



Ngari (Suing for Himself and on Behalf of his Deceased Brothers Represented by Their Surviving Wives) & another v Ngatia & another (Environment & Land Case 652 of 2014) [2024] KEELC 5956 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KEELC 5956 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 652 OF 2014
JO OLOLA, J
SEPTEMBER 20, 2024

BETWEEN

MATHENGE NGATIA NGARI (SUING FOR HIMSELF AND ON BEHALF OF HIS DECEASED BROTHERS REPRESENTED BY THEIR SURVIVING WIVES) PLAINTIFF

AND

MARY WANGUI WAIGI SUBSTITUTED PLAINTIFF

AND

CHRISTOPHER WANGOMBE NGATIA DEFENDANT

AND

JECINTA NJERI WANGOME SUBSTITUTED DEFENDANT

JUDGMENT

1. This suit was initially instituted as Nyeri HCCC No. 4 of 2008. By his Plaint dated 18th January 2008, Mathenge Ngatia Ngari (the original Plaintiff) expressing himself to be “Suing for himself and on behalf of his deceased brothers represented by their surviving wives” sought Judgment against the Defendant for orders listed as follows:-
 - a). A declaration that the Defendant holds the parcel of land Nyeri/Watuka/700 in trust for the Plaintiff and (his) other deceased brothers namely, Moses Waigi Ngatia, Muteru Ngatia, Francis Mugo Ngatia and Simon Gichuki Ngatia who are being represented by their surviving wives, namely, Mary Wangui Waigi, Ajerica Wambui Muteru Ngatia, Teresa Wanjiku Mugo and Mary Mumbi Gichuki respectively;



- b). Determination of the trust and the sharing out of the suit land among Mathenge Ngatia Ngari, Christopher Wangombe Ngatia, Mary Wangui Waigi, Ajerica Wambui Muteru Ngatia, Teresa Wanjiku Mugo and Mary Mumbi Gichuki in equal shares;
 - c). That the Defendant be condemned to bear the costs of this suit; and
 - d). Any other relief that Honourable court may deem fit to grant.
2. The basis for those prayers was the Plaintiff's contention that the Defendant was his brother and that the suit property had belonged to their mother until her death in 1970. It was his case that thereafter, the Plaintiff and his now deceased brothers had caused the suit property to be registered in the name of the Defendant to hold in trust for the family.
 3. But in his Statement of Defence dated 12th April 2008, Christopher Wangombe Ngatia (the original Defendant) asserted that the Plaintiff had no capacity whatsoever to bring the suit on behalf of the others.
 4. While admitting that he was the registered proprietor of the suit property, the Defendant denied that the said registration was in trust for the Plaintiff or anyone else as stated by the Plaintiff. It was further the Defendant's case that the Plaintiff has never occupied the suit land and that all his brothers were allocated different portions of land before their mother's death.

The Plaintiff's Case

5. Four (4) witnesses testified in support of the Plaintiff's case at the trial.
6. PW1- Mary Wangui Waigi is the substituted Plaintiff. She told the court that the Original Plaintiff was her husband and that he had seven (7) brothers. PW1 told the court that all the 7 brothers grew up on the suit land which belonged to their mother- Wanjogu Ngatia. Some of the brothers later brought their own pieces of land.
7. On cross-examination, PW1 told the court the suit property is about 24 acres and that the same was registered in the name of Christopher Wangombe Ngatia who was the youngest of the brothers to hold in trust for the other brothers.
8. PW2- Angelica Wambui Muteru told the court she was the widow of Muteru Ngatia who was one of the sons of Wanjogu Ngatia. She testified that the land was registered in the name of the Defendant to hold in trust after the family successfully concluded a succession cause that had been filed. PW2 further told the court that at the time of her mother –in-law's death, she had left a loan pending with the Settlement Fund Trustees (SFT) over the suit land and that all the family had contributed towards offsetting the loan. PW2 further testified that her husband had no other land and that he was not buried on the suit property after the Defendant barred them from doing so.
9. PW3- Teresa Wanjiku Mugo told the court she was the wife to Francis Mugo Ngatia who was also a brother to the Defendant. She told the court her husband contributed in repaying the loan to the SFT.
10. PW4- John Ngatia Gichuki is a son to Mary Mumbi Gichuki on whose behalf he testified. He told the court his mother was the widow to Simon Gichuki Ngatia and that the mother was unwell and could not hear. PW4 testified that his father contributed to the loan through which the suit property was acquired. He further reiterated that the land was registered in the name of the Defendant in trust for all the brothers.



The Defence Case

11. On her part, the substituted Defendant called two (2) witnesses at the trial.
12. DW1- Jecinta Njeri Wangombe is the substituted Defendant. She told the court the original Defendant was her husband. DW1 testified that she got married in 1975 and that that was the year the succession cause in relation to her mother-in-law Wanjogu Ngatia who had passed on in 1970, was completed. DW1 told the court her mother-in-law had acquired the land from the SFT and that 3 of her sons also got land from the SFT.
13. DW1 testified that she was unaware that the suit property was registered in her husband's name in trust for the other family members. She further told the court she was unaware if her mother-in-law had any other parcel of land save for the suit property. She told the court her husband paid the loan pending with the SFT and that his brother Muteru had refused to vacate the land even though Muteru had another piece of land elsewhere.
14. DW2 – Paul Mathenge Wangombe is a son of the original Defendant together with DW1. He told the court the father's brothers dwell in parcels of land that they had also inherited from his grandmother. DW2 testified that his grandmother had during her lifetime bequeathed each of his sons separate parcels of land and that it was not true that the suit property was registered in his father's name in trust for anyone else.

Analysis and Determination

15. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.
16. The suit herein was initially instituted in the year 2008 by Mathenge Ngatia Ngari against his brother Christopher Wangombe Ngatia. It was the Plaintiff's case that the parcel of land known as Nyeri/Watuka/700 (the suit property) belonged to their mother Wanjogu Ngatia who passed away in the year 1970 leaving behind some six (6) sons.
17. It was the Plaintiff's case that their deceased mother had acquired the suit property on a loan obtained from the Settlement Fund Trustees and that the loan had not been paid in full as at the time of their mother's death. The Plaintiff told the court that in order to offset the loan, the family had resolved to have the property registered in the name of the Defendant to hold in trust for the family.
18. Christopher Wangombe Ngatia however disputed that position. While admitting that he was the registered proprietor of the suit property, the defendant denied that the said registration was in trust for the Plaintiff or anyone else. The Defendant asserted that the Plaintiff had never at any one time occupied the suit property and further, that all his brothers were allocated different portions of land by their mother before her death.
19. As it turned out, Christopher Wangombe Ngatia passed away on 23rd October 2014. Following an application made by the Plaintiff, the deceased Defendant was substituted herein by his wife Jecinta Njeri Wangombe. As fate would have it, Mathenge Ngatia Ngari who had instituted this suit only survived his brother by some 5 years. On 27th February 2019, the original Plaintiff passed away and was similarly substituted in these proceedings by his wife Mary Wangui Waigi. The two deaths led to the amendment of the Plaint on 24th July 2020 with similar amendments to the Statement of Defence on 5th February 2021 to reflect the new realities.



20. As was stated in Peter Ndungu Njenga v Sophia Watiri Ndungu [2000] eKLR:

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

21. The concept of a customary trust was well explained by the Supreme Court in the case of Isack Kieba M’Inanga v Isaaya Theuri M’Lintari & Another[2018] eKLR where the court held as follows:-

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard we agree with the High Court in Kiarie v Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:-

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; and
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.

22. In the matter before me, it was not contested that the parties herein are all members of the family of one Wanjogu Ngatia who passed away on 5th March 1970. It was also not contested that the said Wanjogu Ngatia was the original owner of the suit land before it came to be registered in the name of the original Defendant herein.

23. The parties however disagree as to the circumstances that led to the Defendant being registered as the proprietor of the suit property. According to the Plaintiffs, the family agreed to have their last born son registered as the proprietor of the suit property in trust for the rest of the family to make it easier for them to offset the balance of a loan that was still owing to the Settlement Fund Trustee through whom their mother had acquired the suit land.

24. According to the Defendant, however, the suit property was bequeathed to him by their mother Wanjogu Ngatia. It was their case that before her death, their mother had given the other siblings land elsewhere or money to go buy their own land elsewhere and hence the bequest of the suit property to the last born son.

25. The contention by the Defendant that his mother had given his brothers land and/or money to go buy land elsewhere was however not supported by any material evidence. The Defendant and his witnesses did not place anything before this court to suggest that their mother Wanjogu Ngatia had owned any parcels of land other than the suit property. There was also no evidence of when the monies for purchase were given out to the other sons. While it was true that the original Plaintiff and some of



his brothers owned land elsewhere, there was no evidence that their mother had aided them in the acquisition thereof.

26. Similarly, I did not find any evidence that during her lifetime, Wanjogu Ngatia had bequeathed the suit property to the original Defendant. All that was evident was that as at the time of her death Wanjogu Ngatia lived with some of her children including the Defendant on the suit property. Her third born son Mutero Ngatia indeed continued residing on the piece of land alongside the Defendant until his death in the year 2007.
27. From the material placed before me, it was Wanjogu Ngatia's sons who agreed to have the suit property registered in the name of the Defendant. For that purpose, they filed Succession Cause No. 21 of 1973 before the District Magistrates Court at Ruringu wherein they agreed that the Defendant would take charge of the suit property.
28. The reasons for that arrangement were self-evident from the Application for Certificate of Succession and the Certificate of Succession issued by the Director of Land Settlement in the Defendant's name on 11th April 1973. It was apparent from a perusal of the documents produced by the Defendant himself that Wanjogu Ngatia's family was, trying to retain the land that had been registered in their mother's name by the Settlement Fund Trustees. The conditions for such registration as can be discerned from the conditions given in the SFT application form were inter alia, as follows:

“The Land may not be subdivided. Legal heir/heirress should be appointed in accordance, with Registered *Land Act* Cap 300 Section 101(2) which reads “Not more than one person may be registered as the proprietor of any parcel of which the Settlement Fund Trustees (former CMB) has at any earlier time been registered as the proprietor.”

29. It was therefore evident to me that the rules in place did not allow more than one person to be registered as proprietor of such land and that the Plaintiff was candid when he asserted that they agreed to have the defendant who was barely 20 years old when their mother died to be registered as the proprietor of the suit land.
30. That was also the reason on the 15th July 1975, the sons of Wanjogu Ngatia wrote an Agreement over the ownership of the suit property in the presence of the Area Chief. In his letter addressed to the Settlement Officer, on the said Agreement and dated the same day the chief stated as follows:-

Ref: Agreement of Ownership of Land

“Mr. Christopher Wangombe and his brothers have come to an Agreement that Wangombe should be the one who is going to own Plot Number 700 which was previously owned by his mother Wanjogu Ngatia.

I am a witness of this Agreement and there is no problem about it.

Below are the signatures of Wangombe's brothers who have agreed that the Plot should belong to Christopher Wangombe Ngatia.”

Mathenge Ngatia

Kariuki Ngatia

Simon Gichuki

Muteru Ngatia

Mugo s/o Ngatia.”



31. Those being the circumstances under which the Defendant came to be registered as the proprietor of the suit property, it was apparent to me that each of the claimants herein could have been entitled to be registered as an owner or beneficiary of the suit property but for the restriction placed by Section 101 (2) of the Registered *Land Act* (now repealed) on land acquired through the Settlement Fund Trustees.
32. It was also clear to me that the Defendant was always aware of this arrangement and hence the reason he had never asked his brother Muteru Ngatia and/or his family to vacate the suit land. His position must have changed around 28th April 2004 when he was finally issued with a brand new title deed in his sole name. That change of mind was apparent when three (3) years later, his brother Muteru died. Brandishing his new title deed, he successfully stopped the interment of his brother on the suit property.
33. Alarmed by their brother's change in attitude, the family moved to court and instituted this claim urging the court to determine the customary trust. From the foregoing, I am persuaded that the Plaintiff had established all the elements of a customary trust and that their Defendant brother held the suit property in trust for the other sons of Wanjogu Ngatia.
34. Accordingly, Judgment is hereby entered for the Plaintiff in terms of prayers (a) and (b) of the Amended Plaintiff dated 24th July 2020.
35. Each party shall bear their own costs.
37. It is so ordered.

DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 20TH DAY OF SEPTEMBER, 2024.

In the presence of:

Mrs. Maina for the Plaintiff.

Mrs. Machira for the Defendant.

Court Assistant: Michael

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J. O. OLOLA

JUDGE

