



Kaguongo & 2 others v Rukungu & 3 others (Environment & Land Case 58 of 2018) [2024] KEELC 1331 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1331 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 58 OF 2018**

**JM MUTUNGI, J
MARCH 14, 2024**

BETWEEN

**WANJIRA WARUKUNGU KAGUONGO 1ST APPLICANT
STANLEY MURIUKI RUKUNGU 2ND APPLICANT
BERNARD MURAGE RUKUNGU 3RD APPLICANT**

AND

**BENJAMIN MUCHIRI RUKUNGU 1ST RESPONDENT
HILLARY MAINA GIKUNJU 2ND RESPONDENT
JAMES MURIMI MUNYUA 3RD RESPONDENT
PETER KARIMI MUCHINI 4TH RESPONDENT**

JUDGMENT

1. The Applicant commenced this suit by way of an Originating Summons dated 14th November 2018, seeking for orders that the 1st Respondent be declared to have held LR Mwerua/Kagio/676 and to be holding LR Mwerua/Kagio/6308, 6309, 6311, 6313, 6314 and 6315 (suit land) in trust for the Applicants; a declaration that the 1st Respondent sold his portion of the trust land, to wit, LR Mwerua/Kagio/6307, 6310, and 6312 to the 2nd, 3rd and 4th Respondents respectively; and an order to issue compelling the 1st Respondent to execute all the transfer documents and deliver all the requisite documents relating to LR Mwerua/Kagio/6308, 6309, 6311, 6313, 6314 and 6315, to enable the suit land to be transferred in the names of the Applicants.
2. The Originating Summons was predicated upon the annexed affidavit of the 2nd Applicant, Stanley Muriuki Kaguongo where he averred that in the year 1971, the 1st Applicant purchased LR Mwerua/Kagio/676 from Njikaria Waigua and had the same registered in the name of the 1st Respondent who



was her son. He averred that the 1st Applicant purchased this land using the proceeds that emanated from selling their family land at Kang'uru and that the family agreed that the 1st Respondent was to be registered as the proprietor. The 2nd Applicant stated that they have since occupied the land, developed it and have buried their kins therein. He stated that in the year 1982, the Applicants and the 1st Respondent, assisted by the clan and the local administration agreed to demarcate LR Mwerua/Kagio/676 and each of them to get an acre of LR Mwerua/Kagio/676 to the exclusion of the 1st Applicant who was to get a life interest in the land. He further stated that they have continuously developed their respective portions but that sometime in 2015 they learnt that the 1st Respondent had secretly subdivided the land into LR Mwerua/Kagio/6307, 6308, 6309, 6310, 6311, 6313, 6314 and 6315 and had sold LR Mwerua/Kagio/6307, 6310 and 6312 to the 2nd, 3rd and 4th Respondents.

3. The 1st Respondent filed his Replying Affidavit dated 20th March 2019. He stated that he was the owner of the suit land and that he did not hold the land in trust for the Applicants. He averred that his father died in 1949 and that upon his death, Makumbo who was his father's friend hosted them and the family of his father's first wife on his land. He claimed that when he became of age he relocated to Mombasa where he did odd jobs and from his earnings, he was able to buy LR Mwerua/Kagio/676 from Njikari. He claimed that he returned to Kirinyaga County in 1971 and that in the same year he bought LR Mwerua/Kagio/676, following which he invited his mother and brothers to reside on the land on humanitarian grounds. He averred that he allocated the 2nd and 3rd Applicants each a quarter acre (1/4) and added an Eighth (1/8) Acre of land parcel Mwerua/Kagio/676 to the 3rd Applicant's share because he used to live with his mother. He averred that they lived in harmony until the Applicants demanded title of LR/Mwerua/Kagio/676 through the Area Chief. He stated that he asked them to give him KShs. 20,000/- to cater for subdivision of the land and the subsequent transfer, which they refused to pay. He stated that after he subdivided the land he sold ½ acre and 1/8 acre to Hillary Maina and allocated his four sons ½ Acre each of the suit land. He pleaded that he also allocated the 2nd Applicant ¼ and 1/8 Acre and ¼ of an acre to the 3rd Applicant. He averred the portion he had sold to Hillary Maina fell on the 2nd Applicants portion who refused to move necessitating him to relocate Hillary to land parcel No. 6307. He stated his sons sold the portions he had given them to the 2nd and 3rd Interested Parties but that the 2nd Applicant forcefully buried his son on the portion belonging to Hillary Maina and has registered restrictions on the suit land which the Respondent prays to be removed.
4. The 2nd, 3rd and 4th Respondents also filed their Replying Affidavits all dated 20th March 2016. They confirm that they are the registered owners of land parcel Mwerua/Kagio/6307, 6310 and 6312, having bought the same from the 1st Respondent. They state that the 2nd Applicant had been interfering with, and trespassing into their portions of the land and prayed for a permanent injunction to issue against him. The 2nd Respondent confirms that the 1st Respondent had sold him the portion belonging to the 2nd Applicant, which was land parcel Mwerua/Kagio/6309, but he was relocated to land parcel Mwerua/Kagio/6307 after the 2nd Applicant refused to vacate the portion of land. He claims that the 2nd Applicant has interfered with his portion of land on different occasions by removing beacons from his portion, burying his son in his portion of land while he was away, destroying his fence and trespassing into his property to steal his crops. He avers that he has reported the 2nd Applicant to the area chief and the police severally but the 2nd Applicant has been adamant about it. He confirms that the 2nd Applicant lodged a restriction against his land and prays that a permanent injunction do issue restraining the 2nd Applicant from interfering with his property.
5. The suit was heard on 8th May, 2023 when the Plaintiff and the Defendant testified and closed their respective cases. PW1, Stanley Muriuki Rukungu, testified that the 1st and 3rd Applicant had died and that he was the only Applicant in the matter. He testified that in 1959 his mother had been allocated



land which she registered in the name of her first born son, the 1st Respondent. This land he said was land parcel Mwerua/Kagio/676. He stated that the 1st Respondent sold the Applicants portion of the land to the 2nd, 3rd and 4th Respondent and that when he discovered he cautioned the land to preserve his interest. He urged the Court to intervene as he had children who are dependent on him. Under cross examination, PW1 testified that the initial land was allocated to his father by the clan in 1959 and due to the fact that he had died, the land was allocated to his mother who registered it in the names of the 1st Respondent due to the fact that she did not have an identity card at the time. He maintained that his mother sold the land at Kangari to buy land parcel Mwerua/Kagio/676 in 1971. He confirmed that around 1963 they moved from the colonial villages and went to stay with Makumbo. He denied that the 1st Respondent ever went to Mombasa and insisted that the initial land was bought by their mother. He testified that he was allocated 1 acre of the land and denied that he was ever asked to contribute any money for survey.

6. DW1, Benjamin Muchiri Rukungu, testified that his father had two wives and was of the clan of Munjiru. He testified that he was born in 1946 and his father died 3 years after. He stated that after 1959, they went to stay with Makumbo their uncle for a year after which he (DW1) raised money and bought land from Njikari. He also averred that he raised the money to purchase the land from doing odd jobs in Mombasa and that his mother was the one that identified the initial suit land. He stated that he moved his family from Makumbo's land and relocated them to his land. He testified that he sold ¼ acre of the land to raise money for the subdivision of the land. He stated that his intention was to allocate the Applicants and himself ½ of the land. On cross-examination, he testified that the 2nd Applicant's son died when the 1st Respondent had already sold the portion of land to Hillary. He refuted ever destroying any crops or trees belonging to the 2nd Applicant.
7. The 2nd, 3rd and 4th Respondent gave their evidence to the effect that they were the registered owners of LR Mwerua/Kagio/6307,6310 and 6312 to the exception of the 4th Respondent, who sold his parcel of land to another person. They adopted their Replying Affidavits and exhibits as evidence. They testified that the 2nd Applicant had cautioned their land and prayed the same to be removed. The 4th Applicant prayed for the dismissal of the suit against him with costs.
8. The parties filed written submissions following closure of the trial. The Applicants filed their submissions dated 30th October 2023 and the Respondents submissions dated 26th May 2023 were filed on 30th May 2023. I have reviewed and considered the pleadings, the evidence and the submissions made on behalf of the parties. The following are the issues that arise for determination:-
 - i. Whether the 1st Applicant (now deceased) was allocated by the Clan any land on behalf of her deceased husband that she caused to be registered in the 1st Respondents name being the eldest son to hold in trust for his siblings?.
 - ii. Whether such land as in (i) above was sold and the proceeds thereof utilised to purchase land parcel No. Mwerua/Kagio/676 that was also registered in the 1st Respondents name to hold in trust?
 - iii. Whether the 1st Respondent held land parcel Mwerua/Kagio/676 (subdivided into land parcels Mwerua/Kagio/6307,6308,6309,6311,6314 and 6315) in trust for himself and the Applicants?
 - iv. What reliefs and/or orders should the Court grant?
9. The Plaintiff's case is that their father died in 1949 and that their clan about 1959 allocated land to their mother which she sold as it was located in a rocky area. The Plaintiff's evidence was that their mother sold the land allocated to her and purchased land parcel Mwerua/Kagio/676 which was registered in



the name of the 1st Defendant who was her eldest son to hold in trust for his other siblings. Although the Plaintiff stated the initial land the mother was allocated was in Kagio, the particulars of the land was not given. In paragraph 5 of the Supporting Affidavit the Plaintiff averred that land parcel No. Mwerua/Kagio/676 was purchased by their mother after she

“sold the family land at Kangaru, which had been allocated by our deceased father, Warukungu Kaguongo, who died before the time of land registration and registered in the name of the Respondent as the eldest son to hold in trust for that part of my late father’s family comprising one of his two houses represented by his second window, the 1st Applicant and her children.”

10. According to the Plaintiff the initial land that the mother sold was registered in the 1st Respondent’s name though no evidence was adduced to demonstrate the existence of such land and who the registered owner was. If there was such land why were no documents availed? Land registration in most of Kirinyaga County predated independence with most of the land being registered from 1958 and the early 1960’s. The Plaintiff in his evidence explained that when they came out of the colonial villages they were given shelter by one “Makumbo” who was a friend of their deceased father. If their mother had been allocated land by the clan, why did they need to be given shelter? If the land was there, they definitely would have moved into the land. I find no basis upon which I can hold that indeed the Plaintiff’s mother was allocated any land by the clan which she sold to buy the suit land. There is no evidence that there was any such land. Although the Plaintiff stated in the Supporting Affidavit (paragraph 8) that the land was sold to the County Council of Kirinyaga for Kshs 3,200/- and the proceeds used to buy the suit land, no such evidence was led. If the County Council was involved in the transaction there certainly should have been records evidencing the transaction. They were not availed in evidence.
11. The Plaintiff and the 1st Respondent agreed that before they moved to land parcel Mwerua/Kagio/676 they as a family were staying on the land of Makumbo who had allocated them a portion to reside on and to cultivate. The 1st Respondent was emphatic that he was the one who purchased land parcel Mwerua/Kagio/676 using funds he had saved from doing odd jobs in Mombasa where he had gone to after he became of age to try and eke a living. Given the circumstances under which the 1st Respondent’s family was living as squatters in somebody else’s land, and the 1st Respondent having been the eldest son in his family it is probable that he decided to find a way of getting his family out of the dire circumstances that they were in. In those circumstances it would not have been unusual for him to have made savings with the object of buying land and resettling his family members on land that was their own. I am persuaded that is what he did.
12. The abstract of title (green card) for land parcel number Mwerua/Kagio/676 shows that the 1st Respondent was registered as owner on 16/8/1971 for consideration of Kshs 3,200/-. The parcel of land is shown to have been a subdivision of land parcel number Mwerua/Kagio/602.
13. Although the Plaintiff has asserted that the 1st Respondent was registered to hold the land in trust for the other members of the family, there is no evidence to support such assertion. There is no evidence that the 1st Respondent held the land under a customary trust as pleaded by the Plaintiff. The 1st Respondent admits that when he bought the land, he moved the family members from where they had been squatting to the land and each of them was allocated a portion to utilise. That in my view did not constitute the 1st Respondent a trustee. He was doing so on humanitarian grounds to his own kinsfolk. Whether or not there is a trust is a matter of fact and evidence. Though the 1st Respondent permitted his kin to settle on the suit land that did not constitute him a trustee. As expressed elsewhere in this Judgment there was no evidence to support the claim that clan land was sold and the proceeds utilised



to buy the suit land. Only if there was proof of that claim, would a customary trust have been held to have arisen. The existence of such land that was allegedly sold and proceeds used to buy the suit land was not proved. Quite evidently the Plaintiff did not satisfy the threshold established by the Supreme Court in the case of *Isack M'Inanga Kibia -vs- Isaaya Theuri M'litari* (2018) eKLR regarding the principles to be considered in determining whether there was a trust. Notably the Plaintiff did not prove that the land in question was before registration, family, Clan or group land.

14. The 1st Respondent however after permitting the Plaintiffs to come onto the land he had acquired and allocating them specific portions of the land, the Plaintiffs have developed the various portions they were allocated including constructing their homes thereon. In the Replying Affidavit the 1st Respondent stated that he had agreed to give his brothers the 2nd and 3rd Plaintiff's portions of ¼ acre each and as the 3rd Plaintiff, Bernard Murage Rukungu (deceased) was allegedly living with the mother in the same house, he agreed to give an additional 1/8 acre to him. The 1st Respondent had subdivided and sold portions which he had transferred to the 2nd, 3rd and 4th Respondents. As it were, the Plaintiffs were not raising any claim to the parcels that were sold and transferred out to the 2nd, 3rd and 4th Respondents/Interested Parties but the land that remained.
15. The 2nd Plaintiff in his evidence stated that both the 1st Plaintiff and 3rd Plaintiff (Applicants) had died and no substitution was effected meaning their respective cases abated. The 1st Respondent having agreed to give some land to the Plaintiffs who were his mother and two brothers and the matter having been reported to the Chief, who sanctioned the sale of ¼ acre portion of land to cater for the subdivision expenses, which portion he actually sold to the 2nd Respondent, Hillary Maina Gikunju, the 1st Plaintiff held himself out that he would honour the arrangement. The Plaintiffs had an expectation that the 1st Respondent would honour the arrangement. The 2nd Plaintiff has all his life lived on the suit property and it would be inequitable to order him to be evicted from the land which he had always known to be his home. He had a legitimate expectation that he would be entitled to get a portion of the land.
16. I enter Judgment in favour of the 2nd Plaintiff and order that the 1st Respondent transfers a portion measuring one-half (1/2) acre to the 2nd Plaintiff (Stanley Muriuki Rukungu) to be located on the portion that he has developed and resides unless the 2nd Plaintiff voluntarily agrees to be located at a different location.
17. This matter being amongst family members in exercise of my direction, I make no order for costs. Each party to bear their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 14TH DAY OF MARCH 2024.

J. M. MUTUNGI

ELC - JUDGE

