



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 77 OF 2017

HELLEN WAMBUI KABUGA

-

PLAINTIFF

VS

JENELICAH WANGARI MUGO

-

DEFENDANT

JUDGMENT

1. Hellen Wambui Kabuga is the sister-in-law of the Defendant, Jenelica Wangari Mugo, the wife of David Macharia Kabuga who is deceased.

2. The Plaintiff filed suit against the Defendant on 23/11/16 claiming a declaration that the Defendant's husband David Macharia Kabuga deceased held L.R No. Loc.12/Sub-Loc.4/2103 in trust for her.

4. In her evidence in chief the Plaintiff averred that the suit land was registered in the name of the Defendant's husband to hold in trust for her. That on the death of her brother, the Defendant succeeded him vide Succession Cause No. 515/2013. That the original land belonged to their family Patriarch Chege Kabuga, who died in 1951. That Chege Kabuga sired the 8 children to wit; Mwihaki (deceased) Chege Kabuga (deceased), Wanjiru(deceased) Plaintiff, Irungu Kabuga, Ishafari, David Macharia Kabuga (deceased) and Mbuthia(deceased). That the family Land No. L.R No. Loc.12/Sub-Loc.4/1227 was registered in the name of Irungu Kabuga and upon his death the same was inherited by his wife Margaret Wangui Irungu and David Macharia Kabuga. That the latter held Loc.12/Sub-Loc.4/2103 in trust for the Plaintiff.

4. In her evidence she stated that she did not know the Defendant and that she only emerged to bury her husband and claimed to be her wife.

5. She averred that her father Chege Kabuga had 2 parcels of land: which parcels were subdivided and given to his surviving children. That she was given her portion of the family land L.R No. Loc.12/Sub-Loc.4/2106 where she currently lives with her 3 children. L.R No. Loc.12/Sub-Loc.4/1227 was given to Margaret Wangui Irungu and David Macharia to share equally. That before David Macharia died he allowed her to till his portion of the land L.R No. Loc.12/Sub-Loc.4/2103 since he lived in Nairobi and was not cultivating it. Asked why she did not demand the suit land from her brother who died on 11/1/2011, she replied that the deceased intended to transfer it to her before his death. No evidence was however adduced to support this averment.

She further revealed that her deceased brother had one son named Kabuga by another woman whom she did not know and that she was prepared to give him another piece of land (Macharia's) should he show up to demand the same. She stated that she did not know that her deceased brother had a wife and children (referring to the Defendant and her Children). It was her testimony that she was seeing the Defendant for the first time in Court. She stated that she did not file any Succession cause against the estate of her

deceased brother (the defendant's husband). She admitted that the Defendant's husband was buried on the suit land.

6. The Defendant gave evidence in Chief and admitted that the suit land was registered in the name of her deceased husband and denied that he (deceased) held it in trust for the Plaintiff. She denied the allegation that the Plaintiff had been developing the suit land even when the Defendant's husband was alive and averred that the Plaintiff was tilling the land on the express permission of her husband who was not utilizing the land at the time. That she was a bare licensee.

7. Further the Defendant stated that pursuant to Succession Cause No. 8/99 the estate of Chege Kabuga was distributed vide a confirmed grant issued on 2/3/2000 as follows;-

a) L.R No. Loc.12/Sub-Loc.4/949 was shared between Njeri Chege Kabuga (1.675 acres) and Helen Wambui Kabuga/the Plaintiff (1.675 acres) respectively.

b) L.R No. Loc.12/Sub-Loc.4/1227 was shared between Margaret Wangui Irungu (1.675 acres) and David Macharia Kabuga (1.675 acres) respectively.

8. In denying the presence or inference of trust in L.R No. Loc.12/Sub-Loc.4/2103, the Defendant stated that the Plaintiff has her own land L.R No. Loc.12/Sub-Loc.4/2106 where she currently resides which land was a subdivision of the family land. The Defendant's husband was also given a similar acreage in L.R No. Loc.12/Sub-Loc.4/2103. Her own parcel of land has no customary trust and so is the Defendant's husband. Both owned the parcels absolutely holding no interest of customary trust in favour of anybody. That the fact of the Plaintiff's tilling her husband's parcel is purely as a bare licensee and not in trust. That in any event the Plaintiff never raised the issue of trust during the lifetime of the Defendant's husband.

9. That after the demise of her husband she filed a Succession Cause No. 515 of 2013 where the grant was confirmed in the estate of David Macharia Kabuga was issued on 18/4/16 and the suit land was distributed as follows; -

“L.R No. Loc.12/Sub-Loc.4/2103 to Joseph Kabuga Macharia, Alex Mugo Macharia and Pascaline Wangechi Wangari and Ann Nyambura Macharia (minor) to share equally”.

The interest of the minor Ann Nyambura Macharia is held in trust by Jenelica Wangari Mugo and Pascaline Wangechi Wangari. That she is the legal representative of the deceased husband.

10. On cross-examination the Defendant stated that she has constructed a mabati house on the land. That apart from the Plaintiff Kabuga Chege (son of Irungu Chege) also tills the suit land and that earlier on her mother in law too would till the suit land for food crops on the permission of her late husband.

11. Both parties have filed written submission which I have carefully considered. The issues that commend themselves to this Court for determination are; whether the Plaintiff has established customary trust in the suit land and whether the Defendant is the registered owner of L.R No. Loc.12/Sub-Loc.4/2103?

12. It is not in dispute that the Defendant is the legal representative of the estate of the late David Macharia Kabuga the registered owner of L.R No. Loc.12/Sub-Loc.4/2103. It is also not in dispute that the estate of the late David Macharia Kabuga vide Succession 513/2013 has been distributed to his dependants, one of which is not even the Defendant herself. The Defendant is holding a $\frac{1}{4}$ share in trust of a minor, Ann Nyambura Macharia.

13. It is also admitted that the Plaintiff together with their nephew one Kabuga Chege and sometimes their Defendant's mother in law have been cultivating food crops on the land initially at the permission of the Defendant's deceased husband with the understanding that once they (Defendant and her husband) needed the land, they would stop the cultivation. This fact has not been controverted by the Plaintiff by

adducing evidence to the contrary either at the trial or in the pleadings.

14. It is also on record that the land was family land having been owned by the family patriarch. The Plaintiff admitted that the land was distributed to her surviving Siblings out of which she got L.R No. Loc.12/Sub-Loc.4/2106 which is measured 1.675 acres just like the Defendant's husband. No evidence has been adduced to support the averment that both siblings held the portions in trust for each other or such other family members.

15. The background of this land shows that it was first registered in 29/5/61 in the name of Irungu Kabuga. In 2001 it was transmitted to Margaret Wangui Irungu (Irungu Kabuga's wife) and David Macharia vide Succession Cause No. 8/99. The parcels L.R No. Loc.12/Sub-Loc.4/1227 was then partitioned to give resultant titles of L.R No. Loc.12/Sub-Loc.4/2103 and L.R No. Loc.12/Sub-Loc.4/2104. L.R No. Loc.12/Sub-Loc.4/2103 was registered in the name of David Macharia Kabuga. On the death of David Macharia Kabuga the Defendant was appointed the legal representative of her husband's estate and vide a confirmed grant issued on 18/4/17 the estate was distributed to;

a) Loc. 12/Sub-Loc.4/2103 – Joseph Kabuga Macharia, Alex Mugo Macharia and Pascaline Wangechi Wangari to share equally.

Ann Nyambura Macharia (Minor) – Jenelich Wangari Mugo and Pascaline Wangechi Wangari (to hold her share in trust.)

a. Loc. 12/Sub-Loc.4/916 - Joseph Kabuga Macharia, Alex Mugo Macharia, Pascaline Wangechi Wangari and Jenelich Wangari Mugo to share equally. Ann Nyambura Macharia (Minor) – Jenelich Wangari Mugo and Pascaline Wangechi Wangari (to hold her share in trust.)

b. Standard Chartered A/Cs No. 0120102375002 & No.0150170237500 to be registered in the names of Jenelich Wangari Mugo as a Sole proprietor.

c. Motor Vehicle Reg. KRW 391 to be registered in the names of Jenelich Wangari Mugo as a Sole proprietor.

16. Section 28 of the Land Registered Act provides for trusts including customary trusts in registered land. Such interest need not be registered on the Register. The claim of the Plaintiff in this case centres on overriding interest in form of customary trust. The Court of appeal in **Mbui Mukangu vs. Gerald Mutwiri Mbui CA No. 281 of 2000** states that for one to establish a claim in customary trust, one had to prove that they are in actual physical possession or occupation of the land. The question of establishing trust is that of a fact and is subject to proof on inquiry. In her evidence in Chief the Plaintiff admitted that she has been farming on the land but she resides on her Loc. 12/Sub-Loc.4/2106. It is the Defendant's evidence that farming too is being done by Chege Kabuga and it was at the permission of her late husband and hence are bare licensees. The Plaintiff has not adduced evidence to contravene the issue of licensee. That evidence of the Defendant remains uncontroverted.

17. From the evidence on record it is clear that both siblings (Plaintiff and Defendants husband being children of Chege Kabuga) benefited from the estate of their father in equal shares. It is therefore not true as pleaded in Para 6 of her plaint that she does not have alternative land. She has admitted in her evidence that she and her children live on No. Loc.12/Sub-Loc.4/2106. The question that the Plaintiff has failed to answer is why she did not sue/claim customary trust both in 2001 when their respective parcels were being registered in their names (Registered on 19/6/2001 and titles issued) and also when the letters of grant of administration for the estate of the Defendants husband were being granted in 2017?. The only inference the Court can read into this is because both siblings received equitable and equal share of their fathers land and this suit is an afterthought.

18. It is the unchallenged evidence of the Defendant that she has constructed a Mabati house on the suit land. The deceased husband was also buried on the same land. This was admitted by the Plaintiff in her evidence during cross-examination.

19. The Plaintiff's evidence that she does not know the Defendant as her late brother's wife is not true. In her pleadings on Para 6 she alleges that the Defendant's husband held the suit land in trust for her. She alleged that she had asked the Defendant to dissolve the trust on various occasions but she was unwilling. This shows that she had contact with the Defendant. She also mentioned that the Defendant appeared in 2011 to bury her husband on the suit land. The Plaintiff was not truthful when she testified that she had only seen the Defendant in Court at the trial. There is also a letter on record way back in 2013 addressed to the Plaintiff by the area chief of Iyego location notifying her that the Defendant was in the process of processing the late husband's letters of administration. There is nothing on record that she did challenge the letter in relation to the ownership of the suit land.

20. In conclusion I am persuaded that the Plaintiff has not established a customary trust in the suit land on a balance of probabilities and her claim fails entirely. The suit is dismissed with costs to the Defendant.

DELIVERED, DATED AND SIGNED THIS 7TH DAY OF DECEMBER, 2017.

J.G. KEMEI

JUDGE