



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 147 OF 2016

EUNICE WAKUTHII MUCHINA.....1ST PLAINTIFF

JANE WANJIRU KINYUA.....2ND PLAINTIFF

VERSUS

FLORAH WAMBUI MUCHINA.....DEFENDANT

JUDGMENT

This is yet another of those common family disputes over land.

The plaintiffs are the daughters of the defendant who is the registered proprietor of land parcel No. MUTIRA/KATHARE/579 (the suit land) which is one of the five (5) sub-divisions of the original land parcel No. MUTIRA/KATHARE/80 that belonged to the plaintiffs' late father **MUCHINA MBUKO**. It is the plaintiffs' case that their late father transferred the suit land to the defendant to hold in trust for them but she has refused to determine the trust thus giving rise to this suit in which the plaintiffs seek the following orders:

- 1. A declaration that the defendant holds 1 acre out of land parcel No. MUTIRA/KATHARE/579 in trust for the plaintiffs.***
- 2. Costs of the suit.***

The record shows that the defendant was served on 25th October 2016 with the plaint and summons to enter appearance but did not enter any appearance nor file a defence. The suit therefore came up for hearing on 21st November 2017 when the 1st plaintiff **EUNICE WAKUTHII MUCHINA** testified on behalf of her sister **JANE WANJIRU KINYUA** the 2nd plaintiff as well.

From the testimony of the 1st plaintiff, their late father sub-divided his land parcel No. MUTIRA/KATHARE/80 on 18th November 1998 and distributed it among his four sons and the defendant as follows:

1. MUTIRA/KATHARE/579 - Defendant
2. MUTIRA/KATHARE/580 - JULIUS MUCHINA
3. MUTIRA/KATHARE/581 - PETER MUCHINA

4. MUTIRA/KATHARE/582 - MICHAEL MUCHINA

5. MUTIRA/KATHARE/583 - JOHN MUTHII MUCHINA

It is the plaintiffs' evidence that their late father had instructed that the suit land be held by the defendant in trust for them. However, the defendant has now decided to sub-divide the suit land and add the sons extra portions and meetings to persuade her to determine the trust have not bore any fruits.

As the defendant did not enter appearance nor file a defence, the plaintiffs' evidence is un-controverted. It is clear from the certificates of search that the plaintiffs' four brothers were each given a share of the original land parcel No. MUTIRA/KATHARE/80 by their late father while the suit land was registered in the names of the defendant. There is nothing on the Green Card to indicate that the suit land was to be held by the defendant in trust for the plaintiffs but it has now been settled in a long line of cases that the registration of land in the name of one party does not extinguish the rights of other parties who may be entitled to it under a trust. See for example MUKANGU VS MBUI 2004 2 K.L.R 256, KANYI VS MUTHIORA 1984 K.L.R 712 and MUMO VS MAKAU 2004 1 K.L.R 13. Section 28 of the repealed Registered Land Act under which the suit land is registered makes it clear that the registered proprietor of land is not relieved of any duty or obligation to which he is subject as a trustee by the mere fact of such registration. A similar provision is found in Section 25 of the new Land Registration Act 2012. The law will of course not presume a trust save in cases of absolute necessity where the intention of the parties to create a trust is clearly shown – MBOTHU & OTHERS VS WAITIMU & OTHERS 1986 K.L.R 171. In this case however, I need not draw any presumptions on the existence of a trust because there is the direct and un-controverted evidence of the 1st plaintiff to that effect. In her oral evidence, the 1st plaintiff stated as follows:

“Land parcel No. MUTIRA/KATHARE/579 was registered in the names of the defendant as a trustee on our behalf. It measures 2 ½ acres and it was registered in the names of our mother to hold for herself and on our behalf. This was as per the instructions of our father who had communicated this decision to us prior to his death”.

And in her written statement which she also asked the Court to adopt as her evidence, the said witness has stated as follows:

“That the sons were given 0.405 Hectares each while we as the daughters were jointly given 1.0 Hectares which was registered in our mother's name to hold in trust for us”

Only the defendant could have rebutted that evidence. She chose not to do so having been duly served with the plaint and summons in this case. It is not clear why the defendant wants to give her sons extra portions of land at the expense of the plaintiffs. Perhaps that is due to the long but out-dated belief that women are not entitled to land from their parents. Had the defendant taken part in this trial, the Court would have enlightened her that, under Article 27 of the 2010 Constitution, women and men are entitled to equal treatment irrespective of their status. No doubt her daughters will take home that message as they too probably have children of their own. The totality of the evidence before me, however, is that the only conclusion that this Court can arrive at is that the plaintiffs have proved on a balance of probability, that the defendant holds the suit land in trust for them and are entitled to the orders sought in the plaint.

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

1. A declaration that the defendant holds 1 (one) acre out of land parcel No. MUTIRA/KATHARE/579 in trust for the plaintiffs.

2. No order as to costs.

B.N. OLAO

JUDGE

8TH DECEMBER, 2017

Judgment dated, delivered and signed in open Court at Kerugoya this 8th day of December 2017

Plaintiffs - present

Defendant – absent

Right of appeal explained.

B.N. OLAO

JUDGE

8TH DECEMBER, 2017