



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: KARANJA, WARSAME, & ASIKE-MAKHANDIA, J.J.A)**

**CIVIL APPEAL NO. 9 OF 2017**

**BETWEEN**

KARINGA GACIANI.....1ST APPELLANT  
 BEATRICE MUTHONI KARINGA.....2ND APPELLANT  
 EUNICE WAGATWE KARINGA.....3RD APPELLANT  
 MWANGI KARINGA.....4TH APPELLANT  
 DENIS MURIMI KARINGA.....5TH APPELLANT  
 MARY MUTHONI KARINGA.....6TH APPELLANT  
 SARAH WANJIRU NJOGU.....7TH APPELLANT  
 JOHN WAWERU KARINGA.....8TH APPELLANT  
 SAMUEL WACHIRA KARINGA.....9TH APPELLANT  
 FRANCIS GITHINJI KARINGA.....10TH APPELLANT  
 FREDRICK KAVATIA KARINGA .....11TH APPELLANT  
 JACKSON MACHARIA KARINGA.....12TH APPELLANT

**AND**

NDEGE KABIBI KIMANGA.....1ST RESPONDENT  
 AGNES WANGECHI.....2ND RESPONDENT

*(An appeal from the Judgment of the Environment and Land Court at Kerugoya,*

*(B. N. Olao, J.) dated 11th November, 2013*

*in*

*ELC Case No. 220 of 2013)*

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**JUDGMENT OF THE COURT**

1. This is an appeal against the Judgment of the Environment and Land Court dated 11th November, entered in favour of the respondents for

the orders;

**(a) Cancelling the registration of the appellants from the register as the proprietors of land parcels nos. Mutira/Kaguyu/4932 to 4943 and consolidating the same into the former land parcel no. Mutira/Kaguyu/637 (The suit land).**

**(b) Declaring the suit land held in trust and transferring 1.5 acres each out of the suit land to the respondents.**

2. The dispute emanates from a levirate union between Kabibi Kimanga and Wangechi sometime back in the 1940's after Gaciani Kimanga left for Tanzania. Gaciani Kimanga (deceased) and Kabibi Kimanga are brothers and that prior to his departure for Tanzania, Gaciani Kimanga was married to Wangechi (deceased). The facts in brief are that the union between Wangeci and Gaciani Kimanga bore two children namely **the 1st appellant, Karinga Gaciani** and his sister Muthoni. When Gaciani Kimanga returned from Tanzania he found that his younger brother Kabibi Kimanga had sired children with his wife. Disgruntled, Gaciani Kimanga went back to Tanzania where he died and was buried. In his absence, his wife Wangechi proceeded to cohabit with Kabibi Kimanga and sired other children including the 1st respondent, **Ndege Kabibi Kimanga** and **Ndiga Kabibi**, the deceased husband to the **2nd respondent, Agnes Wangechi**.

3. The suit land at the time was registered in the name of Karinga Gaciani during the land demarcation at Kirinyaga on 21st November, 1959 who was the eldest brother to hold in trust for the family because at that time, women could not be registered as land owners. A dispute ensued on the parties' rights in the suit land in 1998 when Karinga Gaciani transferred the suit land into the names of his two wives, **Beatrice Muthoni (the 2nd appellant)** and **Eunice Wagatwe Karinga (the 3rd respondent)** and **their children (the 4th to 12th respondents)** allegedly without informing Ndege Kabibi Kimanga (the 1st respondent).

4. When the matter proceeded to trial, it was observed that since the suit land was given to the appellant by their clan, he could not deal with it as private property as the intentions of the clan could only have been that, the appellant being the eldest son, would only hold the suit land in trust for himself and his family including the children born out of the levirate union between the appellant's mother and his uncle.

After considering the evidence tendered, the trial judge in a judgment dated 11th November, 2016 found that the appellant holds the suit land and the resultant subdivisions thereof in trust for them. The trial court had this to say;

***“The suit land was not purchased by the 1st defendant as his own property. Being clan land and as his father was not there, the intentions of the clan could only have been that he, as the eldest son, would hold it in trust for himself and his family including the children born out of the levirate union between his mother and his uncle.*”**

5. The appellants being aggrieved by the judgment of the trial court, lodged the instant appeal on 6 grounds summarized primarily on two pertinent issues; the evidence tendered to support the respondents' claim to the suit land was insufficient and secondly that the trial court failed to address itself to the peculiar relationship between the parties which was incapable of giving rise to customary trust.

6. By a consent dated 20th January, 2021 the parties agreed to dispose of the appeal by way of written submissions.

7. While highlighting the background facts in support of the appeal, the appellants reiterated their case that the trial court failed to consider that the respondents fall under the household of the late Kabibi Kimanga although they all share the same biological mother. It was argued that from the nature of Kikuyu customs which the parties in this appeal ascribe to, once Kabibi Kimanga took over his elder brother Gaciani Kimanga's wife and sired children with her, those children became the blood lineage of Kabibi Kimanga which is why they bear the surname “Kabibi” and not Gaciani. Moreover, the trial court failed to consider the respondents' legitimate interests in the suitland measuring 10.0 hectares registered in the name of Kabibi Kimanga.

8. It was the appellants' submission that once the land in dispute was demarcated to the 1st respondent, Ndege Kabibi and Charles Ngirigacha Kabibi (Kabibi Kimanga's son whom he sired with his 1st wife) were awarded by the clan their own parcel of land namely L.R **Mutira/Kaguyu/635** measuring 10 hectares issued to them on 21st November, 1959 where Kabibi Kimanga lived with Wangeci and the respondents. Therefore, in view of those arguments, the appellants urged this Court to find merit in the appeal by setting aside the decision of the trial court dated 11th November, 2016.

9. In rebuttal, the respondents submitted that the parties belong to the Ucera clan under the Kikuyu customs and that under the Registered Land Act (now repealed) a first or subsequent registration does not extinguish rights under Kikuyu customary law neither does such registration relieve the registered owner of his obligations under **section 28** of the **Land Registration Act** as a trustee. This proposition was based on the argument that under Kikuyu customary law, children resulting from a levirate union are regarded for all purposes as children of a deceased husband. Thus, the respondents submitted that they have a legitimate claim in the land in dispute, that they discharged their burden of proof during trial and as such, the appeal should be dismissed with costs to the respondents.

10. An appeal to this Court from the High Court is by way of retrial. We must analyze and re-assess the evidence on record and reach our own conclusions in the matter while always bearing in mind that we are at a disadvantage of neither having seen nor heard the witnesses. (See ***Selle-vs- Associated Motor Boat Co., [1968] EA 123***).

11. We have considered the submissions and the record in its entirety. The sole issue for our determination is on the respondents' overriding interest over the suit land.

12. The Supreme Court in their recent decision in ***Isack M'inanga Kiebia v. Isaaya Theuri Mlintari & Another (2018) eKLR*** set out guidelines in determining a claim for customary trust over a registered property. A customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under **section 28** of the **Land Registration Act**. What is essential is the nature of the holding of the land and the intentions of the parties. Therefore, if the said holding is for the benefit of other members, whether or not they are in possession or actual occupation of the land is immaterial. The Supreme Court highlighted some

of the elements that would qualify a claimant as a trustee as follows;

- “1. The land in question was before registration, family, clan or group land;**
- 2. The claimant belongs to such family, clan or group;**
- 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous;**
- 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances;**
- 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”**

13. It is clear from the evidence tendered by the parties that the late Gaciani Kimanga had 9 children, 3 sons and 6 daughters and that in 1959, the suit land was registered in the names of the 1st appellant, as the eldest son, allegedly to hold in trust for the family. It is also factual that on 1st December, 1998 the 1st appellant transferred the suit land jointly to himself and his two wives, the 2nd and 3rd appellants. The suit land was again subdivided on 16th February, 2011 into title numbers Mutira/Kaguyu/4932-4943 and transferred to the appellants. It is the case of the appellants that the trial court failed to consider the peculiar relationship between the parties herein and the circumstances under which the suit land was registered in the names of the 1st appellant. We entirely agree that is a valid and legitimate concern but the question is whether the trial court failed to consider the peculiar circumstances of the issues in dispute.

14. It is clear that the relationship between the parties herein is not only peculiar but unique in the sense that the 1st appellant, 1st respondent and the late Ndiga Kabibi husband to the 2nd respondent are all children of one mother (the late Wangeci Kimanga). Secondly, the 1st appellant's father (Gaciani Kimanga) married Wangeci Kimanga with whom they had two issues namely Karinga Gaciani and Muthoni Gaciani. Thirdly, the father to the 1st appellant Gaciani Kimanga had a younger brother, namely Kabibi Kimanga. As stated earlier, sometime in 1940, the father to the 1st appellant proceeded to Tanzania for greener pastures leaving behind his wife Wangeci and two children. Upon his return, he found that his wife had been taken over by his younger brother, (Kabibi Kimanga) with whom they were blessed with 3 children namely Ndiga Kabibi (husband to the 2nd respondent), Sarah Wamtura Kabibi and Margaret Wangigi Kabibi.

15. Understandably and naturally as a human being, the late Gaciani Kimanga got disappointed and disgraced by the conduct of his younger brother who took his most important and precious thing in his life (his wife) hence his abrupt and swift return to Tanzania, till his demise.

16. Having secured the battle against his brother, Kabibi Kimanga, proceeded to cement his relationship and sired more children namely Jane Wambu Kabibi, Cicily Waruguru Kabibi and Ndiga Kabibi (1st respondent) and Pauline Njeri Kabibi. It is clear therefore that the respondents are from the family of Kabibi Kimanga, the man who took over the wife of his brother.

17. It is also clear that the appellants are from the family of Gaciani Kimanga, the man who displaced and inherited his brother's wife while alive. Consequently, it is clear beyond peradventure that the 1st appellant, 1st respondent and the late Ndiga Kabibi husband to the 2nd respondent, Agnes Wangeci are all children of one mother (late Wangeci Kimanga) hence the conclusion that the suit land was registered in trust for the benefit of all family members including the respondents herein. From the evidence on record, the parties belong to the Ucera clan and as was rightly pointed by the trial court, the registration and subsequent subdivision of the original title does not and cannot extinguish rights under Kikuyu customary law and neither does such registration relieve the person in whose name the land is registered, of his obligation and duties of trusteeship. We hold that just like the 1st appellant, his brothers and sisters hold a legitimate claim to the suit property whether from the levirate relationship or not. To hold otherwise would be to legitimize the appellant's claim that since the appellant's brothers were/are a product of a levirate union, they are incapable of inheriting from their deceased mother, a position that offends the very tenets of the Constitution on the principles against discrimination. (See ***CKC & Another (Suing through their mother and next friend JWN) vs. ANC [2019] eKLR***).

18. It is apparent from the forgoing that the respondents proved their case against the appellants on their customary trust claim. Suffice to say the observations of this Court in ***Mwongera Mugambi Rinturi & Another vs. Josphine Kaarika & 2 Others [2015] eKLR*** that have never been more apt and where it was accepted “... ***that a child is a child none being lesser on account of gender or the circumstance of his or her birth. Each has a share without shame or fear in the parents' inheritance and may boldly approach to claim it.***”

19. Therefore, we hold that the suit land in question was held in trust and for the benefit of all family members including the respondents herein. That presumption was not dislodged by the evidence on record and it is our humble view that the trial court correctly addressed its mind to the facts and applied the same to applicable law. We therefore hold that the appeal has no merit and is hereby dismissed with no orders as to costs.

***Dated and delivered at Nairobi this 9th day of July, 2021.***

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

***Signed***

**DEPUTY REGISTRAR**