clear that the original land No. MUTIRA/KAGUYU/222 belonged to the parties' deceased father before its subdivision into three parcels one of which is the suit land registered in the defendant's names. That is evidence on which this Court can find, which I hereby do, that the registration of the suit land in the defendant's names was so that he could hold it in trust both for himself and the plaintiff.

Further evidence of a trust is found in the defendant's own replying affidavit in opposition to the plaintiff's application for revocation of the grant issued in **EMBU HIGH COURT SUCCESSION CAUSE No. 93 of 2009**. In paragraph 14 of that affidavit, the defendant depones as follows:

“That this application is an after-thought and if the applicant is now desirous of having a share of our father's estate from the share of our mother's house MUTHONI KIMENYI which I inherited, I am ready and willing to transfer to her 0.20 Ha (½ acre) from the 0.77 Ha being land parcel MUTIRA/KAGUYU/5262 which I got instead of having the Grant revoked and interfering or prejudicing the other houses' inherited interests”.

This affirmation was a clear recognition by the defendant that infact he was registered as the proprietor of the suit land but only to hold the same in trust for himself and his sister the plaintiff. This Court must therefore disabuse of him of any notion that he can decide what portion to give the plaintiff or that he is

not obliged to give the plaintiff her share of the suit land. The parties are Kikuyu and the concept of trust is not alien in Kikuyu customary law where the trustee (muramati), normally the eldest son, inherits land to hold in trust for himself and other heirs – **NJUGUNA & OTHERS VS NJUGUNA C.A CIVIL APPEAL No. 33 of 1982 (1983 e K.L.R)**. Of course as a good muramati, the defendant would have had a good case for a slightly bigger portion. However, the filing of this suit by the plaintiff is a clear demonstration that the defendant has not been a good muramati and would therefore not be deserving of a bigger portion than the plaintiff. What he purported to do in the revocation proceedings smacks of discrimination against her sister by virtue of her gender. That is prohibited by **Article 27 of the Constitution** which provides for equal treatment for both men and women. The plaintiff did not disclose her marital status but that notwithstanding, this country subscribes to and has ratified various International Covenants and treaties that legislate against discrimination against women. These include the ***African Charter of Human and Peoples’ Rights otherwise known as the Banjul Charter (1981), the Universal Declaration of Human Rights (1948), the Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights and the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW)***. **Article 1 of CEDAW** defines discrimination against women as follows:

“Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.

It must therefore be made clear to the defendant that as a trustee, he is not doing any favour to the plaintiff by offering her ½ acre of the suit land. Rather, it is his responsibility and duty to equitably share the suit land between himself and the plaintiff notwithstanding her gender or marital status. From the evidence herein, I am satisfied that the plaintiff has established her case against the defendant and is entitled to the orders sought in her plaint dated 7th September 2016 and filed herein on 16th September 2016.

The up-shot of the above is that judgment is entered for the plaintiff against the defendant as prayed in paragraph 15 of her plaint save that there shall be no order as to costs.

It is so ordered.

B.N. OLAO

JUDGE

21ST APRIL, 2017

Judgment dated, delivered and signed in open Court this 21st day of April 2017

Ms Muthike for Ms Thungu for Plaintiff present

Defendant absent

Right of appeal explained.

B.N. OLAO

JUDGE

21ST APRIL, 2017