



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 131 OF 2015

PHYLLIS KARIUKO NJAGI.....PLAINTIFF

VERSUS

DAVID KIURA NJAGI.....DEFENDANT

JUDGMENT

The plaintiff (**PHYLLIS KARIUKO NJAGI**) filed this suit on 27th October 2015 seeking judgment against the defendant (**DAVID KIURA NJAGI**) in the following terms:-

1. A declaration that the defendant holds registration to title No. KABARE/MUTIGE/192 measuring 2.0 Ha on his own behalf and in trust for the plaintiff and other family members and consequently do order the sub-division of L.R No. KABARE/MUTIGE/192 into five (5) portions as follows:-

- (a) Phyllis Kariuko Njagi - 1 acre**
- (b) David Kiura Njagi - 1 acre**
- (c) Patrick Chomba Njagi - 1 acre**
- (d) Wilson Karinga Njagi - 1 acre**
- (e) Charles Mwendia Njagi - 1 acre**

and respective title deeds be issued by the Land Registrar Kirinyaga.

2. Costs of the suit plus interest.

The plaintiff's claim was premised on pleadings that she is the mother of the defendant who, together with his other siblings, was born and brought up on land parcel No. KABARE/MUTIGE/192 (the suit land) which was registered in the names of the defendant as the first born son in 1957 when he was hardly two (2) years old. However, the defendant chased away the plaintiff who now lives in rental houses within Mwea area. The defendant also chased away his siblings **WILSON WARINGA NJAGI and CHARLES MWENDIA NJAGI** and the only sibling living on the suit land is **PATRICK CHOMBA NJAGI**. That the dispute was first heard by elders who divided the suit land as follows:-

- 1. DAVID KIURA - 1.3 acres**
- 2. PHYLLIS KARIUKO - 1 acre**

3. WILSON KARINGA - 1 acre

4. CHARLES MWENDIA - 1 acre

5. PATRICK CHOMBA - 1 acre

The elders' award was registered as **LDT CASE No. 11 of 2005 at KERUGOYA COURT** but an appeal was later filed which the plaintiff conceded. The plaintiff therefore claims that the defendant is the registered proprietor of the suit land in trust which should be determined as pleaded herein.

The defendant filed a defence in which he conceded that he was registered as the proprietor of the suit land in 1958 when he was aged six (6) years but he denied all the plaintiff's averments and in particular, that he holds the suit land in trust for the plaintiff or his siblings.

The parties were the only witnesses in their respective cases.

The plaintiff told the Court that the defendant is the first born son out of her six children being two daughters and four sons and that the suit land was registered in his name to hold in trust for her because she did not have an Identity Card and land was not registered in the names of women at that time. She added that when the suit land was registered in the names of the defendant, he was only aged six (6) years. She testified that the defendant has refused to sub-divide the suit land between her and his siblings and instead chased her away in 2003 yet she had lived thereon for sixty (60) years. She asked the Court to adopt her statement as her evidence and her list of documents as her documentary evidence.

The defendant similarly asked the Court to adopt his statement as his evidence and also his list of documents. He confirmed that the plaintiff is his mother being one of the three wives of his father **EVAN NJAGI KAGONDU** (deceased) who owned land parcel No. KABARE/MUTIGE/193 where the plaintiff lived until 1982 when she left following a disagreement with her husband and went to live with the defendant's siblings at Ngurubani. He denied that the plaintiff ever lived with him on the suit land adding that he lived with his father on the parcel No. KABARE/MUTIGE/193 until 1970 when he moved to live on the suit land which is registered in his names.

Submissions have been filed both by **Mr. NGANGAH advocate** for the plaintiff and **Ms MUTHIKE advocate** for the defendant.

I have considered the evidence herein both oral and documentary as well as the submissions by counsel.

It is not in dispute that the suit land is registered in the names of the defendant. However, the law is that such registration does not relieve the registered proprietor of any duty to which he is subject as a trustee. **Section 25 of the Land Registration Act 2012** which recognizes and protects the rights of a registered proprietor has a provisos in **Sub-section (2)** that:

“Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject as a trustee”

A similar provision existed under **Section 28 of the repealed Registered Land Act** under which the suit land is registered. In **KANYI VS MUTHIORA 1984 K.L.R 712**, the Court of Appeal made it clear that the registration of land in the name of a proprietor did not relieve him of his duties or obligations as a trustee nor extinguish rights under Kikuyu Customary Law.

The parties herein are Kikuyu and therefore the trust being referred to in these proceedings can only be a trust under Kikuyu Customary Law. The plaintiff was therefore obliged to lead evidence that indeed the defendant holds the suit land in trust for her and his siblings as pleaded in her plaint. **Sections 107 to 109 of the Evidence Act** places that burden on her. In an attempt to prove her claim against the defendant, the plaintiff testified how the suit land was registered in the defendant's names when he was only aged six (6) years and that she has lived on that land for sixty (60) years until 2003 when the defendant chased her

away and further, that she has no other land. Her advocate in his written submissions, urged me to be guided by my own decision in the case of **JASON GITIMU WANGARA VS MARTIN MUNENE WANGAARA KERUGOYA ELC CASE No. 278 of 2013**. However, the facts in that case are very different from those obtaining in this case. In the **WANGARA** case (supra), there was evidence that the land in dispute was where the litigant's father and his six wives were buried and further, that all the family members had put up homes on the land in dispute. In this case now before me, the plaintiff does not live on the suit land and out of the defendant's five (5) siblings, only one lives on the suit land. There is also evidence that the plaintiff's deceased husband **NJAGI KAGONDU** owned land parcel No. KABARE/MUTIGE/283 which was the subject of Succession Cause No. 46 of 2007 at the Principal Magistrate's Court Kerugoya in which the plaintiff was given a share and so too were her co-wives **WAMARUA** and **WAGUAMA**.

Secondly, in the **WANGARA** case (supra), there was evidence from the claimant's siblings that indeed their elder brother had been registered as proprietor of the land in dispute in trust for his siblings. In this case now before me, and although the plaintiff was claiming a share of the suit land both for herself and also for her other children **DAVID KIURA NJAGI, PATRICK CHOMBA NJAGI, WILSON KARINGA NJAGI** and **CHARLES MWENDIA NJAGI**, none of those children were called as witnesses to support her claim that the defendant holds the suit land in trust for them as well. That was particularly strange given the fact that they are named as beneficiaries of the suit land. The only conclusion that this Court can arrive at is that the defendant's siblings would not have supported the plaintiff's claim.

Then there is the defendant's evidence, which is not rebutted, that he and the plaintiff used to live on land parcel No. KABARE/MUTIGE/193 belonging to the defendant's deceased husband until 1982 when the plaintiff left following a disagreement with her husband. Although the plaintiff tried to suggest that the defendant chased her away in 2003, there was documentary evidence in form of proceedings in **KERUGOYA SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE No. 108 of 1989** in which the plaintiff and three others had filed a suit against her deceased husband claiming that he held land parcel No. KABARE/MUTIRA/283 in trust for himself and his family. That suit was dismissed by **E.N. MAINA SRM** (as she then was) on 13th August 1993. What I find significant in that case is that when the plaintiff testified on 14th April 1993, she told the Court that her husband had chased her away "**almost 26 years ago**". Clearly, it cannot now be true, as claimed by the plaintiff, that the defendant chased her away in 2003.

Trust is a matter to be determined by the evidence adduced. As was held in **MWANGI MBOOTHU & OTHERS VS GACHIRA WAITIMU & OTHERS 1986 K.L.R. 171**;

"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 intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied".

Upon considering all the evidence herein, I am not persuaded that the plaintiff has proved her case against the defendant. Her evidence falls far short of what is required to prove a trust, customary or otherwise.

The up-shot of the above is that the plaintiff's suit is dismissed. Each party to meet their own costs.

B.N. OLAO

JUDGE

20TH DECEMBER, 2016

Judgment delivered, dated and signed in open Court this 20th day of December, 2016

Mr. Ngangah for Plaintiff present

Mr. Otieno for Ms Muthike for Defendant present

Right of appeal explained.

B.N. OLAO

JUDGE

20TH DECEMBER, 2016