



**Kinyua v Mugo & 2 others (Enviromental and Land Originating Summons
73 of 2013) [2024] KEELC 7098 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7098 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 73 OF 2013**

JO OLOLA, J

OCTOBER 31, 2024

IN THE MATTER OF L.R NO. MAHIGA/ROKERA/260

AND

IN THE MATTER OF DECLARATION AND DETERMINATION/DISSOLUTION OF TRUST

BETWEEN

MICHAEL MACHARIA KINYUA PLAINTIFF

AND

CHARLES MACHARIA MUGO 1ST DEFENDANT

LAWRENCE MACHARIA WAHINYA 2ND DEFENDANT

MIRIAM WANGECI WAROGO 3RD DEFENDANT

JUDGMENT

1. By the Originating Summons herein dated 22nd April 2013, Michael Macharia Kinyua (the Plaintiff) claims to be a beneficiary of the estate of one Warogo Muite (deceased) and urges the court to determine the following questions:
 1. Whether LR No. Mahiga/Rokera/260 is registered in the name of Warogo Muite alias Warogo Macharia (deceased) in trust for the Plaintiff and the Defendants and in what proportions;
 2. Whether the said trust subsisting in respect of LR. No. Mahiga/Rokera /260 registered in the names of Warogo Muite alias Warogo Macharia (deceased) should be determined and all beneficiaries granted their respective shares;
 3. That the costs of this suit be paid by the 3rd Defendant.
2. The Originating Summons is supported by an affidavit sworn by the Plaintiff wherein he avers that he is the legal representative of the deceased and one of the beneficiaries of the estate. It is his case that the



- deceased was a paternal uncle to himself as well as the 1st and 2nd Defendants while the 3rd Defendant is the wife to the deceased.
3. That Plaintiff further avers that the suit property belonged to their grandfather Macharia and asserts that the same was registered in the name of the 3rd Defendant's husband in trust for the other siblings. He accuses the 3rd Defendant of encroaching on other portions of the land meant for the other beneficiaries and urges the court to determine the trust and grant each beneficiary their respective portions of the land.
 4. Both Charles Macharia Mugo and Lawrence Macharia Wahinya (the 1st and 2nd Defendants) are in support of the Plaintiff's case. In his Replying Affidavit sworn on 6th November 2013, the 2nd Defendant avers that the 3rd Defendant's deceased husband did not own the land absolutely but held the same in trust for himself and his three brothers including the father of the 1st Defendant. He avers that when his father died, he continued leasing out his portion to various tenants as he does not reside on the suit property.
 5. In his own Replying Affidavit sworn on 3rd February 2014, the 2nd Defendant reiterates the averments contained in the 1st Defendant's affidavit and urges the court to determine the trust in the manner proposed by the Plaintiff.
 6. Miriam Wangechi Warogo (the 3rd Defendant) is however opposed to the Plaintiff's claim. In her Replying Affidavit sworn on 6th June 2013, the 3rd Defendant asserts that the suit property is registered in the name of her deceased husband as the absolute proprietor thereof and not as a trustee for anyone else. While she concedes that the Plaintiff is a brother to her husband and the 1st and 2nd Defendants are sons of her late husband's brothers, the 3rd Defendant asserts that her father-in-law had no land in Nyeri during the period of land demarcation and consolidation.

The Plaintiff's Case

7. At the trial herein, the Plaintiff called a total of five (5) witnesses in support of his case.
8. PW1- Peter Waithaka Kinyua is the substituted Plaintiff. Relying on his Affidavit sworn on 17th September 2020, he told the court that his deceased brother Michael Macharia Kinyua had filed a Succession Cause in court where he had stated how the suit land ought to be divided between the parties. He told the court they have their portion but the portions belonging to the 1st and 2nd Defendants were taken away by the 3rd Defendant after she chased away persons who had been allowed to cultivate the same by the two Defendants. He told the court that it was not true that the land belonged solely to the 3rd Defendant and her children.
9. PW2- Pius Karuga Ndirangu is a neighbor of the parties. He testified that the parties herein are one family and that the entire family has been utilizing their respective portions of the suit land from the time PW2 was a Youngman. PW2 further told the court that at one time he had leased a portions of the land from the 1st and 2nd Defendants and that he utilized the said portion without interference until 31st March 2007 when the 3rd Defendant and his sons destroyed all his crops.
10. PW3- Jeremano Mwai Karuga is also a neighbor of the parties and a member of the same clan. PW3 told the court that it was agreed that Macharia Kinyua would be the one to distribute the land. It was his testimony that the land does belong to the entire family and that other members of the family had been buried in their respective portions of the land.
11. PW4- William Kahuria Thirikwa told the court he comes from the same village with the Plaintiffs. He testified that between the years 2000 and 2006, he had leased part of the suit land belonging to the 2nd



Defendant and his wife Leah Nyathiomu (now deceased). PW4 told the court that the land belongs to four deceased brothers, namely Kinyua Macharia, Warogo Macharia, Wahinya Macharia and Mugo Macharia.

12. PW5- John Ngari Kabanya told the court he belongs to the same “Ngengi” clan with the parties herein. He told the court they had dealt with the issue of the ownership of the land and decided that the same be distributed to the four families as the land did not solely belong to the 3rd Defendant.

Analysis and Determination

13. I have carefully perused 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.
14. By the Originating Summons filed herein, the Plaintiff contends that the parcel of land known as Mahiga/Rokera/260 is their ancestral land and that though it is registered in the name of the 3rd Defendant’s husband, the same is subject to a customary trust. Though sued as “Defendants” herein, the 1st and 2nd Defendants were actually on the same side with the Plaintiff. In their respective Replying Affidavits filed in response to the Originating Summons, the two Defendants echoed and supported the Plaintiff’s claim in great detail and, like the Plaintiff, accused the 3rd defendant of interfering with, and encroaching upon their respective portions of the suit property.
15. On her part, the 3rd Defendant rejected the contention that the suit property was registered in the name of her husband to hold in trust for either the Plaintiff and/or the 1st and 2nd Defendants. It was the 3rd Defendant’s case that her husband had singularly purchased the suit property and was registered as the absolute proprietor thereof.
16. From the material placed before the court, it was not in dispute that the parties herein were members of a family. It was also not in dispute that the suit property was registered in the name of the 3rd Defendant’s husband one Warogo Mute alias Warogo Macharia on 31st January 1958.
17. It was not contested that the Original Plaintiff Michael Macharia Kinyua as well as the fathers of the 1st and 2nd Defendants were elder brothers of the 3rd Defendant’s said husband. It was apparent that following the death of the 3rd Defendant’s husband on 12th April 1997, the Macharia family started tussling on the circumstances under which the 3rd Defendant’s husband came to be registered as the proprietor of the suit property. While the Plaintiff and his nephews contended that the suit property was registered in the name of the 3rd defendant’s husband to hold in trust for the family, the widow insisted that there was no such trust and that the land had solely belonged to her husband.
18. After the parties failed to agree on matters concerning the suit property, the original Plaintiff herein Michael Macharia Kinyua petitioned the High Court at Nyeri and instituted Nyeri High Court Succession Cause No. 151 of 2007 seeking to be allowed to administer the estate of his deceased brother Warogo Mute with the suit land herein cited as the sole property to be administered. Michael was thereafter issued with a confirmed Grant of Letters of Administration for the estate on 14th March 2008.
19. When the 3rd Defendant got wind of the Grant, she filed an Affidavit of Protest on 11th August 2009 in the said Succession Cause asserting that her deceased husband was only survived by herself and their four (4) children. As repeated herein, the 3rd Defendant averred in the said Affidavit that the suit property was solely owned by her husband and that the Plaintiff and his other brothers had no interest



in the land save for a portion measuring some 0.5 acres which according to the 3rd Defendant was given to the Plaintiff's mother by the deceased for use on compassionate grounds.

20. Having heard the parties on the protest and in a Ruling rendered on 13th April 2011 in the said Nyeri HC Succession Cause No. 151 of 2007, the Honourable J.K Serگون J, ordered the parties to take out the necessary proceedings to determine the claim based on trust. In the meantime the summons for confirmation of grant were stayed pending these proceedings which were subsequently instituted again by Michel some two (2) years later.
21. As fate would have it, Michael passed away on 4th April 2016. He was substituted in these proceedings by his brother Peter Waithaka Kinyua.
22. As it were, trusts, including customary trusts are some of the overriding interest recognized under Section 28 of the [Land Registration Act](#) to subsist and affect registered land without their being necessarily noted in the register. Considering a claim based on customary trust in the now reknowned case of Isack Kieba M'Inanga –vs- Isaya Theuri M'Lintari & Another (2018) the Supreme Court of Kenya delivered itself thus:

“(58). What are we to make of these changes? Several interpretations are plausible. It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the Registered [Land Act](#) (now repealed) in Section 25 of the [Land Registration Act](#), it can be logically assumed that certain trusts can still be noted in the register. Such trusts, not being overriding interests, would bind the registered proprietor in terms noted in the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered Land Acts, have now been subsumed in the “customary trusts” under Section 25 (b) of the [Land Registration Act](#). Thus, under the latter section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land.”

23. As to what is required to demonstrate the existence of such a trust, the Supreme Court went on to hold as follows in the Isack Kieba M'Inanga case (supra):

“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 –vs- Kinuthia, that what is essential is the nature of the holding of the land and the 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.
 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”
25. At the trial herein, the substituted Plaintiff relied on his supporting affidavit sworn on 17th September 2020. It was the Plaintiff’s case that the parties to his suit are related and that the suit land though registered in the name of the 3rd Defendant’s husband, is really family land. The Plaintiff testified that he and his brothers have lived on and utilized this land to-date, that they have homes established thereon and that the 1st and 2nd Defendants equally have a share in that their fathers were also brothers to the registered proprietor. It was the Plaintiff’s case that the suit land had in fact been informally divided into four (4) portions for each of the four (4) deceased brothers and that the land originally belonged to their late grandfather but was registered in the name of the 3rd Defendant’s husband to hold in trust for the rest of the family.
26. That position was indeed supported by the 1st and 2nd Defendants who are the Plaintiff’s nephews. While the 1st and 2nd Defendants did not testify at the trial herein, they had on 21st February 2022 entered into a “consent Judgment” with the Plaintiff in which they affirmed that the suit property was registered in the name of their uncle Warogo Mute in trust for the Plaintiff and urged that the court determines the trust with each beneficiary being granted their respective shares.
27. The 3rd Defendant of course denied the existence of any such trust. Before she procured the services of an advocate to represent her at the tail end of these proceedings, the 3rd Defendant acted and indeed, cross- examined all the Plaintiff’s witnesses in person. When she appeared before the court, at the trial, this court noted that the 3rd Defendant was a fairly elderly lady with very little comprehension on what to ask the witnesses.
28. From her line of cross-examination however, it was apparent that while she had pleaded that her husband purchased the suit property and was the absolute proprietor thereof, she did not contest the fact that she only occupied a portion of the land while her husband’s brothers equally occupied portions thereof.
29. It was telling that while the 3rd Defendant insisted that the Plaintiff and the 1st and 2nd Defendants had never lived on the land, she conceded both in her Affidavit of Protest filed in the High Court Succession Cause and in her Replying Affidavit filed herein that both the original and the substituted Plaintiffs were using a portion of the land measuring 0.5 acres. At Paragraphs 3 to 6 of the Affidavit of Protest sworn on 10th August 2009, the 3rd Defendant avers as follows:
- “ 3. That the deceased was the youngest son in the family and the Estate LR. No. Mahiga/Rokera/260 (sic) was registered in his name absolutely and not as a trustee;
 4. That Lawrence Macharia Wahinya is not entitled to a share of the deceased estate but his claim lies in his father’s estate;
 5. That Charles Macharia Mugo equally has no claim in the estate but ought to pursue his father’s estate; and



6. That Michael Macharia Kinyua and his brother Peter Waithaka Kinyua were through their mother given a portion to occupy by the deceased measuring about 0.5 acres which was on compassionate grounds.”
30. It was also telling that while in the 2009 Affidavit the 3rd Defendant claimed that the Plaintiff and his brother were occupying part of the suit land on alleged compassionate grounds, in her Replying Affidavit sworn and filed herein on the 7th June 2013, she purports that the land was only given for cultivation purposes. At Paragraph 8 and 9 of the Replying Affidavit, the 3rd Defendant deposes as follows:
- “ 8. The Plaintiff, 1st and 2nd Defendants fathers never lived in the parcel of land as they knew the current position concerning the land; and
9. That the person who was given a portion of land to be cultivating by my late husband was the Plaintiff’s mother which portion measuring approximately 0.5 (1/2) acres owing to respect I have for my late husband I had proposed the Plaintiff and his brothers inherit in my late husband’s estate.”
31. As it turned out, the 3rd Defendant chose not to testify at the trial herein and the averments made in her pleadings can only be considered as having been abandoned.
32. From the material placed before the court, I was persuaded that the Plaintiff had demonstrated by ample evidence that they live on, have built and cultivate a portion of the suit land. It was also evident to me that while the 1st and 2nd Defendants were not present physically on the land, they had been exercising proprietary control of portions thereof over a period of time by leasing the same to third parties. In support of their case, the Plaintiff has exhibited a copy of a letter dated 5th February 2007 from the Area Chief Mumwe Location. The said letter, written to assist the family to pursue Succession proceedings clearly names the Plaintiff and all the three (3) Defendants herein as beneficiaries of the suit property.
33. At Paragraph 21 of the Supporting Affidavit of Michael Macharia Kinyua sworn on 22nd April 2013, the Plaintiff had sought that the trust be declared and determined so that each of the beneficiaries can get their respective shares as follows:-
- a). Lawrence Macharia Wahinya- 0.33 acres.
 - b). Charles Macharia Mugo – 0.33 acres.
 - c). Michael Macharia Kinyua - 0.6 acres
 - d). Miriam Wangechi Warogo – 0.33 acres.
34. In the absence of any testimony to the contrary and having been persuaded that the Plaintiff has proved his case on a balance of probabilities, I hereby enter Judgment for the Plaintiff as against the 3rd Defendant and hereby declare as follows:
1. That LR. No. Mahiga/Rokera/260 is registered in the name of Warogo Mute alias Warogo Macharia (deceased) in trust for the Plaintiff and the three Defendants in equal shares.
 2. That the said trust in respect of LR. No. Mahiga/Rokera/260 registered in the name of Warogo Mute alias Warogo Macharia (deceased) be and is hereby determined and all the above beneficiaries be granted their respective shares as per Paragraph 22 of this Judgment.



3. The 3rd Defendant shall bear the costs of this suit.

DATED, SIGNED AND DELIVERED AT NYERI THIS THURSDAY 31ST DAY OF OCTOBER, 2024.

In the presence of:

Mr. Waweru Macharia for the Plaintiff.

Ms. Mwendu holding brief for Magua for the 3rd Defendant.

Court Assistant: Kendi

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J. O. OLOLA

JUDGE

