



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 80 OF 2015

REBECCA WANJIRU WARUI

**(Suing as the Personal Representative of the Estate of JAMES MAINA WACHIRA (Deceased)
.....PLAINTIFF**

VERSUS

WACHIRA GICHEGU.....DEFENDANT

JUDGMENT

The plaintiff herein **REBECCA WANJIRU WARUI** suing as the Personal Representative of the Estate of **JAMES MAINA WACHIRA** (the deceased herein) filed this suit on 30th June 2015 seeking judgment against the defendant, **WACHIRA GICHEGU**, in the following terms;-

(a) A declaration that the defendant holds in trust land parcel No. MWEA/MUTITHI/SCHEME/604 subject to the overriding interest of the plaintiff herein being the personal representative of JAMES MAINA WACHIRA (deceased).

(b) An order that the defendant facilitate the execution of the relevant transfer and other documents in favour of the plaintiff and in default, the Deputy Registrar of this Court to execute all the necessary documents for and on behalf of the defendant.

(c) An order for permanent injunction restraining the defendant from evicting the plaintiff.

(d) Costs of the suit and interest thereon.

(e) Any other relief that this Honourable Court may deem fit to grant.

The suit is premised on the pleadings that the plaintiff is wife to the deceased who is a son to the defendant and that at all material time since 1999, she has been living on parcel of land No. MWEA/MUTITHI/SCHEME/604 (the suit land) which is ancestral land registered in the defendant's names to hold in trust subject to the overriding interest of his deceased son and by extension, in trust for the plaintiff and her children. However, the defendant is now threatening to evict the plaintiff and her children from the suit land yet that is where the deceased is buried and the plaintiff has extensively developed the same.

Though served with the plaint, the verifying affidavit and list of plaintiff's witnesses on 10th July 2015, the defendant neither entered appearance nor filed a defence and on 15th September 2015, an interlocutory judgment was entered against him. This suit was thereafter listed for formal proof before me on 19th April 2016.

When this case came up for hearing, the plaintiff led by her counsel **Ms FATUMA** asked the Court to adopt her statement as her evidence and also produced as her exhibits the limited grant ad litem issued to her by **ONG'UDI J.** on 27th March 2014 in **EMBU HIGH COURT ADMINISTRATION CAUSE No. 56 of 2014**, the Green Card in respect of land parcel No. MWEA/MUTITHI/SCHEME/604 and the Green Card in respect of land parcel No. MWEA/MUTITHI/SCHEME/147 – Exhibits 1 to 3 respectively.

According to the plaintiff's oral evidence and her written statement, the defendant who is her father in law lives on land parcel No. MWEA/MUTITHI/SCHEME/190 and has never lived on the suit land. It is her case that although the suit land is registered in the names of the defendant, she and her deceased husband have lived on the suit land since 1999. She adds that the suit land is a sub-division of land parcel No. MWEA/MUTITHI/147 which originally belonged to the defunct Kirinyaga County Council but was given to the defendant by his Agachiku Clan (a Mbari ya Ngurwe). That before the death of her husband on 21st November 2005, the defendant had expressed his wish to transfer the suit land to her husband and arrangements were being made to book an appointment with the Land Control Board but unfortunately, her husband died before that could be done and was buried on the suit land. Immediately after her husband's burial, the defendant began harassing her and demanding that she vacates and she had to seek the intervention of the local administration and clan elders who restrained the defendant. The defendant however proceeded to take away two bulls and a cow from her home. The defendant has other parcels of land where he resides with his wife and other children and the suit land is the only source of livelihood for the plaintiff and her children.

I have considered the plaintiff's un-controverted evidence herein. It is clear from the Green Card in respect to the suit land (Exhibit 2) that it is registered in the names of the defendant although the plaintiff has lodged a caution thereon claiming a beneficial interest. It is however well settled that the registration of land in the name of one party does not relieve him of his duty as a trustee. And such a trust extends to and is recognized under Kikuyu Customary Law –

KANYI VS MUTHIORA 1984 K.L.R 712,

MUMO VS MAKAU 2004 1 K.L.R 13 and

MUKANGO VS MBUI 2004 2 K.L.R 256.

Section 28 of the Land Registration Act 2012 provides as follows:-

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –

(a) -

(b) trusts including customary trust”

The suit land is registered in the defendant's names under the **repealed Registered Land Act**. While **Section 28** of that Act recognizes the right and privileges of the registered proprietor, it has a provisosal 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”.

It is therefore clear that though the defendant is the registered proprietor of the suit land, that registration does not relieve him of his duty as a trustee to hold it for the plaintiff and her children.

Has the plaintiff proved her case against the defendant as required in law? In my view, she has discharged that burden. Her evidence is not rebutted as the defendant chose not to defend this suit. That notwithstanding, there is cogent evidence upon which this Court can decide that indeed the defendant holds the suit land in trust for the plaintiff and her family. Firstly, there is evidence that the suit land is a

sub-division of land parcel No. MWEA/MUTITHI/SCHEME/147 which was given to the defendant by his Agachiku Clan (a Mbari ya Ngurwe). The defendant did not therefore purchase the suit land as his personal property. Rather, it was given to him by his clan to hold in trust for his family which includes the deceased and, by extension, the plaintiff and her children.

Secondly, the deceased was buried on the suit land and there is un-controverted evidence that prior to his death, the defendant had expressed a desire to transfer the suit land to him but those arrangements were put on hold when he died.

Thirdly, the plaintiff and her children have been living on the suit land since 1999 and that is their only source of livelihood. On the other hand, the defendant has other parcels of land including land parcel No. MWEA/MUTITHI/SCHEME/190 where he lives with his wife and children. It would be an act of un-mitigated cruelty and injustice if the defendant were to evict the plaintiff from the suit land as he has threatened to do. Taking all that into account, I am persuaded that the plaintiff has proved her case against the defendant as required in law and is therefore entitled to the prayers sought in her plaint.

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

- 1. A declaration that the defendant holds in trust land parcel No. MWEA/MUTITHI/SCHEME/604 subject to the overriding interest of the plaintiff herein being the personal representative of JAMES MAINA WACHIRA (deceased).***
- 2. An order that the defendant facilitate the execution of the relevant transfer and other documents in favour of the plaintiff and in default, the Deputy Registrar of this Court to execute all the necessary documents for and on behalf of the defendant.***
- 3. A further order that such registration of land parcel No. MWEA/MUTITHI/SCHEME/604 in the names of the plaintiff shall indicate that she holds it in trust for herself and her children.***
- 4. An order for permanent injunction restraining the defendant, his agents, employees or anybody acting under him from evicting the plaintiff or her children.***
- 5. As the parties are a daughter and her father-in-law, each shall meet their own costs.]***

B.N. OLAO

JUDGE

25TH NOVEMBER, 2016

Judgment delivered, dated and signed in open Court this 25th day of November 2016.

Mr. Kagio for Ms Fatuma for Plaintiff present

No appearance by Defendant

Right of appeal is explained.

B.N. OLAO

JUDGE

25TH NOVEMBER, 2016