



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.125 OF 2012

HUMPHREY PETER MURAGURI.....1ST PLAINTIFF

MARY MUKAMI MUIRURI.....2ND PLAINTIFF

GILBERT MWANGI MURAGURI.....3RD PLAINTIFF

GILBERT MWANGI MURAGURI.....4TH PLAINTIFF

STEPHEN KINYUIRO MURAGURI.....5TH PLAINTIFF

ROSE WANGARI MURIGU MURAGURI (Suing as the legal representatives
of the estate Of SIMON NGURI MURAGURI).....6TH PLAINTIFF

JOSEPH THIBITHE MURAGURI.....7TH PLAINTIFF

VERSUS

JOHN NGIGI MACHARIA.....DEFENDANT

JUDGMENT

(Suit by plaintiffs claiming that certain land registered in the name of the defendant is land held in trust; parties being brothers and sisters; plaintiffs claiming that the land was purchased by their mother and registered in the name of defendant as trustee; evidence showing that the land was purchased through an SFT loan that was taken and paid for by the defendant; defendant admitting that his mother made a contribution but in form of a gift; a gift given does not equate to a trust; no evidence to support any trust; suit dismissed)

PART A: INTRODUCTION AND PLEADINGS

1. This suit was commenced through a plaint filed on 31 July 2012. The six plaintiffs and the defendant are all siblings. The dispute in this case is over the ownership of the land parcel Nyandarua/Matindiri/27 (hereinafter “the suit land”) which is registered in the name of the defendant. The contention of the plaintiffs is that the defendant holds this land in trust for all of them. It is pleaded in the plaint that the land was acquired by their mother, one Wachinga Wangui Muraguri (deceased) in the year 1964, and that their mother registered the land in the name of the defendant, who was the first born. It is pleaded that in breach of the trust, the defendant has now claimed the whole of the land and has failed to subdivide and distribute it to the plaintiffs, and now deals with it as if it were his own property, to the exclusion of the plaintiffs. It is pleaded that the defendant now wants to distribute this land to his own children. In the suit, the plaintiffs have asked for a declaration that the defendant holds the suit land in trust for himself and the plaintiffs. They have also asked for an order for the subdivision and distribution of the suit land in the following manner :-

John Ngigi Macharia - 2.5 Ha.

Mary Mukami Muiruri - 2.0 Ha.

Humphrey Peter Muraguri - 2.0 Ha.

Gilbert Mwangi Muraguru - 2.0 Ha.

Stephen Kinyuiro Muraguri - 2.0 Ha.

Simon Ngugi Muraguri - 2.0 Ha.

Joseph Thibitie Muraguri- 2.0 Ha.

Graveyard and Memorial Site - 0.5 Ha.

2. The defendant entered appearance and filed a statement of defence whereby he refuted the claims of the plaintiffs. He denied having been born of the same mother and father as claimed by the plaintiffs, and pleaded that they are only born of the same mother, but different fathers. He denied that the suit land was acquired by their mother and denied any allegation of trust. He pleaded that the suit land was acquired by him solely and nowhere did their mother feature in the process of acquisition. He pleaded that his mother only loaned him a sum of Kshs. 1,000/= to top up, and which sum their mother demanded that it be returned, by the defendant educating his other siblings, including the plaintiffs, which he fulfilled. He asserted that the suit land has always been his private property. He asked that the suit be dismissed with costs.

PART B: EVIDENCE OF THE PARTIES

3. PW-1 was Humphrey Peter Muraguri, the first plaintiff. He testified that the defendant is their eldest brother. He stated that they were born of the same mother and father, both of whom are deceased. He testified that the suit land was acquired in the year 1964 from the Settlement Fund Trustees (SFT) and that their mother paid money to the SFT through the defendant. The money was of their mother, only that she gave the defendant to make payment. He stated that during that time, women were not allowed to have Identity Cards. Their mother was also married to a polygamous home of five wives and he explained that if the land was registered in her name, it would have ended up with her husband, but she wanted it for her own children. He stated that the defendant was born in 1940 and was 24 years at the time. The second born, Mary Mukami, was born in the year 1943, PW-1, the 3rd born was born in the year 1948; the 4th born, being the 3rd plaintiff, was born in the year 1949; the fifth born, the 4th plaintiff, was born in the year 1953; the 6th born, the 5th plaintiff, was born in the year 1957; and the 7th born, the 6th plaintiff was born in the year 1959.

4. He testified that their father was a forest squatter and had 5 wives. He would apportion some land to each wife and each wife would fend for her own family. He stated that in the year 1964, their mother was 43 years old and very active. She was a farmer and business lady. She would sell her farm produce in various markets and had saved Kshs. 5,000/= to purchase the suit land. At that time, the defendant had just finished his 'O' Level exams in the year 1963 and was a trainee in various institutions. The defendant had in the year 1962 taken in a wife, and had a child, and he testified that it is his mother who paid dowry for him. This relationship did not however last long and in the year 1963, the defendant married again. He testified that is their mother who accommodated them, and took care of the defendant's wife and child, as the defendant was still in school. He stated that in 1964, the defendant could not maintain himself or his family. He was then a trainee in Kenya Power and Lighting Company, and the Survey Department. He was eventually employed as a cashier trainee by the Municipal Council of Nakuru towards the end of the year 1964.

5. He testified that it is their mother who educated all of them, and in turn, they would assist her in farming. Since they needed much more, their mother would lease land in the forest reserve and grow more crops. He stated that after their mother had paid the deposit of Kshs. 5,000/= to the SFT for the suit land, no specific person lived on it, although there were workers. The land is about 42 acres and they would go there during the weekends to help the workers. He stated that the land had pyrethrum, livestock and other crops, and also cattle. He stated that the farm was making money, through the farm produce, and the money would be paid into a cooperative, which would remit some of it to the SFT to pay off the loan. He testified that the loan was cleared in the year 1977 and was offset by money from the farm. Their mother died in the year 1971, and although she never settled on the land, as she concentrated her efforts more in Dundori where she lived, it was said that she actively cultivated the suit land. Their father died in the year 1977, and PW-1 stated that during his lifetime, he assisted greatly in the farm. Their mother was buried in the suit land but their father was buried in land held by a son of the 2nd wife.

6. After their mother died, PW-1 and the defendant assisted in educating their other siblings. He testified that in the year 1968, the defendant resigned from his work at the Municipal Council of Nakuru. He then worked in Nairobi and transferred to Nakuru. He was then sacked in the year 1973. By that time, the defendant had acquired some land in Ol Rongai area and that is where he settled. He stated that the defendant also has other parcels of land elsewhere. In the year 1996 they shared correspondences with the defendant over the suit land through which the defendant asserted that he is the sole owner of it.

7. He testified that the defendant does not allow them to access the property and has written to the plaintiffs, that they must first seek his permission and he must be notified in advance, before they can visit the property. Nonetheless, in the year 2011, they congregated in the farm to lay a tombstone on the grave of their mother, despite the protestation of the defendant, who did not participate. He stated that they all deserve the land and they are ready to give the defendant a bigger share, since in Kikuyu tradition, the one who takes care of land is given a bigger share. He said this has a term, "mburi wa muramati." He stated that at the moment, none of them live on the suit land although it is the defendant who farms it and leases out some portions of it. He gave evidence that the defendant had not properly managed the farm leading to a protest by the SFT in the year 1975.

8. He denied the claim in the defendant's defence, that their mother only contributed Kshs. 1,000/= towards the raising the initial deposit of Kshs. 5,000/=. He stated that their mother paid the SFT the Kshs. 5,000/=. and set aside another Kshs. 1,000/=. which he and the defendant deposited in a bank. He stated that the defendant later withdrew this money and used it and he had to go through Secondary School on a bursary. He averred that in the year 1972, he himself was employed as a teacher earning a gross salary of Kshs. 1,170/= and a net of Kshs. 960/=. He could save about Kshs. 200/= and even with these kind of savings, it would have taken him more than 2 years to save Kshs. 5,000/=.

9. He testified that it is only the defendant who is now benefiting from the farm and even harvested trees that they (the plaintiffs) planted. He has also taken loans using the land.

10. In cross-examination, PW-1 testified inter alia that their father died without leaving them any land. The family used to live in Dundori and used to visit the disputed land. Dundori was a colonial concentrated village, and the colonialists used to allow the head of the family about 3/4 of an acre to share irrespective of how many wives he had, or how many children he had. In this instance, their father had 5 wives, and this 3/4 acre would be shared amongst the wives, each only getting a narrow strip to farm. The food was therefore mainly for subsistence but PW-1 asserted that they used to have a surplus, which would be sold in the market. He reiterated that their mother was very aggressive and hard working, and also leased other parcels of land, through which she would plant more crops and sell to the market. Their granary was always full and there was enough to consume and sell. He never asked her how much she earned, but she catered for all their needs. Their father did not contribute to their upkeep, his role being more in discipline. Their mother never had a bank account and would put her money in a tin in the granary.

11. He stated that the defendant went to a boarding school for his secondary education and completed his form 4 in the year 1963. In the year 1964 when he was a trainee, he only used to receive a stipend, for out of pocket expenses, but he could afford gifts for them. The land was purchased in December 1964 before the defendant had been formally employed. He was not too sure of how much was paid for the land and did not know the purpose for the initial deposit of Kshs. 5,000/= to the SFT.

12. He stated that he himself joined Form 1 in the year 1965, and that it is his mother, through the defendant who paid his fees. His other siblings were also in school. After their mother died in 1971, it is the defendant who took care of the other siblings who were still in school. He himself trained as a teacher and completed his training in the year 1971. He started working in the year 1972 after attaining his Diploma.

13. He stated that the defendant obtained title to the land in the year 1977. He affirmed that it is the defendant who paid the SFT loan between 1965 and 1971, but he insisted that this was made through the farm produce, and that the farm could sustain itself. Their mother would also chip in when the income would be insufficient. After their mother died in the year 1971, the defendant is the one who serviced the loan. He asserted that he himself and his other siblings also contributed towards offsetting the loan by working in the farm when their mother was still alive. He stated that there was a permanent employee, and some casual workers, all of whom were paid from the proceeds of the farm. The defendant had taken his wife to live on the suit land, and built a temporary house for her, but she left in the year 1967 owing to health issues. He was not aware of any default on the SFT loan.

14. He testified that although no document was written that this land was held in trust for them, it actually was, just as the rest of the houses of his father had registered land in the names of their first borns to hold land as trustees.

15. PW -2 was Mary Mukami Muiruri the 2nd plaintiff. She was 21 years old when the suit land was purchased in the year 1964. She testified that in this year, the defendant was a college student, and could not have been in a position to raise money to buy the land. He was being assisted and he had a family living in their mother's house. She stated that the money to purchase the land came from her mother. She claimed that the land was registered in the name of the defendant, as he is the one who held an ID card, was clever, and had gone to school. She herself was married in the year 1964 and was employed as a coffee picker. She would earn a shilling and 5 cents a day. Her husband was an untrained teacher who at that time earned Kshs. 130/= per month. They purchased their own parcel of land in the year 1971 at Kshs. 1,200/=, for a two acre share, which money they paid in installments. She used this analogy to assert that the defendant could not have been able to raise Kshs. 5,000/= in the year 1964. She would visit the farm occasionally where her mother had crops and livestock. She at times helped her mother in picking pyrethrum. From the year 1964, the next time she visited the land, was the year 1972. She does not visit the land often since she has her own home to take care of.

16. In cross-examination, she asserted that their mother was richly blessed and did not miss going to the market at least twice a week. She could not however tell how much money she earned. She insisted that the land was bought by their mother through her farming activities. She could not however be registered, as owner since women were not allowed to hold ID cards. She thought that the Kshs. 5,000/= initially paid was for full payment of the land and an additional loan advanced for development of the farm. The proceeds from the farm would then pay off the loan. She stated that the defendant would pay the money but when he lacked cash, their mother would pay. Apart from the defendant, the rest of them never lived on this land. She got married in the year 1962 and has only been on the farm about two or three times. She could not tell how many times their mother visited the disputed land but she said that it was frequent. She did not know how long it took to pay the SFT loan or when title was issued.

17. With the above evidence, the plaintiffs closed their case.

18. On his part, the defendant testified inter alia that although they share the same mother, his father is not the same father with the plaintiffs. He testified that his mother had earlier been married in Masailand, but got into a fight with her husband, which was taboo, and she got banished. She left for Elementaita area where she was betrothed to a suitor but she could not be married as she was expecting the defendant, with the defendant whom she conceived while in Masailand. It is then that their father took her in, and he was born shortly after, in the year 1941. Because of this, he was never a darling of his father as he was not biologically his son.

19. He stated that he was in a boarding primary school where the fee was about Kshs. 60/=, which was expensive by then, but his mother could manage to pay. He also went to a boarding secondary school. The fee was Kshs. 250/= but his mother could only raise Kshs. 100/= and he got a remission of the balance of Kshs. 150/=. In Form 2, his mother did not have money to send him to school as she had to pay fees for his other siblings. He therefore used the carpentry skills that he had been trained while in primary school, to make furniture during the school holidays, so as to raise money. Between Form 1 and Form 4, his mother therefore only contributed the initial Kshs. 100/=.

20. He stated that their family was poor as his father did not earn much and never contributed to their upkeep. His mother however worked hard and used to sell potatoes and maize. According to him, there was enough to eat, but not much to sell, and what she sold went towards educating the children. He stated that at times, she could borrow money from some elders in the village, and during holidays, she would do some casual jobs and pay off these debts.

21. He stated that after completing Form 4 in the year 1963, he was taken in by Kenya Power and Lighting Company as a trainee technician and was being paid over Kshs. 400/= per month. He was here for about 3 to 4 months, after which he joined the Survey of Kenya as a Junior Survey Assistant, where he again earned over Kshs. 400/= per month. He was here for 6 months, after which he joined the Municipal Council of Nakuru, as a Clerk in the Treasury Department, where he was earning over Kshs. 400/= per month. He stated that to purchase the land, he contributed Kshs. 4,000/= out of his own earnings. A deposit of Kshs. 5,000/= was however needed and he was short of Kshs. 1,000/=. He testified that his mother used to save some money in a big glass bottle which he thought was not safe and he advised her to open a bank account. She gave him the money, which he deposited in a joint account held by himself and PW-1. When he got into the deficit of Kshs. 1,000/= it is this money which he convinced his mother to give him. He stated that his mother allowed him this money on condition that he would educate his other siblings, since in their large family, priority had to be given to education.

22. He stated that he then paid the sum of Kshs. 5,000/= to the SFT. Out of this money, Kshs. 700/= was paid as 10% for the land, which was valued at Kshs. 7,000/=. Kshs. 200/= went towards stamp duty. The sum of Kshs. 4,050/= was working capital. The loan that he had to pay, over a period of 30 years, was of Kshs. 6,750/= and the land was charged for this amount. He was later advanced another loan of Kshs. 5,300/= for livestock, housing, fencing and tools. This sum had to be paid over a period of 10 years. His wife used to live on the farm from the year 1965 to the year 1968 when she left owing to illness. He then left a caretaker in the farm. When he took over the farm, they cultivated less than an acre of it where his wife used to grow potatoes. They did not have money to farm much, as the amount of Kshs. 4,050/=. which was to be working capital was never actually used as working capital because he paid fees for his siblings. In 1968 and 1969, he expanded the area under cultivation to about 8 acres. He stated that the farm could not sustain itself and he used to service the loan out of his salary. He produced a letter where he had instructed his employer to be deducting Kshs. 300/= from his salary to pay off the loan.

23. He stated that, save for a caretaker, there were no employees on the land, and no member of the family. The land in fact remained unattended, leading to a complaint by the SFT in the year 1975, where they threatened to repossess the land. He stated that owing to the threat, he went to SFT and paid all the money outstanding which he completed paying in the year 1977. He then got title.

24. He refuted the claim that his mother paid for the land and stated that the plaintiffs did nothing on this land. He denied that the land is held in trust. He stated that it is he who educated the plaintiffs, out of the covenant that he had with his mother, and that after her death, he was responsible for the family. He resigned from gainful employment in the year 1974, by which time his own nuclear family was also growing and in need, as he now had children going to secondary school. He stated that he has ensured that his siblings are educated, and they are now professionals, and they have had their chance to buy their own land. He stated that he allowed his mother to be buried on this land as she had no other land and would have otherwise been buried in the forest.

25. In cross-examination, he reiterated that he was earning a salary of over Kshs. 400/= per month when he was a trainee at Kenya Power and Lighting. He denied that he was only being given a subsistence allowance of Kshs. 80/=. He earned Kshs. 446/= per month at the survey department and Kshs. 475/= per month when he was first employed by the Municipal Council of Nakuru. He stated that he used to spend only about Kshs. 20/= and the rest went to his savings. It was possible to save this much because one would get free housing. He stated that he would save over Kshs. 300/= per month. His wife was also working and gave him some money to raise the sum of Kshs. 4,000/=. He also borrowed some money from his workmate.

26. He admitted that their mother was hard working, and had worked for a long time, although there were periods of crisis such as those during the Mau Mau war. He admitted having an affair in the year 1961 and that it is his mother who took care of his girlfriend after she delivered a baby since he was still in school. She also paid dowry on his behalf which was less than Kshs. 1,000/=. He admitted that his mother paid his fees in primary school but not in secondary school as all she paid was Kshs. 100/= when he joined Form 1. He stated that he would work in the school farm and do carpentry to raise fees.

27. He stated that the Kshs. 1,000/= that his mother gave him was kept in an account in the year 1962. His mother had no ID and could not hold the account which was held by himself and PW-1. He denied that this money was kept in the account for the school fees of PW-1 and denied squandering it.

28. He stated that the first crop of pyrethrum was planted 3 years after he bought the land and there were no proceeds out of pyrethrum. There were potatoes for consumption but not for sale. His siblings would cultivate the land as a token of appreciation because he was paying their fees. He agreed that they planted some trees on the land which he harvested in the year 2010 and earned some Kshs. 500,000/.

29. He stated that his mother only went to the land once during her lifetime when he took her to see the land that he had bought. He explained that his mother could not be buried in any family land because there was none. His own father was buried in land owned by a child of his 2nd house. He agreed that he has buried his wife and son in other land but not because the disputed land is family land. He agreed that he has other land which the plaintiffs have not laid claim to.

30. With the above evidence, the defendant closed his case.

PART C: SUBMISSIONS OF COUNSEL

31. I invited counsel to submit and they did file written submissions. In his submissions, Mr. Kanyi Ngure, learned counsel for the plaintiffs, reviewed the evidence and inter alia submitted that the defendant had no steady income in the year 1964 and his wife and son were being maintained by their mother. He pointed at a letter dated 26 February 2011, written by the defendant, and submitted that in that letter, the defendant admitted to his poor financial status at the time. He submitted that the defendant was impecunious and could not raise the deposit of Kshs. 5,000/= for the land. He submitted that it is his mother whose hard work raised this sum, and pointed out that she is indeed the one who paid dowry for the defendant, and in fact wished to buy another parcel of land for the sum of Kshs. 10,000/=. He submitted that the defendant never pleaded that he was under employment during this period or pleaded how he raised the deposit and that his defence was vague and evasive. He thought that he ought to have made elaborate pleadings about the nature of his employment and earnings in the year 1964. He submitted that a party is bound by his pleadings. He further submitted that the defendant could easily have exhibited his employment contracts or pay slips, or bank statements, to show that he earned the money he claimed in the year 1964, and relied on Section

112 of the Evidence Act, Cap 80, Laws of Kenya. He further pointed out that the defendant never called any witness to support his ability to raise the amount of Kshs. 5,000/=. He submitted that the defendant only exhibited one letter showing his salary deductions to offset the loan and no other documentation. He referred me to the evidence of the plaintiffs, that the farm was self sustaining, and submitted that this was even admitted in the statement of defence. He submitted that the defendant himself admitted that the plaintiffs assisted to farm the land. He also thought it instructive that the defendant never buried any of his immediate family on the land. He submitted that the true owner of the land was their mother. He submitted that the plaintiffs' evidence was cogent on the creation of a customary trust in respect of the suit property. He relied on Section 28 (b) of the Registered Land Act, Cap 300, Laws of Kenya, and the cases of *Mukangu v Mbui (2004) 2 KLR* and *Njenga Chogera vs Maria Wanjira Kimani & 2 Others, CoA at Nairobi, Civil Appeal No. 322 of 2003 (unreported)* which are cases where the eldest son was held to hold property in trust for the other siblings. He averred that the proposed subdivision by the plaintiffs is fair.

32. On his part, Mr. Chege for the defendant, inter alia submitted that the burden of proof was upon the plaintiffs, and referred me to Section 107 of the Evidence Act. He submitted that there was no evidence that the late mother of the litigants was capable of raising the sum of Kshs. 5,000/= as she single handedly raised the family. He pointed out that no eye witness was called to attest to this. He submitted that the defendant has tendered evidence that he was employed and could raise the money. He submitted that there is no evidence of any meeting held by the family where any alleged trust was discussed. He referred me to the evidence of payment for the loan made by the defendant, and the threats by SFT to repossess the land, yet none of the plaintiffs ever stepped in to salvage the situation. He submitted that when the defendant harvested trees no claim was raised for share of the proceeds. He also pointed out that no claim was ever raised, more than two decades after the demise of their mother. He did not agree that the plaintiffs have any right over customary law or the Law of Succession to inherit the land. He referred me to the register of the suit land which does not contain any claim of trust. He did not think that the plaintiffs have proved any trust. He referred me to the test of trust laid down in *Joseph Githinji Gathiba vs Charles Kingori Gathiba (2001) eKLR*. He submitted that trust must be proved by way of evidence.

PART D: ANALYSIS AND DECISION

33. I have considered the matter. The main prayer of the plaintiffs is that they wish to have a declaration that the suit land is held in trust for them and for an order to have the land subdivided in various portions to be separately held by each of them.

34. I have no problem with the general concept of a trust, and indeed it has been held in several decisions in this jurisdiction, that one sibling can hold property in trust for his other siblings. An example is the oft cited case of *Kanyi vs Muthiora (1984) KLR 712* where the Court of Appeal held that registered land is subject to the equitable doctrines of implied, constructive and resulting trusts.

35. The current law under Section 28 of the Land Registration Act, which came into force on 2 May 2012, before this case was filed, provides as follows at Section 25 on the rights of the proprietor:-

Rights of a proprietor.

25. (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.

36. It will be seen from the above, that although a proprietor has the absolute right to hold land, such holding is subject to interests that do not require noting in the register, and such holding does not absolve the proprietor from any duty or obligations under a trust.

37. The interests which do not need noting in the register, or overriding interests, are described in Section 28 of the statute, and these interests include at Section 28 (b), trusts including any customary trust. It cannot therefore be argued that because such interests are not noted in the register of a parcel of land, a person cannot found a claim on the basis of an unregistered trust. A trust can constitute an overriding interest and need not be noted in the register. Thus in as much as the register herein does not have any entry that the suit land is held in trust, that does not mean that the plaintiffs are precluded from claiming that it is held in trust on their behalf. The suit by the plaintiff is therefore properly presented before this court.

38. For the plaintiffs to succeed, I must be convinced that the plaintiffs have proved that the suit property is held in trust for them. The basis upon which the plaintiffs allege that the suit land is held in trust is the claim that the suit property was purchased by their late mother from the SFT between the months of July and December of 1964. It is further claimed that the defendant was registered as proprietor because he held an ID card and was the first born in the family. The plaintiffs thus claim a customary trust or other trust that may arise out of such relationship.

39. I am not however persuaded that the plaintiffs can sustain a customary trust. First, the land in dispute is not land that was ever held under customary tenure. The ancestors of the litigants in this matter were never in possession and occupation of this land and never claimed it as their own. The land was indeed purchased from the SFT which is the entity that was used by the Government to buy off white colonial settlers and have land redistributed to the local population. The land was thus purchased from the Government and is not land that can be considered to have been handed down to the litigants herein. Neither was I informed of any customary law under which this land can be said to be held. This case is therefore distinguishable from the case of *Mukangu vs Mbui* cited by counsel for the plaintiff, which was a case that

pitted a father and his son, over land that was claimed to be ancestral land. The claim can however be founded on other forms of trust, and indeed one can sustain a claim for trust if he/she can prove that certain land is held by the proprietor on behalf of another.

40. The basis of the plaintiffs' suit is the claim that the suit land was purchased from money that came from the purse of their mother and that the defendant's registration was merely out of convenience. It is trite law that he who alleges must prove. The burden of proving that the land was purchased by money from the mother of the litigants is therefore of the plaintiffs. Have the plaintiffs discharged this burden? I do not think so.

41. I have absolutely no documentary evidence that the money that was paid for the purchase of the land came entirely from their deceased mother. Neither do I have any document indicating that the defendant was appointed by their deceased mother to hold the land on her behalf or on behalf of her children. The only evidence that I have is the oral evidence of the plaintiffs. But even then, none of the plaintiffs ever witnessed the defendant being given any money by their mother. Indeed, they could not be present, as PW-1 was in school at the time, and PW-2 was already married and was living elsewhere. The entire case of the plaintiffs is therefore based on an assumption, that because their mother was hardworking and keen in business, then she must have been the one who raised the sum of Kshs. 5,000/= required as a deposit to purchase the land. I am afraid that for the circumstances of this case, that is not enough. First, there is a good probability that the defendant could have raised the money because he was actually in gainful employment. The probability that the deposit was significantly raised using the resources of the defendant cannot therefore be ruled out. Maybe the case could have been a bit different if the property had been purchased in the year 1963, or earlier, when the defendant was still in school. But the property was purchased in December of 1964, after the defendant had been in employment for about one year, and one cannot state that he was impecunious at the time and incapable of raising funds on his own, whether entirely through his own resources, or by borrowing some money from his friends with the assistance of his wife. One cannot therefore entirely rule out the claim of the defendant that he raised Kshs. 4,000/= from his own resources and that his mother gifted him the short fall of Kshs. 1,000/=. I cannot hold, on the mere assumption, that because their mother was industrious, then she must have been the one who entirely contributed towards the purchase of the suit property.

42. Now, even assuming that it is their mother who raised the entire sum of Kshs. 5,000/= for the deposit, I have no other evidence that their mother continued to make any additional payments for the land. Out of this sum of Kshs. 5,000/= that was paid, only Kshs. 950/= went towards the purchase of the land and the sum of Kshs. 4,050/= was allocated to development. I have evidence that an additional sum of Kshs. 5,300/= was taken as a loan by the defendant in order to receive various inputs for the farm. These sums were not borrowed by their mother but by the defendant. The evidence that I have is that the payment of the loan amount came from the defendant, and not from their mother, nor from the farm.

43. In their oral evidence, the plaintiffs claimed that the farm was self sustaining and that it paid its own loan. I have no evidence to back up these allegations. But even if the farm paid its own loan, the loan was taken by the defendant, and it would essentially be the industry of the defendant paying the loan. The plaintiffs themselves admitted that they only went to the farm intermittently during school holidays, meaning that they were never too involved in the management of the farm, and could not be privy to its intricacies. Despite their evidence, that the farm was highly productive, I doubt if this was the case. I am more inclined to believe the evidence of the defendant on this point, as I have seen from the documents produced by the defendant, which were not controverted by the plaintiffs, that as at 1973, the SFT were still owed Kshs. 10,159/=. If indeed the farm was so lucrative, and the produce used to offset the loan, then the SFT would not have been asking for this money, for it would have been paid off a long time ago.

44. It was also alleged that their mother, on various occasions, used to make payment for the SFT loan, and continued to do so until her death, but I have seen nothing of that sort from the statement of account produced by the defendant, which again, was not controverted by the plaintiffs. In fact, there is a letter written by the SFT, dated 5 August 1975, complaining that the farm was not being managed and that the defendant had failed to cultivate at least an acre of arable land, erect a good dwelling house, or manage the livestock on the land. This to me, does not paint a picture of a thriving and productive farm as the plaintiffs claim. On the contrary, I have documentary evidence that the SFT loan was being paid off from the defendant's salary through a check-off system. This evidence is also not controverted by the plaintiffs. I have no reason to doubt the defendant's evidence that he single handedly struggled to pay off the SFT loan and there was no input whatsoever from his mother or the plaintiffs.

45. Apart from the fact that I have no evidence of any payment by their mother, the evidence that I have shows very little or absolutely no attachment whatsoever, by the mother of the litigants, towards this land. First, she never farmed on this land. Secondly, she never lived on this land. She was living in Dundori, in land that must have been very small, given that it was in the old colonial villages. If she indeed is the one who purchased the suit land, I ask myself why she would chose to continue living in a small piece of land in Dundori, while she had a whole 15 Ha of her own land. Why would she want to continue leasing small pieces of land yet here is land that is held together and ready for farming? To me, that is not the ordinary behavior of an industrious farmer who has just purchased sizable land after laboring so much working on small pieces of land. Here was land where she could finally settle and live a fairly comfortable life. Why would she buy such significant land using so much money then leave it to go to waste when she was an articulate farmer? To me, her lack of interest in this land, buttresses my opinion that she did not purchase this land, and never intended to own it. If she had purchased it, I believe she would have moved into it, built a house, settled in with her large family, and rested in relative comfort. Even if she did not live in it, she would have aggressively farmed it, just as she did on the other small pieces of land, and one would have seen significant payments being made into the loan account, which I have not seen. One would indeed have expected her to dedicate a lot of time on this farm rather than on the small bits that she leased.

46. The bulk of the case of the plaintiffs was based on the assumption that their mother was very well off, and had huge amounts of money. I do not think the evidence bears this out. True, there is consensus that she was a very hard working woman, who cared deeply for the welfare of her family. There is no question that she had enough to buy food, take her children to school, and some bit left to spare to settle some bills here and there. But I do not think that she had a lot of money to spare. If she truly had a lot of money as claimed by the plaintiffs, she would probably have bought other land, and probably built a house at some point. But I have no evidence that she ever purchased other land, or ever built a house of her own. This is not very usual behavior for a person who would have lots of money in her hands. I was not told that she ever held any significant amounts of money when she died, or that the parties ever inherited anything that she may have left. To me, she had enough, but not too much as to invest in a venture such as this one. She struggled like any other hard working person would struggle, and made some money, but she was not "rich" so to speak.

47. My own appreciation of the evidence, is that it is the defendant who purchased the suit property using his own resources and a little help from his mother. That little help, was not meant to place any trust upon the defendant. A parent can gift his/her child some money, or other property, for the child to advance himself/herself. Such gift should not be construed to be an obligation that whatever the child will produce out of that gift is going to be held in trust for his/her siblings. For there to be a trust, it must be clear, that the person is granted the property to hold on behalf of others, but not on his own behalf. I am afraid that from the evidence tendered, I am not persuaded that this suit is a case of trust. I am not convinced that the plaintiffs have proved this case on a balance of probabilities. To hold that there is a trust, I would have needed much more than the mere allegation that the defendant holds the property in trust. The relationship of brother and sister, or the fact that the defendant was the first born, by itself without anything more, cannot be said to automatically raise the presumption of a trust.

48. For the above reasons, I have little option but to dismiss this suit. The defendant shall have the costs of the case.

49. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 23RD day of November 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-

Mr. Kanyi Ngure for the plaintiffs

No appearance on the part of M/s Munene Cheche & Company Advocates for the defendant

Court Assistant: Carlton Toroitich