



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C NO. 971 OF 2013

TERESIA WANJIKU KARANJA

As administrator of the estate of

Karanja Njuguna PLAINTIFF

VS

JOSEPH NDICHU NJUGUNA

Administrator of the estate of Njuguna Thaga

alias Njuguna Thaga Karanja (deceased).....DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendant seeking an order that the defendant do transfer LR No. Ngenda/Karuri/1042 to her on grounds that she is the rightful owner of the land pursuant to a trust accruing to her late husband Karanja Njuguna being the beneficiary of 1/3 of the family land known as LR No. Ngenda/Karuri/536.

2. It is her claim that L.R Ngenda /Karuri /536 measuring 2.6 acres that was registered in the name of Njuguna Karanja Thaga was family land. That he held the land for herself and in trust for his two brothers namely, Paul Karanja Njuguna (her late husband) and Mwangi Karanja. That on instructions/directions of her mother in law Wanjiru Karanja, the land was held by Njuguna Karanja Thaga under customary trust and was to be divided into 3 portions as follows; Njuguna Thaga on the east; Paul Karanja Njuguna in the middle and Paul Karanja Njuguna on the western side. That in breach of the customary trust, the said Njuguna Thaga Karanja subdivided the land into 3 portions.

- | | | |
|------------------------------|---|------------|
| a) L.R No Ngenda/Karuri/1041 | - | 0.85 acres |
| b) L.R No Ngenda/Karuri/1042 | - | 0.85 acres |
| c) L.R No Ngenda/Karuri/1043 | - | 0.9 acres |

3. That this land LR No. 536 has been a subject of family dispute and was arbitrated by the Chief and the elders severally in 1983 and 1984 in both instances it was decided that the family land should be subdivided into 3 portions amongst the 3 brothers. It would appear that the matter was not resolved until the two brothers Karanja Njuguna and Njuguna Karanja Thaga died in 2002 and 1995 respectively.

4. The Plaintiff is the wife of Paul Karanja Njuguna and the Defendant is the son of Njuguna Karanja

Thaga.

5. That Land LR No. 1041 was transferred to the sons of Mwangi Karanja namely Robert Njuguna Mwangi and Joseph Mwangi and failed or refused to transfer LR No 1042 to the plaintiff's husband. Both L.R Nos 1042 and 1043 were therefore left registered in the name of Njuguna Karanja Thaga. After the death of Njuguna Karanja Thaga, the Defendant obtained letters of grant of administration for the estate Njuguna Karanja Thaga vide Succession Cause No. 470/2004-Thika and the land 1042 was distributed and allocated to the defendant. This has aggrieved the family of Paul Karanja Njuguna who filed this suit through the Plaintiff herein.

6. It is on record that the Defendant was served with the summons to enter appearance dated 12th August, 2013 and the copy of plaint, verifying affidavit, list of witnesses and statements as were on the list of documents of the Plaintiff's case. See the affidavit of summons dated 13th February, 2014 and filed in Court on 21st February, 2014.

7. On the 19th February 2014 the Plaintiff applied for Interlocutory Judgement be entered against the Defendant for failure to enter appearance and on 16th May, 2014 wrote the Deputy Registrar requesting that their case be listed for formal proof. The matter was finally heard for formal proof on 27th March, 2017.

The Plaintiffs case

8. At the hearing the Plaintiff testified along two other witnesses. The Plaintiff testified that;

(a) During Demarcation of land in Kaguri Sub-location the family land of Wanjiru Karanja ref. Ngenda/Karuri/536 comprising of 2.0 acres was on the direction/instructions of the family Matriach Wanjiru Karanja registered in the name of Njuguna Thaga to hold 1/3 of the land on his own and the other 1/3 each for Mwangi Karanja and Paul Karanja Njuguna under customary trust. He was the eldest son of Wanjiru Karanja.

(b) That Wanjiru Karanja Kimunya had 3 sons namely Njuguna Thaga, Paul Karanja Njuguna and Mwangi Njuguna.

(c) That Ms. Wanjiru Karanja divided the land on the ground and allocated each son there to live as follows;-

- Njuguna Thaga – Eastern side
- Paul Karanja Njuguna – Middle
- Mwangi Karanja – Western side

(d) That the matter went before the elders Court at Karuri Sub-location presided over the assistant Chief in 1983 and 1994 and in 1994 the elders unanimously ruled that the Njuguna Karanja Thaga should inherit the larger portion of 0.90 points (acres) and the two brothers Mwangi Karanja and Paul Karanja Njuguna be given 0.85 points each, on grounds that Njuguna Karanja Thaga was the 1st born in the family. Each were to meet the expenses of surveying the land.

(e) It would appear that in pursuance of the of the elders ruling of 1983, Njuguna Karanja Thaga subdivided the land into 3 portions namely LR No. 1041, 1042 and 1043 measuring 0.85 acres, 0.85 acres and 0.90 acres respectively. Plot No. 1041 was transferred to the sons of Mwangi Karanja namely Robert Njuguna Mwangi and Joseph Kimuhu Mwangi. He was left with Plot No. 1042 and 1043. He died on 27.7.95 having failed to transfer Plot 1042 to the Plaintiff's husband Paul Karanja Njuguna.

(f) In 1995 the Defendant and the late Karanja Njuguna again appealed before the elders Court in Mangu location to hear the dispute regarding LR No. Plot 1042. The elders on hearing the dispute ruled that the Karanja Njuguna should pay the Defendant the survey fees and that Succession Cause be filed for the estate of Njuguna Karanja Thaga so that the interest of Njuguna Karanja be cited therein for his title to be transferred to him. It would appear that indeed letters of grant of administration were obtained in the name of Karanja Njuguna in 1997 as the legal representative. See Succession Cause No. 52/96. By the time Karanja Njuguna died in 2002 this had not happened.

(g) It is on record that vide Succession Cause No. 470 of 2004 the Defendant was appointed as the legal representative of the late Njuguna Karanja Thaga on 24th March, 2005. This must be after the death of Paul Karanja Njuguna who died on 23rd March, 2002. The said grant to the Defendant was confirmed on 20th January, 2006 where the land Ref. 1042 was inter alia distributed to the Defendant as a beneficiary.

(h) That the Defendant transferred the suit land L R No. 1042 to herself on 28th February, 2006 ostensibly in pursuance of the confirmed grant cited above.

(i) That she has lived on the suit land L. R No 1042 since the demarcation of the land in 1952. She has developed the land by building houses and growing coffee, wattle trees, bananas and subsistence crops. That the L R No 1042 belongs to her and urged the Court to grant her prayer that the Defendant be ordered to transfer the suit land to her.

9. PW 2- Duncan Kamau Kagori testified that he is the former Chief of Mangu Location from 1981 – 1995. He confirmed that he presided over the land dispute in 1984 where the elders ruled that the land being family land be subdivided into 3 for the 3 brothers with the elder brother getting a larger portion 0.9 acres and the other two being given 0.85 acres. He stated that the Defendant has no claim on L. R No 1042 as his father's portion was 1043 and 1042 belonged to Paul Karanja Njuguna the husband of the Plaintiff. He also attested to the fact that the family of the Plaintiff have lived on the land since 1940s.

10. PW 3 – Francis Ndugu Kamau stated that he knows the history of land starting when it was referred to as L. R No 536 to the 3 subdivisions. He was the former Assistant Chief of Karuri Sub-location. That before Njuguna Karanja Thaga died he had subdivided the land into 3 portions. He gave the L R No 1041 to the sons of Mwangi Karanja, L.R No. 1043 was registered in the name of his son the Defendant and 1042 remained in his name. That the Defendant succeeded his father and registered L.R No 1042 in his name in 2005. That L.R No 1042 belongs to the Plaintiff and not the Defendant.

11. The Plaintiff filed submissions which I have carefully considered and the issue before this Court is whether the Plaintiff is entitled to Plot No 1042.

Whether the Defendants father being the registered owner held the land in trust for the Plaintiff's husband?

12. It is on record that the suit property is registered under the now repealed RLA which states under Section 28 as follows;

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register: Provided

that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

The case of **Gachuba vs. Gathiba** state as follows'

“Correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interest under section 30 of the Registered Land Act. But since the same registration recognizes trust in general terms as is done in the proviso to section 28 and section 126 (1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has the piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to the proviso to section 28 of the Registered Land Act such registration does not “relieve a proprietor from any duty or obligation to which he is subject as a trustee”.

13. The new LRA Act under Section 24 (a)

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

Section 25 (1) & (2) of LRA state as follows;

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject— (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

Section 28 (b) states as follows;-

‘trusts including customary trusts’

It therefore follows that Section 25 and 28 provide for recognition of trusts in hand and more particularly customary trusts.

14. The evidence given by Simon Kamau Kagori which was corroborated by Francis Ndungu Kamau stated that the land Plot No. 536 was family land. That the Defendant’s father wanted a larger portion of the land which was awarded to him by the elders in 1983. That in 1984 another elders Court held that the land being family land and registered in the name of the Defendants father was being held in trust for himself and his two brothers. The elders ruled that the land be subdivided and transferred to Paul Njuguna Karanja (0.85 acres) and Mwangi Njuguna (0.85 acres) and the remainder 0.90 acres to be in the name of the Defendant’s father.

15. This Court finds that the Plaintiff has established the existence of a customary trust on the land. The Defendant therefore succeeded land that was held in trust and the customary trust continued and he also held the land in trust for the Plaintiff and her family. If there was no trust, the Defendants father would

not have transferred the land 0.85 to his brothers Mwangi Njuguna's sons. It would appear that the reason why the land was not transferred to the name of Paul Njuguna Karanja was Kshs 16000/= expenses for survey fees that was outstanding. Upon subdivision the land L.R No 1042 remained in the name of Njuguna Karanja Thaga. Mr. Francis Ndirangu Kamau Thaga called him to his home and in the presence of his son, the defendant, directed the defendant to demand Kshs 16000/= from the Plaintiff's husband so as to transfer the land (1042) to him. Kshs 16000/= was for the portion payable by the Plaintiff's husband in respect to his parcel of land.

16. It is the Plaintiff's case that she has lived on the land since 1952. She and her family has developed the land growing both subsistence and cash crops and built houses which reside in with her family. This evidence is corroborated by the two witnesses who testified on record. In **Mwangi vs Mwangi 1986 KLR 328** it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights; the possessory rights of the Plaintiff are binding on the property and are indeed overriding, having been in physical occupation and possession for over 64 years.

17. In the end this Court finds and holds that the Plaintiff has proved her claim and Judgement is entered in her favour in the following terms;

- (a) The Defendant is hereby ordered to transfer LR No. Ngendo/Karuri/1042 to the Plaintiff forthwith.
- (b) In default the Deputy Registrar is directed to sign all the appropriate and necessary documents of transfer of the land to the plaintiff.
- (c) Costs of the suit to be paid by the Defendant.

DATED, SIGNED & DELIVERED AT NAIROBI THIS 22ND SEPTEMBER 2017

J.G.KEMEI

JUDGE