



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 67 of 2017

MARY WAMBUI MBUTU

PLAINTIFF

VS

JANE WANJA GITAU

DEFENDANT

JUDGMENT

1. By a plaint dated 15.5.13 the Plaintiff moved this Court for judgment against the Defendant and for the following Orders;

- a) A declaration that the Defendant's husband held LOC.11/MARAGI/405, GIKINDU/MIRIRA/952, and GIKINDU/KAMBIRWA/440 in trust for his two brothers and three sisters who are deceased but only one sister is left VERONICAH WANJIRU in the family of the late Mwangi Mutwiri.
- b) An Order dissolving the trust and the Defendant be compelled to transfer a third of LOC.11/MARAGI/405, GIKINDU/MIRIRA/952, GIKINDU/KAMBIRWA/440 to the Plaintiff
- c) Costs of the suit.

2. The matter came up for inter-parties hearing on 12.7.17 when the Plaintiff testified that she was the only child of her deceased parents Mr. and Mrs. Mbutu Mutwiri. That the suit land initially belonged to her grandfather who left it to her late uncle Ephraim Gitau Mutwiri (also known as Gitau Mutwiri) to hold in trust for himself and his siblings, her father included. The land was registered in the name of the Plaintiff's uncle Ephraim Gitau Mutwiri who died before subdividing the land to his other brothers. That the Plaintiff's father died after Ephraim Gitau Mutwiri leaving the Plaintiff on the suit land. That Ephraim Gitau Mutwiri was survived by his wife the Defendant herein. That after the death of the Plaintiff's father the Defendant chased away the Plaintiff from the suit land and demolished her father's house. The Plaintiff reported the matter to the chief who Ordered that she be given the portion that belonged to her late father. On cross examination when asked if she left voluntarily she said that she was chased away by the Defendant. She also stated that she had no evidence to support the arbitration if any by the Chief.

3. The Defendant testified that her husband owned the suit land as an absolute owner and not in trust for anyone, let alone the Plaintiff's father. The Plaintiff's father had left his home earlier before the demarcation and only returned after the exercise was over. That when he came back the Plaintiff and her father were accommodated by the Defendant's husband out of brotherly love. That she gave the Plaintiff some land in succession cause No 930 of 2009 -Nyeri because she had raised her up and not because of the alleged trust. That her father in law was polygamous and all the other step-brothers to the husband held their lands as absolute owners and not in trust for anyone just like her husband did.

4. In her submissions filed on 26.7.17 the Plaintiff submits that she is the legal representative of her late father who was a brother to the Defendant's husband. That her grandfather had two wives namely Karagi and Waruguru. That Karagi had two sons Fabian Gitau and Wachira whilst Waruguru had Ephraim Gitau (Defendants husband), Wanjiku, Mbutu Mutwiri, Veronica Wanjiku and Kinuthia. That at the time of adjudication of the land the Plaintiff's parents were away from the family home but her father later came back from his sojourn in Uganda. That upon his return he lived on one of the suit land - Loc 11 /Maragi/405 until his death. That the Plaintiff's grandmother later came back and she also lived on the suit land as well. Those positions are not disputed by the Defendant. That the absence of the Plaintiff's parents during the adjudication of the land did not mean they lost their entitlement to inherit the grandfather's land. The Defendant's husband being the eldest son in the 2nd house and the only one present at home had the suit land registered in his name in trust for the other family members. The Plaintiff has invited the Court to seek guidance from various case law in support of her claim, that is to say, **Njuguna Vs Njuguna (2008) 1 KLR 889, Henry Mukora Mwangi Vs Charles Gichina Mwangi 92013) Eklr and Genesis Muriithi & 2 others Vs Genesis Ciarwigi Muchiri (2017) eKLR.**

5. The Defendant on her part submitted that the burden of proof of the alleged trust lay on the Plaintiff and had failed to discharge the same. The Plaintiff never met her grandfather as she was born away from home. That the Aunt of the Plaintiff who was present in Court was not called as a witness. The evidence from the elder's arbitration was not adduced. That the Defendant's husband was allocated the suit land during land adjudication in absolute ownership and not in trust for anyone. That the Plaintiff was accommodated by her husband as tenants at will (muhoi) with no right over the suit land. That the Plaintiff did not prove she was chased away. That the Defendant was generous to include the Plaintiff as a beneficiary on the succession of her husband's estate.

Analysis and determination

6. The issue for determination is whether the suit lands were held under customary trust and if in the affirmative, whether the Plaintiff is entitled to a third of the suit lands?

7. The following facts are settled in this case; It is a fact that the Plaintiff has sued as the legal representative of the estate of the late Mbutu Mutwiri and the Defendant is sued the administratrix of the estate of the late Ephraim Gitau Mutwiri. It is not in dispute that the Plaintiff is the daughter of the late Mbutu Mutwiri, a younger brother of the Defendant's husband, the late Ephraim Gitau Mutwiri. That the suit lands were registered in the name of the Defendants husband Gitau Mutwiri in 1971. It is also commonly admitted by both parties that their grandfather Mutwiri Mwangi had two wives, the eldest Karagi bore Fabian Gitau and Wachira whilst the second wife, Waruguru bore Ephraim Gitau, Wanjiku, Mbutu Mutwiri (Plaintiff's father), Veronica Mutwiri and Kinuthia.

8. It is also on record that during the demarcation of land the Plaintiff's father was absent. It is the evidence of the Plaintiff that the land was left to Ephraim Gitau by her grandfather to hold it in trust for himself and his two brothers, one of whom was the Plaintiffs father. That the suit lands were registered in the name of Ephraim Gitau because he was present and secondly because he was the first-born son of the house of Waruguru. That the lands given to the sons of Karagi have no dispute. According to the Plaintiff the said Ephraim Gitau died before he subdivided the suit land for distribution to his brothers. It was the Plaintiffs evidence that the dispute relating the land had arisen while both her grandmother Mary Wangoi and Ephraim were alive. That she reported the matter to the Chief, the elders and even the District Officer Muranga to no avail.

9. The Defendant on the other hand states that the land was registered in the name of her husband to hold absolutely. It is her evidence that it is Fabian Gitau the 1st son of Karagi, the first house played the role in allocating the suit land to his siblings including her husband and that is how her husband got the land. It is on record that the sons of the 1st house, Fabian Gitau and Wachira got their lands. The question that begs an answer is where did Fabian Gitau get the land to allocate the Defendant's husband? Who took the land that should have been for the Plaintiff's father? Was this the land for the second house, the house of Waruguru, their mother and therefore family land? Was this land intended for absolute ownership by the Defendant's husband?

10. It is also not disputed that the Plaintiff returned from Uganda with her father and went to the homestead of Ephraim Gitau at Kiharu L.R No. Loc 11/Maragi/405 and were given a house which they occupied until the demise of the Plaintiff's father. It is not in dispute that the house was built by the Defendant's husband. Evidence was also led that the Plaintiff's grandmother also lived at some point at the suit land when she fell sick and returned from Kagio in Kirinyaga where she had hitherto settled. It is also not in dispute that the Plaintiff continued to live with the Defendant until 2007 when she left allegedly because she was chased away, an allegation that has been denied by the Defendant who stated that the Plaintiff left voluntarily. It is the Defendants submission that the Plaintiffs father was accommodated out of brotherly love and was for all intents and purposes a Muhoi (a tenant at will i.e a person occupying land with the permission of the owner but obtaining no right or interest in the land). That he did not assert any right on the land during his lifetime.

11. It is the Defendant's case that the Plaintiff should be contented with the 2 acres of land that she is inheriting pursuant to the succession cause No. 930 of 2009 where she is listed in the affidavit in support of summons for confirmation of grant as one of the beneficiaries. On cross examination the Defendant stated that she included her as a beneficiary because she raised her and not on account of her father's share of the suit land. This is inconsistent with her averment that the suit land belonged to her husband absolutely.

12. It is the Plaintiff's case that the family land (his grandfathers) was distributed according to the houses as per the Kikuyu customary law and in that way, Fabian Gitau and Wachira took the land that belonged to Karagi while the one for the second house of Waruguru went to Ephraim Gitau as the first born son of Waruguru and also that he was present during the land consolidation. That at this time her father was absent and therefore it only follows that Ephraim held the suit land on his behalf and that of his siblings.

13. Nothing has been said about Kinuthia, one of the sons of Waruguru except that he is deceased. No evidence has been adduced to suggest that the other children of Waruguru have demanded their share of the suit land. It is the Plaintiffs case that she is entitled to her late father's share of the suit land that was held by Ephraim Gitau as a trustee for his late father. That the customary trust survived the death of Ephraim and even though on record the Defendants husband is the registered proprietor of the land the same did not extinguish the customary trust in favour of her father. The Defendant on the other hand has vehemently stated that the suit lands belonged to her husband absolutely and are not subject to any trust and further averred that if any trust existed, it is for the Plaintiff to prove the same.

14. In the Case of **Felista Muthoni Nyaga V. Peter Kayo Mugo, [2016] eKLR** the Court observed:

"It is now well settled that the registration of a party as owner of land does not relieve him of his duty or obligation to which he is subject as trustee. That is clear from Section 28 of the now repealed Registered Land Act under which the suit land is registered which is similar with the provisions in Section 25 of the new Land Registration Act 2012....."

15. While it is the law that the registration of a party as the proprietor of land does not defeat a claim of trust nor relieve such proprietor of his obligation as a trustee, there must be evidence upon which a Court can conclude that infact the registered proprietor of the land subject of the suit before it is infact holding the same as a trustee for the benefit of others. In **Wambugu V. Kimani (1992) 2 KLR 58 and also Muiruri V. Kimemia (2002) 2 KLR 677**, the Court of Appeal held that a trust must be proved by evidence and in **Mbothu & others V. Waitimu & 11 others, 1980 KLR 171**, the Court of Appeal stated as follows:

"The law never implies, the Court never presumes a trust but in case of absolute necessity. The Courts will not imply a trust save in Order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.

Since the Plaintiff's claim was based on trust, the law places the onus on her to prove the existence of such trust..... It is however clear from the evidence herein that the Plaintiff has neither pleaded nor proved any of the particulars as to how the trust subject matter of this claim arose with

respect to the suit land. There is really no evidence upon which this Court can make a finding that the Defendant holds the suit land in trust for him.”

16. In **Patrick Mathenge Gachii & 3 others V. Karumi Wambugu & Another [2010] eKLR** Makhandia, J. observed:

“The burden of proving trust rests on the protesters. In my view they have failed miserably to prove such trust. Their entire evidence was hearsay which a Court of law cannot act upon. The mere fact that the protesters are in occupation of the suit premises is no proof of trust. In any event it is apparent that the 2nd protester only came to the suit premises in 1986. It is also instructive that the deceased got registered as the proprietor of the suit premises in 1978 when the 1st protester's father and 2nd protester were all adults. One wonders then, why the two could not at the time claim their portion of the suit premises if indeed they were clear in their minds that their deceased brother held the suit premises in trust for himself and themselves. The trust having not been proved, there is no basis for the protests. Accordingly, they are dismissed.”

17. Section 26 of the Registration of Land Act No. 3 of 2012 evidence of registration of a proprietor of land is prima facie evidence that the person named as the proprietor of the land is absolute and defeasible owner subject to the encumbrances, easements restrictions and conditions contained or endorsed in the certificate of title. However, Section 28(b) of the Registration of Lands Act No. 3 of 2012 recognizes customary trust as one of the overriding interests in land. An overriding interest need not be registered on the face of the title. Absence of registration does not however invalidate such a customary trust. In the case of **KANYI VS MUTHIORA 1984 K.L.R 712 (C.A)**, the Court held that registration of land in the name of one proprietor under the Registered Land Act does not extinguish rights under Kikuyu Customary Law and neither does it relieve the proprietor of his duties or obligations as a trustee.

18. That be the case, the Plaintiff however has not presented any evidence to impugn the title of the Defendant's husband. It is on record that the Plaintiff was not present when the land was demarcated. It is also admitted that she did not meet with her grandfather. She was a child on her return with her father and by then the land had been demarcated and registered in the name of the Defendant's husband. The greater part of her evidence is therefore hearsay that has not been corroborated. She did not call any other witnesses to testify in support of her testimony. The question that begs for an answer is why her father did not assert title for the land under trust. There is no documentary or oral evidence tendered by the Plaintiff to support any claim by the father. Indeed, the father was showed a place and a house to settle in on the land and if indeed he was entitled to the land under trust nothing would have prevented him from staging a claim for it during the lifetime of both his brother and mother. It is also on record that he was housed in a house that was given by the brother Ephraim and therefore he did not built a house for himself, that may lend credence to the evidence that he was being accommodated at will. The Plaintiff stated that the matter had been arbitrated by the elders, chief and even the local District Officer, however she did not adduce any evidence to support this averment.

19. What should the Court do in the instance? In the case of **Vijay Morjaria...Vs...Nansing Madhusingh Darabar Hulashib Nansingh Darbar, Civil App. No.106 of 2000 LLK 7349(CAK)**, where the Court held that:-

“A party is bound by his or her pleadings and must either succeed or fail within those pleadings.”

Equally he who alleges must prove. The Plaintiff bears the burden of proof in persuading the Court to determine the case in her favour. She did not succeed in that regard. However I note that not all is lost for the Plaintiff in that she has been catered for under succession of the estate of the late Defendant's husband by being allotted 2 acres out of the estate.

20. Taking the totality of the evidence, I find and hold that the Plaintiff has not proved her claim and the case is dismissed.

21. Parties being related, each to bear their own costs of the suit.

DELIVERED, DATED AND SIGNED AT MURANG'A, THIS 18TH DECEMBER, 2017.

J. G. KEMEI

JUDGE