



REPUBLIC OF KENYA



Mburu & 3 others v Marangu & 3 others (Environment & Land Case E014 of 2022) [2024] KEELC 13903 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13903 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E014 OF 2022**

CK YANO, J

DECEMBER 19, 2024

BETWEEN

**ROSEMARY KAROKI MARANGU MBURU 1ST PLAINTIFF
KALLEN KATHAMBI KAIMENYI 2ND PLAINTIFF
LUCY GAKIRU MARANGU 3RD PLAINTIFF
SUSAN KIENDE MARANGU 4TH PLAINTIFF**

AND

**ADIEL GITOBU MARANGU 1ST DEFENDANT
GEOFFRAY KIMATHI MARANGU 2ND DEFENDANT
JOSEPH KABURU MARANGU 3RD DEFENDANT
AGM (SUED AS THE GUARDIAN OF MNM, A PERSON OF UNSOUND
MIND) 4TH DEFENDANT**

JUDGMENT

The Plaintiffs' Case

1. The plaintiffs instituted this suit vide a plaint dated 19th July, 2022 seeking for the following reliefs:-
 - a. A declaration that land parcel No. Abogeta/U-Kithangari 523 belongs to Joses Marangu Muthamia Marete (Deceased), as the sole proprietor.
 - b. A declaration that the transfer, registration and issuance of certificates of titles over land parcel number Abogeta/U-Kithangari 523 to the defendants and Joses Muthamia Marete (deceased) was null and void and ineffectual to confer a good title upon any of them.



- c. An order to cancel the joint tenancy and titles of the defendants over land parcels number Abogeta/U-Kithangari 523 and to revert the title to the original sole proprietor's name, Joses Marangu Muthamia Marete (deceased).
 - d. An order of permanent injunction restraining the defendants whether by themselves, the servants or agents, from preventing the plaintiffs utilizing, taking part and being involved in the management of the farming activities over land parcel number Abogeta/U-Kithangari 523.
 - e. Mesne profits from February, 2017 to date and until payment in full.
 - f. Interest on (e) above from February, 2017 until payment in full.
 - g. In the alternative, an order be issued that the registration of the joint tenancy on 11th August, 2015 in the names of the defendants and Joses Marangu Muthamia Marete (deceased) shall take effect as a tenancy in common.
 - h. Costs of the suit and interests at court rates.
 - i. Any other relief that the Honourable court may deem fit to grant.
2. The plaintiffs pleaded that at all times material to the suit JOSES MARANGU MUTHAMIA MARETE (deceased) was the registered sole proprietor of land parcel number ABOGETA/U-KITHANGARI 523 measuring approximately 19.25 hectares (hereinafter referred as the suit property).
 3. The plaintiffs averred that before the demise of Joses Marangu Muthamia Marete on 23rd June 2016, the deceased transferred various properties to the plaintiffs and the defendants while the suit property was to be put under trust for the benefit of the family.
 4. The plaintiffs averred that the 1st to 3rd defendants were given five (5) acres each of land in Ngobit, Nanyuki, one (1) acre each of land adjacent to the suit property, one(1) plot each at Kionyo Market while the 1st plaintiff was given land parcel number Nairobi/Block 114/87 measuring 0.013000 Ha and the 2nd, 3rd and 4th plaintiffs were given land parcel number Abogeta/L-KIthangari/1724 measuring 2.85Ha.
 5. The plaintiffs further averred that Joses Marangu Muthamia Marete (deceased) held various meetings with his family. That there were eight family meetings held in total and in every meeting, minutes were detailed for all the meetings held on 15th February, 2014, 18th April, 2014, 5th July, 2015, 19th October, 2014, 10th January, 2015, 19th October, 2015 and 4th June, 2016.
 6. The plaintiffs averred that during the said meetings, it was the wish of the said deceased that the suit property be held in trust for the benefit of his whole family and for gainful use of the said land. That during the family meeting held on 4th June, 2016, the issue of the suit property being put under trust was discussed thus it is mysterious how the suit property was registered in the joint names of the defendants on 11th August, 2015 which registration was done when the family meetings were ongoing and the same was not disclosed by the defendants to the family during the meetings that predate the said registration.
 7. The plaintiffs stated that they and the defendants have for decades lived on the suit property on a portion where their deceased father Joses Marangu Muthamia Marete had built a matrimonial home while the remaining portion was utilized in common for farming of tea, cabbages, onion and other crops for the benefit of the deceased's family and to date the 4th defendant lives on the portion where the said matrimonial home is built.



8. The plaintiffs averred that they used to share profits from the proceeds realized from farming with the defendants which proceeds were being banked at Yetu Sacco Limited. That after the demise of the said deceased on 23rd June, 2016, the 1st to 3rd defendants became hostile to the plaintiffs over the management of the land and farming activities that were being carried out on the suit property to wit tea, cabbages, onions and carrots farming among other crops.
9. The plaintiffs averred that on 23rd June, 2016 after their father passed away, they discovered that the defendants had caused the said land to be registered in their joint names without the consent and/or knowledge of the plaintiffs. The plaintiffs contended that the registration of the suit property as joint tenancy in the names of the defendants on 11th August 2015 was done unlawfully as no leave of the court was obtained, and that the 4th Defendant had no capacity to contract due to her mental infirmity as she was diagnosed with dementia sometime in 2014 and to date she suffers from severe dementia.
10. The plaintiffs itemized the particulars of illegality, irregularity and procedural impropriety by the defendants as causing the suit property to be registered as a joint tenancy without the consent/and knowledge of the plaintiffs, causing the suit property to be registered as a joint tenancy without the leave of court, lack of capacity of the 4th defendant to transact due to her mental infirmity being a person suffering from dementia, taking advantage of the deceased who was very old, 89 years, by secretly causing the registration of the suit property into a joint tenancy and discriminating the plaintiffs based on their gender.
11. The plaintiffs averred that they attempted to resolve the land dispute before Kaguru Deputy County Commissioner but the defendants were adamant and maintained their stand that the plaintiffs are not entitled to the suit property. That on 24th November, 2016 the plaintiffs lodged a restriction over the suit property which was registered on the same day.
12. The plaintiffs stated that sometime in March 2022, the Defendants secretly without informing the plaintiffs appeared before the Deputy County Commissioner and falsely informed him that the family had resolved the land dispute, yet the plaintiffs had not attended any meeting that resolved the dispute. That on 23rd March, 2022 the Land Registrar – Meru, removed the restriction that had been lodged by the plaintiffs vide Kaguru Deputy County Commissioner’s letter dated 3rd March, 2022.
13. The plaintiff’s averred that Joses Marangu Muthamia Marete (Deceased) had a personal account with Yetu Sacco Limited Account Number 1302 and the 4th defendant was a signatory. That after the demise of the said deceased, due to the mental condition of the defendant, the plaintiffs and the 1st to 3rd defendants resolved that the 2nd plaintiff and the 2nd defendant be mandated to operate the said account along with the 4th defendant.
14. The plaintiffs stated that the 1st and 3rd defendants have all along been aware of the mental condition of the 4th defendant as a person suffering from severe dementia and have always been supportive of her medical treatment. That the 1st and 3rd defendants took advantage of the deceased who was of an advanced age, aged 89 years and when he was in the process of changing his name on the title to include his other names namely Marangu Muthamia Marete since the title deed initially had the name Joses Muthamia to cause registration of the joint proprietorship in their favor.
15. The plaintiffs averred that the suit land is a family land that was being utilized in common by both parties herein, thus there exists a customary trust which is an overriding interest over the suit property.
16. The plaintiffs averred that pursuant to Section 91(8) of the *Land Registration Act* No. 3 of 2012, on and after the effective date of the said Act, except with leave of the court, the only joint tenancy that was capable of being created was between spouses, and that any joint tenancy other than that between



spouses purported to be created without leave of the court shall take effect as a tenancy in common. The plaintiffs averred that the defendants created the said joint tenancy on 11th August, 2015 without leave of the court contrary to Section 91(8) of the *Land Registration Act* No. 3 of 2012 (now amended) which was in force. That the 1st to 3rd defendants being the sons of the late Joses Marangu Muthamia Marete (deceased) who was the initial sole proprietor of the suit property, the joint tenancy created on 11th August, 2015 in the names of the defendants and the said deceased should take effect as tenancy in common.

17. The plaintiffs contended that the 1st to 3rd defendants have been hostile towards the plaintiffs by not involving them in the management of the land and the farming activities that are being carried out on the said land. That the actions of the defendants by creating the joint tenancy were geared towards curtailing the plaintiffs from having beneficial interests and ownership of the suit property, which actions amount to discrimination against the plaintiff's based on their gender, thus their actions are illegal and unconstitutional.
18. The plaintiffs further contended that the defendants' title to the suit property is illegal, invalid and cannot confer upon them any proprietary rights.
19. At the hearing, Rosemary Karoki Marangu Mburu, the 1st plaintiff herein testified as PW1. She stated that she lives in Ngong. She adopted her witness statement dated 19th July 2022 and filed in court on 20th July, 2022 as her evidence in chief. She also produced the documents in the plaintiff's list and bundle of documents dated 19th July 22 as P. Exh. 1- 26 respectively and was cross-examined and re-examined.
20. PW1 stated that her sister Susan Kiende Marangu the 4th defendant herein lived on the suit land from the year 2013 up to February 2023 taking care of their mother when the 1st and 2nd defendants herein who are their brothers chased her away. She stated that the 2nd defendant has been staying on the suit land from sometime in the year 2021. PW1 testified that their mother is now taken care of by an employee though she herself pays the hospital bills.
21. PW1 reiterated the averments contained in the plaint. She admitted that before his demise on 23rd June, 2016, their father had transferred various properties to the plaintiffs and the 1st to 3rd defendants. That the properties belonged to the deceased. PW1 stated that a property known as Nairobi/Block/114/87 was transferred to her in the year 2006. That the deceased could have chosen to give the property to anyone else.
22. PW2 stated that another property known as Abogeta/L Kithangari/1724 is in the name of the 2nd, 3rd and 4th plaintiffs. That the title is dated 3rd September, 2015 while their father died on 23rd June 2016. PW1 stated that she saw that title after the death of their father when they found it among documents the deceased had left in his house. That she was with all her siblings and no one raised an issue over the discovery of that title. She confirmed that their father transferred properties to all of them as per his own wish.
23. When shown the title deed dated 12th August, 2015 for the suit property in the joint names of their late father and the defendants herein, PW1 confirmed that the said title deed was also among the documents they found in the house of their father. She also confirmed that that title was issued earlier than the one of September, 2015. That by that time, their father was still alive. PW1 stated that she had a problem with the title for the suit property, hence the filing of this suit. PW1 stated that their problem (as plaintiffs) is that their names are not in the title deed for the suit property. She stated that that property was for everyone of them.
24. PW1 gave the value of the property in Nairobi that was given to her to be about Ksh. 2 Million. She stated that it is a vacant plot.



25. PW1 stated that according to the minutes in their bundle of documents, their father was the chairman when he was aged between 88 and 90 years and that he died at the age of 90 years. That their father was able to chair the meetings and knew what he was doing and often attended the meetings unaccompanied by anyone. PW1 stated that it was not possible for their father to be misled. That the titles were issued around that period.
26. PW1 stated that during those meetings, their father explained to them the need to put down the names and identity cards against the property that was transferred to each one of them. PW1 stated that she knew the names in the titles after the demise of their father, but admitted that the properties were subject to discussions in their family meetings where she was the secretary and the previous minutes used to be confirmed in subsequent meetings.
27. PW1 confirmed that the account for tea proceeds that was in the names of their father, the 2nd plaintiff, Joses Marete and the 3rd defendants was closed in the year 2017 and the amount that was there shared equally among the family members. PW1 stated that their father willingly distributed properties to all of them and no one complained, except the dispute over the suit land. According to PW1, the suit land was not among the properties that were transferred by their father before his demise. That her 3 brothers did not reveal to them that they were in a joint tenancy with their father and mother.
28. Kallen Kathambi Kaimenyi, the 2nd plaintiff herein testified as PW2. She adopted her witness statement dated 19th July, 2022 as her evidence in chief and was cross-examined. PW2 stated that she was born and brought up in the suit land. That her brothers do not live in the land except the 2nd defendant who came around 2021. She stated that her grandmother called Munyange was buried on the suit land.
29. PW2 stated that she lives in Mitunguu while the suit land is at Kithangari. That their mother lives in the suit land together with one of their brothers, Geoffrey Kimathi, the 2nd defendant herein whom she stated had been given his own land. She stated that they are free to visit their mother, but added that her brothers had chased away one of her sisters who was taking care of their mother.
30. PW2 also stated that she first saw the title to the suit land after the demise of their father. She stated that before her father died, he gave her land elsewhere and which is different from the one she lives in. PW2 stated that they decided to sell the land that she was given and divided the proceeds so that her sister, Susan gets somewhere to construct a house in. That they did not share the proceeds with their brothers.

Defendants' Case

31. The defendants filed their statement of defence dated 27th October, 2024 wherein they denied the plaintiff's claim. They admitted that the parties are blood siblings as the plaintiffs are sisters to the 1st – 3rd defendants while the 4th defendant is their mother and widow to Joses Marangu Muthamia Marete (deceased)
32. The defendants admitted that the deceased was the registered proprietor of the suit property and it is the 4th defendant's matrimonial home.
33. The defendants averred that it was the deceased who had registered the defendants as joint tenants of the suit property before his demise. That although the 4th defendant had been diagnosed with dementia, it only got worse after the death of her husband in 2016 and that prior to that, she was okay. Further, they averred that the suit property was registered in the defendants' names as survivors to the joint tenancy as by the law. That the suit property had already been registered as jointly owned at the demise of their father and not tenants in common and so there was no need to seek leave of the court



- after their father's death. The defendants denied the particulars of illegality, irregularity and procedural impropriety levelled by the plaintiffs against them.
34. The defendants further averred that during the registration of joint ownership in 2015, the 4th defendant was able to transact as her severe dementia only happened after the demise of her husband in 2016, but prior to that, she had the capacity to contract. The defendants also denied that they took advantage of their father's old age and averred that at the time of his death, the deceased was in near perfect mental health and sound mind.
 35. The defendants averred that they have always been in occupation of the suit property whose proceeds are used to take care of the 4th defendant who is ailing and also the 1st – to 3rd defendants who are jobless and with families to take care of. The defendants further averred that the reason why the DCC Meru resolved to have the restriction on the suit property removed is because he was informed of the joint ownership of the property which was way before the restriction was registered and that the DCC realized that there could be no family dispute to a property in joint ownership of the defendants as it could not be available for further transmission. That under Section 60 of the Land Registration Act, upon proof of death of a joint proprietor, the registrar deletes the name of a deceased from the register by operation of law and transmits it to the survivors who in this case are the defendants. The defendants contended that they exclusively own the suit property and argued that the plaintiffs lack locus standi to challenge any matters arising from the suit property having not been joint tenants. The defendants want the suit dismissed with costs.
 36. The defendant called 3 witnesses. DW1 was Adiel Gitobu Marangu, the 1st defendant herein who adopted his witness statement dated 12th July, 2023 as his evidence -in- chief and apart from the photos listed as document number 8, he produced the documents in the defendants list of documents dated 12th July, 2022 as D. Exh. 1 to 9 respectively.
 37. DW1 stated that the title for the suit property which he produced as D. Exh. 1 is in the names of his father Josés Marangu Muthamia Marete (deceased), their mother (4th defendant herein) his brother Joseph Kaburu Marangu (deceased), his younger brother, Geoffrey Kimathi Marangu (4th defendant) and himself. He stated that the title is dated 12th August, 2015 while their father died on 23rd June 2016 and therefore the title existed before the demise of their father. He stated that he became aware of the said title after the death of their father when they found it among his belongings.
 38. DW1 testified that the second title deed dated 22nd September, 2016 in respect of the same land (D. Exh. 2) and in which they stay in registered in the same names, except their late father's name. He stated that they were issued with the said title by the land registrar after they signed an affidavit and produced the death certificate of their late father. DW1 stated that he lives on the suit property together with his brother, Geoffrey Kimathi Marangu and their mother. That each of the plaintiffs were married away and that is where they live except the 4th plaintiff who he stated had disagreed with her husband, and after the death of their father they sold the property that she was given and bought another property where she lives. DW1 stated that apart from the suit property, their father had other properties which he gave to each of the plaintiffs and defendants. He denied having any enmity with the plaintiffs whom he stated have always accessed the suit property as they visited their mother.
 39. DW1 stated that he carries out farming on the suit property but the 2nd defendant lives thereon. He further stated that they used to have family meetings with their father, even when they were young children. That they had one or two meetings in the year 2014 and another in 2016, but no minutes were taken.



40. DW1 stated that their mother started experiencing dementia some 3 months after their father's death but had a problem of arthritis earlier though he had no documents to prove that. He stated that their father once told them he had a problem with the names in the title of the suit land and he changed it. The witness denied being involved in the change of name.
41. DW1 stated that their father did not donate any land to Ririra family but donated 2 acres to PCEA Church who are in occupation but the title is yet to be issued because of this suit. He stated that sometime in 2014, their father asked them their identification documents and photographs which they gave out though they did not know the purpose. DW1 denied being given land in Ngobit, Laikipia County. He stated that sometime in 1995, their father called him and his two brothers and told them that he was a director of a land buying company in Ngobit and asked them to buy shares if they were interested, which he stated they did. That he did not produce a title for that land because it is not part of the suit herein. D.W 1 stated that the 4th plaintiff has lived on the suit land from the year 2016 to 2022 after they employed her to take care of their mother and paid her Kshs. 12,000/= per month from the family account, but when it was exhausted, the 1st and 2nd defendants paid her, though D.W 1 had no documents to support that. That when the 4th plaintiff asked to be paid Kshs. 30,000/= they could not afford. That in 2022, the 2nd defendant came for retirement and was living on the suit land.
42. D.W 2 was Geoffrey Kimathi Marangu. He adopted his statement dated 12th July, 2023 as his evidence in chief. He stated that he lives on the suit property together with their mother where they also carry out farming activities. That the plaintiffs occasionally visit their mother without any problem from anyone. He stated that their father had other parcels of land which he gave out to his children, including the plaintiffs. That they shared the money that was in an account belonging to their father. D.W 2 stated that he was given land next to the suit land. He denied chasing the 4th plaintiff away from the suit property.
43. D.W 4 was Julius Mbatavo who adopted his statement dated 12th July, 2023 as his evidence in chief and was cross- examined and re-examined. He stated that they belonged to the same clan with the deceased and they grew up together. He stated that the deceased who was a teacher and later a chief bought the suit land and did not inherit it. He stated that he was present in a meeting attended by all the parties herein and they resolved that everybody be contented with the share given by the deceased and not interfere with any other.

Plaintiff's Submission

44. The plaintiffs filed submissions dated 21st August, 2024 through the firm of E.M Ouyari & Co. Advocates wherein they gave a summary of both the plaintiffs' and the defendants' cases. The plaintiffs identified the issues for determination to be whether the plaintiffs have locus standi, whether the registration of the suit property as a joint proprietorship in the names of the defendants and the deceased was done lawfully, regularly and procedurally, if there exist a customary trust over the suit property, whether the plaintiffs are entitled to the prayers sought and who should bear the costs of the suit.
45. Regarding the first issue, the plaintiffs' counsel relied on the case of Law Society of Kenya Vs Commissioner of Lands & others, Nakuru High court Civil Case No. 464 of 2000 and Alfred Njau and others Vs City council of Nairobi (1982) KAR 229 and submitted that the plaintiffs' case challenges the joint tenancy over the suit property which was created and registered on 11th August 2015 while the suit property initially belonged to their deceased father who was the sole owner/proprietor. That since the registration of the suit property into a joint tenancy is under challenge, the court has to determine if the registration was done lawfully, regularly and procedurally. That therefore the defendants cannot



- purport to argue that the plaintiffs lack locus standi yet the impugned creation and registration of the joint tenancy is yet to be determined by the court. The plaintiffs submitted that they are children of the deceased who was the sole owner of the suit property and that they used to live on the suit property where they were raised and their mother's matrimonial home is constructed on. That consequently, they have beneficial interest over the suit property and locus standi to institute the suit.
46. Regarding the second issue, it was submitted on behalf of the plaintiffs that the registration of the suit property as joint tenancy in the names of the defendants on 11th August 2015 was done unlawfully, as no leave of the court was obtained. That the [Land Registration Act](#), No. 3 of 2012 (now amended) which came into effect on 2nd May 2012 was applicable. The plaintiff's counsel cited the then Section 91 (1) of the Land Registration 2012 which was deleted and a different section introduced pursuant to Section 29(2) (8) of the Land Laws (Amendment) Act 2016 and submitted that the 1st to 3rd defendants are not spouses of the deceased but are his sons, and therefore in accordance with the then Section 91(8) of the [Land Registration Act](#), 2012, the purported joint tenancy created by the defendants without seeking leave of the court should take effect as tenancy in common. The plaintiffs' counsel relied on the case of Karungu (suing as Administrator of the Estate of John Ngige Karungu – (deceased) Vs Masiva & another (Environment & Land case 540 of 2016) [2023] KEELC 1984(KLR) and Mathiu Vs Kirimi (sued as the legal representative of the Estate of Moses Kirimi (deceased) (Environment & Land Case E020 of 2021 [2023] KEELC 17965 (KLR).
47. It is the plaintiffs' submissions that the deceased was not secretive to his family and having shared and transferred other properties to all the parties herein as confirmed by all the parties during the hearing of the suit, he would have equally made it known to all the parties in the family meetings that he was to transfer the suit property to the defendants to own it as joint proprietors the same way everyone was aware of the other properties transferred by the deceased. The plaintiffs contented that the intention of the deceased was to have the suit property registered as a trust and to be utilized by his family in common. The plaintiffs referred to the minutes of the family meetings held on various dates. The plaintiffs submitted that during the last family meeting held on 4th June, 2016, the issues of the suit property being put under trust was discussed and thus it was mysterious how the suit property was registered in the joint names of the defendants on 11th August 2015 when the family meetings were ongoing and the same was not disclosed by the defendants during those family meetings, including the meetings that predate the said registration. They questioned why the deceased who had transferred other properties while he was alive did not disclose the transfer of the suit property into a joint tenancy. The plaintiffs also questioned why common farming could be done and the profits shared among all the parties and an account be opened on 27th January, 2017 by the parties and have signatories representing the plaintiffs and the defendants and the defendants contention that they came across the joint title after the demise of the deceased. The plaintiffs concluded that the deceased did not create the joint tenancy in favor of the defendants. The plaintiffs relied on the case of Esther Kabugi Njuguna vs Martha Chebet & 3 others [2020] eKLR and cited Sections 43 (2) and 92(1) (2) and (3) of the [Land Registration Act](#), 2012.
48. The plaintiffs further submitted that the 4th defendant had no capacity to contract due to her mental infirmity as she was diagnosed with dementia sometime in 2014 and to-date she suffers from severe dementia. The plaintiffs' counsel relied on the case of Dhalay Vs Republic (1995 – 1998) EA 29. It was also submitted that the 1st to 3rd defendants did not adduce evidence to prove that they are in occupation of the suit property and that the photographs are inadmissible, and the plaintiffs relied on the case of Amayi V Kuya (Environment & Land case E045 of 2021) [2023] KEELC 18836 (KLR). It was submitted by the plaintiffs that the creation and registration of the joint tenancy was not done lawfully, regularly and procedurally.



49. As to the issue whether there exist a customary trust over the suit property, the plaintiffs cited Section 28 (b) of the [Land Registration Act](#) which provides for customary trusts and states that they have an overriding interest. The plaintiffs relied on the case of Kanyi V Muthiora (1984) KLR 712, Mbui [CA No. 281 of 2000](#) and Issack Kieba M'Inanga vs Isaaya Theuri M'Linturi & another [2018] eKLR.
50. The plaintiffs stated that the parties' grandmother, Ciotujuju used to live with the deceased in the suit property and was buried therein as confirmed by P.W 2 and D.W 3. That the suit property belonged to the deceased who used to live with his parents and got registered as the sole proprietor in 1965. That there was no evidence adduced to support the allegations by D.W 3 that the suit property was bought. It is therefore the plaintiff's submission that the suit property is ancestral/family land that was being utilized in common by both parties herein, thus there exists a customary trust which is an overriding interest over the suit property.
51. The plaintiffs urged the court to allow the prayers sought since they have proved their claim against the defendants on a balance of probability. The plaintiffs relied on the case of Republic Vs Kisumu District Lands Officer & another [2010] EKLR, Mombasa Appeal No. 98 of 2016 Super Nova Properties Limited and another V District Land Registrar Mombasa & 2 others, Kenya Anti-Corruption Commission & 2 others (interested parties) [2018] eKLR, Kenya Power & Lighting Co. Ltd Vs Sheriff Molana Habib [2018] eKLR and Omega Enterprise Kenya Limited Vs Eldoret Sirikwa Hotel Limited & others [2001] eKLR. The plaintiff also cited Order 31 Rule 13 of the Civil Procedure Rules and submitted that they are entitled to mesne profits of Kshs. 1,777,442/62 for the years 2017 to 2024 calculated as follows-;
- Annual tea bonus of Kshs. 1,555,262.35 divided by 7 people, that is the plaintiffs and 1st to 3rd defendants multiplied by 8 years.
52. The plaintiffs submitted that it is trite law that costs follow the event and submitted that having succeeded against the defendants they are entitled to the costs of the suit. The plaintiffs relied on the case of [Supermarine Handling Services Ltd Vs Kenya Revenue Authority Civil Appeal No. 85 of 2006](#).

Defendants' Submission

53. The defendants also gave a summary of the case and the evidence adduced. The defendants urged the court to protect the sanctity of their certificate of title produced as D exh 1&2 and cited section 24, 25(a) and 26 of the [Land Registration Act](#). They also urged the court to find that the registration of joint tenancy as valid and without fraud or misrepresentation. The defendants submitted that none of the vitiating factors under Section 26(1) of the LRA exists in the registration of the title. The defendants further submitted that their evidence remains uncontroverted. They submitted that the restriction put on the land by the plaintiffs in 2016 was removed in 2022 pursuant to Section 78 of the LRA after the registrar was satisfied that there was no dispute over it.
54. The defendants further submitted that the claim for Mesne profits on the basis of tea bonuses cannot hold since the tea bushes were planted by the deceased and the 1st defendant. That the plaintiffs neither planted nor did any common farming in the suit property as they had long moved out of the property after getting married. The defendants submitted that the plaintiffs have failed to discharge their burden of proof on a balance of probability and urged the court to dismiss the suit with costs.



Analysis And Determination

55. This court has carefully considered the pleadings, the evidence and the submissions filed by the parties to buttress their assertions. I have also considered the legal authorities proffered by the parties. The court identifies the following issues for determination:-
- i. Whether the plaintiff have locus standi.
 - ii. Whether the registration of the suit property as a joint proprietorship in the names of the defendants and the deceased was done lawfully, regularly and procedurally.
 - iii. Whether the plaintiffs proved the existence of a customary trust over the suit property.
 - iv. Whether the plaintiffs are entitled to the prayers sought.
 - v. Who should bear the costs of the suit?

Whether the plaintiffs have locus standi

56. In their defence the defendants contended that the plaintiffs lack locus standi to challenge any matters arising from the suit property having not been joint proprietors. In *Law Society of Kenya Vs Commissioner of Lands & 2 others* (supra) it was held that-;

“The first point to be decided is whether the plaintiff has the necessary locus standi to file and prosecute the suit. Locus -standi signified a right to be heard. A person must have a sufficiency of interest to sustain his standing to sue in a court of law. That was the holding in *BV Narayana Reddy Vs State of Kamataka Air 1985* Kan 99, 106 (*the Constitution* of India, AR D 226). I adopt the same as a correct proposition of the law and I so hold.”

57. Further, in the case of *Alfred Njau and others Vs City Council of Nairobi* (Supra), it was held-;

“The term Locus standi means a right to appear in court and conversely to say that a person has no locus standi means that he has no right to appear or be heard in such and such proceedings.”

58. In this case, the plaintiffs are the children of the deceased. The defendants are their mother and brothers. The plaintiffs are challenging the registration of the suit property which was initially owned by the deceased, in the joint names of the defendants and the deceased and later in the names of the defendants. The plaintiffs are also claiming the existence of customary trust over the suit property. In my considered view the plaintiffs have shown that they have an interest in the suit property and therefore have locus standi to institute the suit.

Whether the registration of the suit property as a joint proprietorship in the names of the defendants and the deceased was done lawfully, regularly and procedurally

59. It is not in dispute that *Josef Marangu Muthamia Marete* (deceased) who was father to the plaintiffs and the 1st to 3rd defendants and husband to the 4th defendant, was the registered sole proprietor of the suit property together with other properties. From the evidence on record, the suit property was registered in the name of the deceased on 27th May, 1965. On 15th October, 2014 and on 11th August, 2015 a joint tenancy was registered over the suit property. The deceased died on 23rd June 2016. It is also not in dispute that before his demise, the deceased had distributed and transferred his other properties to the plaintiffs and the defendants. In particular, the deceased transferred the property known as



Nairobi/Block 114/87 to the 1st plaintiff, and another property known as Abogeta/L.Kithangari/1724 to the 2nd, 3rd and 4th plaintiffs jointly. Those transfers and registration, including for the suit property, were done by the deceased before his demise. The parties herein have all adduced evidence to the effect that the deceased held various meetings with his family. In their evidence both the plaintiff and the defendants stated that they came to learn the existence of the titles for the suit property after the demise of their father. The plaintiffs also corroborated the defendants' assertions when they pleaded and testified that it was only after the death of their father that they discovered that the suit land had been registered in the joint names of the deceased and the defendants on 11th August 2015. Whereas the plaintiffs allege that the joint tenancy created was not in accordance with the then Section 91(8) of the Land Registration Act, 2012 which required leave of court, the plaintiffs in my view have not proved that the said registration was done by the defendants and not the deceased. It is clear that the joint tenancy over the suit property was created and registered on 15th August 2015 while the deceased was still alive and indeed transferred his other properties to the plaintiffs and the defendants. In my humble opinion the proper person who could answer whether the said joint tenancy was lawful or not is the deceased himself. All the parties herein admit that they only discovered that the title of the suit property was in joint tenancy after the demise of the deceased. In this case, the defendants have been sued in their own personal capacities and not as the legal representatives of the estate of the deceased. It is therefore my finding that the registration of the joint tenancy over the suit property was done by the deceased on his own volition and is the only person who could answer the regularity or otherwise of the registration, and not the defendants herein. The plaintiffs did not adduce any evidence to support their claims that the defendants are the ones who caused the said registration and not the deceased. In addition, the plaintiffs never called the land Registrar as a witness to shed light on who effected the transfer from the deceased to the joint names of the deceased and the defendants.

Whether the plaintiffs proved the existence of a customary trust over the suit property

60. It is the plaintiffs' case that the suit property is ancestral land that is being utilized in common by both parties and thus there exists a customary trust. On the other hand, the defendants' case is that the property was not ancestral land. That the land was acquired through purchase by the deceased together with other properties. The legal burden to prove the existence of trust rests with the plaintiffs who are asserting their right under customary trust.
61. Customary trust was well explained by the Supreme Court in the case of *Isack Kieba M'Inanga Vs Isaaya Theuri M'Linturi & another* (Supra) 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 Vs 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 family 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”.
62. It is not in dispute that the plaintiffs and the defendants herein are related by virtue of being sisters and brothers and their mother. The deceased was husband to the 4th defendant and father to the plaintiff and the 1st to 3rd defendants. The suit property belonged to the deceased. The court has perused the titles over the suit land. The deceased got registered as the sole proprietor on 27th May 1965. It is also common ground that the deceased owned other various properties which he distributed and transferred to the plaintiffs and to the 1st to 3rd defendants. The suit property was registered in joint tenancy in the names of the deceased and the defendants on 11th August 2015. Following the demise of the deceased on 23rd June 2016, the land registrar deleted the name of the deceased and issued a title in the names of the defendants herein as survivors of the joint tenancy on 22nd September, 2016.
63. From the material on record, the deceased owned various properties, including the suit property. In what appears to be a gift inter vivos, the deceased distributed and transferred all his other properties to both the plaintiff and the 1st to 3rd defendants who are his children and left out the suit property. Instead, the evidence on record shows that the suit land was transferred and registered and title issued in the joint names of the deceased and the defendants on 12th August 2015. It was upon his demise on 23rd June 2016 that the deceased’s name was deleted and title issued on 22nd September, 2016 bearing the names of the defendants as the survivors of the joint tenancy. In light of the foregoing, it is clear that the suit land together with other properties were originally owned by the deceased, and therefore may be regarded as family land. However, what has emerged from the material on record is that the deceased as original owner of the properties shared out the same when he was alive and distributed the same to both the plaintiffs and the defendants. In my opinion, the deceased as the registered owner of the suit land had the right to transfer and register it in his name jointly with the defendants just as he did to other properties which he distributed and transferred either to the plaintiffs or the defendants. The plaintiffs in my view, cannot purport that it was only the suit property that was family property. Even the properties that were transferred to the plaintiffs originally belonged to the deceased. The owner, in my view, while still alive had control over this properties and whoever was gifted by the deceased owner could not be regarded as holding the same in trust for others, unless expressly stated. The distribution and transfer by the deceased of the various properties were gifts done inter vivos and I do not think that any trust was intended. In any case, the plaintiffs as beneficiaries of other properties of their deceased father have not alleged that what they got transferred and registered in their names are also held in trust for the other family members, including the defendants. In my view, the claim of trust by the plaintiffs over only one property of the deceased cannot succeed, especially when they themselves got contended with what was distributed and transferred to them, and some of which they have even disposed of and some they still own. The court has also taken note that one of the beneficiaries of the joint tenancy over the suit property is the 4th defendant herein who is the widow of the deceased and the mother to the plaintiffs and the 1st to 3rd defendants. Evidence was led that the proceeds from the suit land are being used to take care of the 4th defendant who still lives on the suit land. Accordingly, it is my finding that the plaintiffs have failed to discharge their burden of proof on a balance of probability and their claim for trust fails. If the deceased intended to have the suit property held in trust, he would have done so at the time he was distributing and transferring his various properties.
64. Consequently, I am not satisfied that the plaintiffs have on a balance of probability proved their case and are not entitled to the orders sought. In the result, the plaintiffs’ suit is dismissed.



65. Although costs of an action or proceedings are at the discretion of the court and the general rule is that costs shall follow the event in accordance with Section 27 of the *Civil Procedure Act*, in view of the close relationship of the parties, I order that parties bear their own costs of the suit.

66. Orders accordingly.

DATED SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF DECEMBER, 2024

In the presence of;-

Court Assistant – Tupet

No appearance for plaintiff

No appearance for defendnant

C.K YANO

JUDGE

