



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 137 OF 2015**

**VIOLET NJOKI GITHENDU**

**FRANCIS MUCIRA MUTHIKE.....PLAINTIFFS**

**(Representative of the late mother ELIZABETH WANJIKU MUTHIKE)**

**VERSUS**

**ROSEMARY MUTHONI GITHENDU.....DEFENDANT**

**JUDGMENT**

This is yet another one of those unfortunate cases involving siblings feuding over land. The parties are all acting in person and so their pleadings are what is commonly referred to as “*home made*”.

The 1st plaintiff **VIOLET NJOKI GITHENDU**, the 2nd plaintiff **ELIZABETH WANJIKU MUTHIKE** (now deceased and represented by his son **FRANCIS MUCIRA MUTHIKE**) and the defendant **ROSEMARY MUTHONI GITHENDU** are the only daughters of **KATHENDU NJERU and NANCY KITHENDU** (both deceased). Their other siblings are their brothers **STEPHEN GATHENDU** and **DICKSON GATHENDU**. During his life time, their late father was the registered proprietor of land parcel No. BARAGWE/RAIMU/124. After succession, the said land parcel was shared out as follows having been sub-divided into three portions:

- 1. BARAGWE/RAIMU/1697 – registered in the names of their mother NANCY KITHENDU**
- 2. BARAGWE/RAIMU/1698 – registered in the names of STEPHEN GATHENDU**
- 3. BARAGWE/RAIMU/1699 – registered in the names of DICKSON GATHENDU**

All that is not in dispute. The plaintiffs’ case however is that land parcel No. BARAGWE/RAIMU/1697 (hereinafter the suit land) was registered in the names of their mother to hold in trust for all the sisters. However, during her life time, the defendant, without their knowledge, approached their mother and became a co-proprietor of the suit land and after their mother’s death, and again without the plaintiffs knowledge, applied for their mother’s names to be deleted from the register. Despite attempts by the plaintiffs and their brothers to have the suit land shared into three portions, the defendant has refused. That led to the filing of this suit on 2nd November 2015 in which the plaintiffs seek judgment against the defendant in the following terms:

***(a) A declaration that the defendant holds the land parcel No. BARAGWE/RAIMU/1697 in trust for herself and the plaintiffs.***

**(b) That the land parcel No. BARAGWE/RAIMU/1697 be sub-divided into three equal portions amongst the plaintiffs and defendant.**

**(c) Costs of this suit.**

**(d) Any other relief the Court deems fit and proper to grant.**

That plaintiff was later amended on 14th March 2016 although no major changes were really made except to confirm that the Estate of **ELIZABETH WANJIKU MUTHIKE** is now represented by his son **FRANCIS MUCIRA MUTHIKE**.

The defendant filed a defence on 4th April 2016 confirming her relationship with the plaintiffs but denying that she holds the suit land in trust for the plaintiffs and putting them to strict proof thereof. She added that she is the registered proprietor of the suit land to the exclusion of all others adding that the plaintiffs were informed by their deceased mother of her intention to transfer the suit land to the defendant since she (defendant) was not married and was a single mother. The plaintiffs are therefore not entitled to the prayers sought and neither have they approached her over this dispute.

The trial commenced on 4th May 2017 when all the parties testified and asked the Court to adopt their statements.

The 1st plaintiff told the Court that the defendant is her eldest sister and the suit land is a sub-division of land parcel No. BARAGWE/RAIMU/124 which belonged to their late father. Following succession, it was divided into three portions being:

**1. Baragwe/Raimu/1697**

**2. Baragwe/Raimu/1698 and**

**3. Baragwe/Raimu/1699.**

Parcel No. Baragwe/Raimu/1697 was registered in the names of their late mother **NANCY KITHENDU** to hold in trust for herself and her three daughters being the plaintiff, the defendant and their deceased sister **ELIZABETH WANJIKU MUTHIKE**. However, the defendant registered herself as a co-proprietor of the suit land which she later registered in her sole names without informing her sisters. That led to the filing of this suit.

The 2nd plaintiff is a son to the deceased **ELIZABETH WANJIKU MUTHIKE** and he associated himself with that testimony.

**STEPHEN NJERU GITHENDU** (PW3) is a brother to the 1st plaintiff and defendant and an uncle to the 2nd plaintiff. He too confirmed that the suit land is a sub-division of land parcel No. BARAGWE/RAIMU/124 which belonged to their late father and which was subsequently divided into three portions two of which were awarded to him and his brother **DICKSON** while the third portion Baragwe/Raimu/1697 was registered in the names of their mother to hold in trust for her three daughters including the 1st plaintiff and defendant following a family resolution after the death of their father in 1975. Before their mother died in 2010, she informed him that the suit land would be shared equally between the three sisters although the defendant had also been registered as a co-owner. In 2013, the 1st plaintiff placed a caution on the suit land when she learnt that the defendant was planning to sell it yet it was being held in trust. He said he is still holding the death certificate of their late mother and the registration of the defendant as a co-owner was done secretly.

The defendant confirmed that the 1st plaintiff is her sister and the 2nd plaintiff her nephew. She told the Court that the suit land was given to her by her mother because she is the one who was living with her while the 1st plaintiff and the mother of the 2nd plaintiff were married and were satisfied with what they had. Following the death of their mother, she asked her brother (PW3) to give her the death certificate but

he told her to wait and never gave it to her. So she went to the Chief who gave her a letter and the suit land was transferred into her names and a new title issued to her.

I have considered the evidence by all the parties and what this Court has to determine is whether the defendant holds the suit land for the plaintiffs.

The defendant is adamant that the suit land was given to her because the plaintiffs had no interest in it since they had land elsewhere. The plaintiffs' case is that the defendant holds the suit land in trust for them and that is why it was registered in their mother's names following the succession proceedings. Trust is a matter of law and fact and the party pleading it must lead evidence to prove the same. In this case, it is not in dispute that the 1st plaintiff, the defendant, their two brothers Stephen (PW3) and Dickson and their late sister Elizabeth Wanjiru Muthike were the only children of their late parents. Their father was the proprietor of land parcel No. Baragwe/Raimu/124 which was shared out following the succession proceedings with the two brothers getting two portions and the suit land being registered in the names of their mother. The plaintiffs' case is that their mother was to hold the suit land for her daughters. The defendant rebuts that and states that the land was given to her by her mother as her property and she does not hold it in trust. However, the plaintiffs' evidence that the suit land was registered in their mother's names in trust for them and the defendant has been corroborated by their brother Stephen Githendu (PW3) who testified that the family had made that decision. The defendant suggested that her brother Stephen Githendu (PW3) does not like her. However, she did not explain why she was made a co-proprietor of the suit land together with her late mother without the knowledge of her siblings. She has told the Court that she was the one living with her mother and the Court can only conclude that she took advantage of that to register herself as a co-proprietor of the suit land secretly without informing her siblings. The intention could only have been to defeat her two sisters' interest in the suit land. The Green Card to the suit property does not indicate that their late mother was registered as proprietor of the suit land in trust for the three sisters. It is well settled however that the absence of a reference to a trust in the instrument of title does not affect the enforceability of a trust – **MUTHUITA VS WANOE 1982 K.L.R 166.**

It is also instructive to note that the registration of the defendant as the sole proprietor of the suit land was done on 27th June 2012 after the death of the parties' mother and again without the defendant informing her siblings. Her brother Stephen (PW3) told the Court that the defendant asked him for their mother's death certificate but he did not hand it to her and is still keeping it. Following their late mother's death and in view of the fact that she and the defendant were the joint proprietors of the suit land, it could only have been registered in the sole names of the defendant in terms of **Section 60 of the Land Registration Act.** That section provides that:

**“If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of the death, delete the name of the deceased tenant from the register by registering the death certificate”** Emphasis added

It is clear from the evidence of Stephen (PW3) that following the death of their mother, he took possession of the death certificate which he refused to give the defendant and which he still holds to-date. The Land Registrar could not therefore have been right to delete the name of the deceased mother of the parties from the register in respect to the suit land without the death certificate. Therefore, all that transpired on 27th June 2012 was an illegality and done to defeat the trust in favour of the plaintiffs. That lends credence to the plaintiffs' evidence, which this Court must therefore believe, that the registration of the defendant as a joint proprietor of the suit land with their late mother was also done for the same purpose. That was to frustrate the plaintiffs claim to the suit land by trust.

It is common ground that the suit land was a sub-division of land originally belonging to the parties' father. It then passed to his children through the succession process. It is inconceivable that their late father would only want the defendant and her brothers to have to have a share in the land and leave out his two other daughters. Indeed no evidence was placed before this Court in that regard. There was no evidence to show that the plaintiffs had been given their own land elsewhere and if that was the case, the onus was on the defendant to lead evidence to that effect. She did not do so. In the course of her

testimony, the defendant told the Court that the plaintiffs were married and satisfied with what they had. The suggestion therefore was that being married, her two sisters had no claim to the suit land. There was however evidence from Stephen (PW3) that infact she too had been married but was chased away by her husband and returned home. The fact that her two sisters were married does not by itself disentitle them to their rightful share in the suit land. That would be discriminatory. **Article 27 of the Constitution** provides for equality before the law irrespective of sex or marital status. Besides, Kenya subscribes to various covenants and treaties such as **THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948)** and the **CONVENTATION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)** just to name a few, which are geared towards eliminating discrimination. The defendant cannot therefore be heard to say that the plaintiffs have no right to the suit land by virtue of their marital status.

It is clear from the evidence herein that it was the intention of the family that the suit land be registered in the names of the parties mother **ELIZABETH WANJIKU MUTHIKE** to hold in trust for her three daughters who are the plaintiffs and the defendant. One of the daughters has since died but her Estate is represented by her son **FRANCIS MUCIRA MUTHIKE** having obtained a limited grant in **KERUGOYA HIGH COURT SUCCESSION CAUSE No. 27 of 2016** for purposes of filing this suit. It was with the realization that the suit land was held by their mother in trust for the benefit of the plaintiffs that the defendant in an attempt to claim it as her own property, secretly had herself registered as a joint proprietor thereto during their mother's life time. Thereafter, she again illegally transferred it into her sole names following their mother's death and without informing her sibilings. Therefore, apart from the plaintiff's direct and cogent evidence establishing the existence of a trust in their favour, there is evidence of her fraudulent scheme to frustrate that trust. This Court is satisfied from the evidence on record that the suit land was registered in the names of the parties' late mother **NANCY KITHENDU** to hold in trust for the plaintiffs and defendant and that was not defeated by the transfer thereof to the defendant who also holds it in trust for the plaintiffs. The defendant's claim that the suit land is her private property cannot therefore be true and must be rejected.

Ultimately therefore, there shall be judgment for the plaintiffs against the defendant in the following terms:

- 1. A declaration that the defendant holds land parcel No. BARAGWE/RAIMU/1697 in trust for herself, the plaintiff and their late sister ELIZABETH WANJIKU MUTHIKE.***
- 2. That the land parcel No. BARAGWE/RAIMU/1697 be sub-divided into three (3) equal portions between the plaintiff, the defendant and the Estate of the late ELIZABETH WANJIKU MUTHIKE.***
- 3. As the parties are family, each shall meet their own costs.***

**B.N. OLAO**

**JUDGE**

**19<sup>TH</sup> MAY, 2017**

Judgment dated, delivered and signed in open Court this 19<sup>th</sup> day of May 2017

Plaintiffs both present

Defendant present

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**19<sup>TH</sup> MAY, 2017**