



**Kinyanjui & another v Kinyanjui (Environment & Land Case
43 of 2018) [2023] KEELC 17785 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 17785 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 43 OF 2018
YM ANGIMA, J
FEBRUARY 23, 2023**

BETWEEN

NYOKABI KINYANJUI 1ST PLAINTIFF

EUNICE MUMBI THIONGO 2ND PLAINTIFF

AND

JOHN NJENGA KINYANJUI DEFENDANT

JUDGMENT

A. The Plaintiff's Claim

1. By a plaint dated 24.07.2018 the Plaintiffs sought the following reliefs against the Defendant:
 - a. A declaration that the Defendant holds land reference No. Nyandarua/Mkungi/145 and/or the subdivisions thereof being Nyandarua/Mkungi/5022 all the way to 5024 both numbers inclusive in trust for himself and for the Plaintiffs.
 - b. An order for cancellation of the title deeds for the subdivision of L.R. Nyandarua/Mkungi/145 being Nyandarua/Mkungi/5022 all the way to 5024 both numbers inclusive to have them revert to the original shape and size of their mother title and to allow for equal subdivision of the same
 - c. Subject to (b) above, an order directing the Defendant to subdivide the whole of land reference No. Nyandarua/Mkungi/145 measuring 11.2 ha into 3 (three) equal portions and transfer 2 (two) of the said portions to the Plaintiffs respectively, failure to which an order does issue that the Deputy Registrar of this Honourable Court executes all relevant documents in respect of the sub-division and registration of the land parcel No. Nyandarua/Mkungi/145 measuring approximately 11.2 ha.



- d. An order of permanent injunction, restraining the Defendant, his family members, representatives, employees, servants, agents and anyone else acting for, on behalf of, through or at the behest, direction or instructions of the Defendant, and/or claiming under the Defendant from evicting and/or in any way interfering with the Plaintiffs' quiet use, occupation, access, and/or share of L.R. No. Nyandarua/Mkungi/145 measuring approximately 11.2 ha.
 - e. Costs of this suit and interests thereon at court's rate.
2. The Plaintiffs pleaded that their late father, Kahia Turacha (the deceased) was allocated Plot. No. 145 – Mkungi Settlement Scheme which was later registered as Nyandarua/Mkungi/145 in 1963 or thereabouts. They pleaded that after the demise of the deceased in 1975 the Defendant, who was their brother, wrote a letter to the Settlement Fund Trustees (SFT) informing them that it was the wish of the deceased that he should be the sole beneficiary of Plot 145.
 3. The Plaintiffs further pleaded that the Defendant had secretly and without involving them undertaken succession proceedings for the estate of the deceased whereby he was issued with a “certificate of succession” which facilitated his registration as the sole proprietor of the suit property. It was further stated that upon his registration as proprietor the Defendant sub-divided the suit property into Title Nos. Nyandarua/Mkungi/5022 – 5024 and had them registered solely in his name.
 4. It was the Plaintiffs' further pleading that even though they had been residing on the suit property as their family land the Defendant had demanded that they vacate and threatened them with eviction therefrom. It was the Plaintiffs' case that all attempts to resolve the dispute before the Land Registrar and the District Officer had failed since the Defendant had offered them some rocky land elsewhere not suitable for farming as alternative land which offer they had declined. The Plaintiffs contended that as children of the deceased, they were entitled to a share of the suit property and that the Defendant was holding the land on his own behalf and in trust for them.

B. The Defendant's Response and Counterclaim

5. The Defendant filed a defence and counterclaim dated 27.08.2018 in response to the suit. By his defence, the Defendant pleaded that the suit property was to be transferred to the deceased only upon payment of loans due to SFT. He asserted that the deceased had failed to settle the loans hence he paid the same in consequence whereof the suit property was transferred to him.
6. The Defendant pleaded that the suit was bad in law because the certificate of succession issued to him was still valid since it had not been set aside or varied. He pleaded that he was the registered proprietor of the suit property and disputed that he was holding it in trust for the Plaintiffs as alleged or at all.
7. The Defendant further pleaded that although he had offered alternative land to the Plaintiffs they had refused to take his gratuitous offer and insisted on residing on the suit property which solely belonged to him. He therefore prayed for dismissal of the Plaintiffs' suit with costs.
8. By his counterclaim, the Defendant reiterated the contents of the defence and pleaded that he was the sole legal proprietor of the suit property. He pleaded that the Plaintiffs were wrongfully and unlawfully occupying the suit property hence they were trespassers. The Defendant consequently sought the following reliefs in the counterclaim against the Plaintiffs:
 - a. An order of eviction of the Plaintiffs from title No. Nyandarua/Mkungi/145.
 - b. An order of vacant possession of the suit property.
 - c. General damages for trespass.



- d. Costs of the counterclaim.

C. The Plaintiffs' Reply and Defence to Counterclaim

9. The Plaintiffs filed a reply to defence and defence to counterclaim dated 11.09.2018. By their reply to defence, the Plaintiffs joined issue with the Defendant upon his defence. They denied that the suit was bad in law and denied that the deceased had failed to pay any loan due to SFT. They further pleaded that the suit property was transferred to the Defendant as a result of the demise of the deceased and not as a result of the alleged default in payment.
10. By their defence to counter-claim the Plaintiffs reiterated the contents of the plaint. They denied that their occupation of the suit property was unlawful and pleaded that the Defendant's counterclaim was only intended to disinherit them. They consequently prayed for dismissal of the defence and counterclaim with costs.

D. Summary of Evidence at the Trial

a. The Plaintiffs' Evidence

11. At the trial hereof, the 1st Plaintiff, Nyokabi Kinyanjui, testified on behalf of both Plaintiffs. She adopted the contents of her witness statement dated 24.07.2018 as her evidence in-chief and produced the documents in the Plaintiffs' list of documents as exhibits. Her evidence essentially mirrored the contents of the plaint. She maintained that the suit property originally belonged to the deceased and that the Defendant obtained its registration through succession proceedings in the District Magistrate's Court at Tulaga in Civil Cause No. 18 of 1978 without involving them as daughters of the deceased. It was the Plaintiffs' case that the Defendant was not the absolute owner of the suit property but he was holding it on his behalf and in trust for them.

b. The Defendant's Evidence

12. The Defendant testified on his own behalf as the sole witness. He adopted the contents of his witness statement filed in court on 28.08.2018. He also produced all the documents in his list of documents as exhibits. He conceded that he obtained registration of the suit property through succession proceedings. He further testified that he solely paid the outstanding loan for the suit property to SFT in consequence whereof he was issued with a title deed.
13. During cross-examination by the Plaintiffs' advocate, the Defendant stated that he did not involve the Plaintiffs in the succession cause since they were not living on the suit property. The Defendant further stated that the Plaintiffs were married at the material time. It was his evidence that he had hired a caretaker who was residing on the suit property.

E. Directions on Submissions:

14. Upon conclusion of the trial, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiffs' submissions were filed on 06.12.2022 whereas the Defendant's submissions were filed on 09.02.2023.

F. The Issues for Determination

15. The court has noted from the record that the parties did not file an agreed statement of issues for determination since they filed separate issues. Under Order 15 rule 2 of the Civil Procedure Rules, the court may frame issues from any of the following:



- a. The allegations contained in the pleadings.
 - b. The contents of documents produced by the parties.
 - c. The allegations made on oath by or on behalf of the parties.
16. The court has perused the pleadings, evidence and documents in this matter. The court is of the opinion that the following issues arise for determination:
- a. Whether the Defendant obtained registration of the suit property in his own right or through inheritance from the deceased.
 - b. Whether the Defendant is holding the suit property on his own behalf and in trust for the Plaintiffs.
 - c. Whether the Plaintiffs are trespassers on the suit property.
 - d. Whether the Plaintiffs are entitled to the reliefs sought in the suit.
 - e. Whether the Defendant is entitled to the reliefs sought in the counterclaim.
 - f. Who shall bear costs of the suit and counterclaim.

G. Analysis and Determination

a. Whether the Defendant obtained registration of the suit property in his own right or through inheritance from the deceased

17. The court has considered the evidence and submissions on record on this issue. The Plaintiffs contended that the Defendant acquired registration of the suit property through succession proceedings for the estate of the deceased without involving them. The Defendant, on the other hand, contended that although the deceased was the initial allottee he had failed to pay the loan and other charges due to SFT hence he was given a fresh and distinct offer by SFT in his own right and not by way of inheritance. The Defendant, therefore, considered himself as the absolute owner of the suit property.
18. It is evident from the material on record that the deceased was the initial allottee of the suit property. There is no evidence on record to demonstrate that the allotment was ever withdrawn for non-payment of any money due to SFT. There is abundant evidence on record to demonstrate that succession proceedings were undertaken before the District Magistrate's court at Tulaga which resulted in the issuance of a certificate of succession in favour of the Defendant.
19. The material on record shows that vide a letter dated 01.03.1979 the District Magistrate's Court Nyandarua District forwarded the certificate of succession for Plot No. 145 to the Director of Settlement at Nairobi. Vide a letter dated 05.06.1979 the Director of Settlement wrote to the Settlement Officer Kinangop Area as follows:

“ Re – Inheritance of Plot No. 145 Mkungu Scheme

You must have received a letter Ref.No. DMC/SUCC/18/78 of 1st March, 1978 from the District Court Tulaga, addressed to the office and copied to you.

It is noted from the certificate enclosed that Mr. John Njenga Kinyanjui was appointed the heir.



Enclosed herewith please find documents drawn in favour of his signature, of which, my copies should be returned together with the old documents for further action.”

20. The court is satisfied that on the basis of the material on record the Defendant did not obtain registration of the suit property on account of default on the part of the deceased but by reason of his death. The Director of Settlement clearly acted upon the certificate of succession which he understood appointed the Defendant as the heir of the suit property. The Defendant cannot turn round and claim that there was no connection between the certificate of succession and his acquisition of the suit property.

b. Whether the Defendant is holding the suit property on his own behalf in trust for the Plaintiffs

21. The court has found and held that the Defendant acquired the suit property by virtue of the certificate of succession as an inheritance from the deceased. The material on record further shows that the Plaintiffs were not involved in the succession proceedings. The Plaintiffs’ evidence was that they were not made aware by the Defendant of the succession proceedings before the District Magistrate’s Court in Tulaga at the material time. The Defendant testified that he did not involve the Plaintiffs because they were not residing on the suit property as they were married and staying with their husbands elsewhere.
22. The record of the succession proceedings indicates that the Plaintiffs were absent. There is no indication on record to show that they were notified of the proceedings. The witnesses who testified before the court stated that the deceased had daughters but that they were all married hence they were not considered for allocation of any share of the suit property. The issue of what would happen if any of the married daughters were to divorce and return home was not considered.
23. The Plaintiffs submitted that the circumstances of the Defendant’s registration gave rise to a customary law trust in their favour since as children of the deceased they were entitled to a share of the suit property just like the Defendant was. They relied upon the cases of Gathiba –vs- Gathiba Nairobi HCCC No. 1647 of 1984, Kanyi –vs- Muthiora [1984] KLR 712, and Mbui Mukangu –vs- General Mutwiri Civil Appeal No. 281 of 2000 among others in support of their submissions on the issue of trust.
24. The Defendant, on the other hand, submitted that the Plaintiffs had failed to demonstrate the existence of any trust. He submitted that he was the absolute owner of the suit property having solely paid the SFT loan. He further contended that vide a certificate of succession issued by the DM’s Court in Tulaga the court had declared that he would be the sole heir of the suit property. It was the Defendant’s submission that the said certificate had never varied or set aside hence it was binding upon the Plaintiffs.
25. The Defendant further contended that he had allowed the 1st Plaintiff to reside on part of the suit property purely on humanitarian grounds because she was sickly and had separated with her husband. The Defendant submitted that no trust of any nature could arise in the circumstances and that no evidence had been tendered to prove a customary trust. It was submitted that the existence of a customary trust was a question of fact which had to be proved through evidence and that the Plaintiffs had failed to tender sufficient evidence in that regard. The Defendant cited the case of Justus Maina Muruku –vs- Jane Waithira Mwangi [2018] eKLR in support of that submission.
26. The court is satisfied on the basis of the evidence on record that the suit property initially belonged to the deceased who was allocated the same by the SFT in 1963. The material on record shows that the Defendant obtained registration thereof through succession proceedings without involving the Plaintiffs who were also children of the deceased. The fact that the Defendant may have paid the



loan due to SFT could not terminate the Plaintiffs' interest in the suit property and confer absolute ownership upon the Defendant.

27. The court is not satisfied that the Plaintiffs are legally precluded from claiming their share of the property of the deceased on account of the certificate of succession issued by the DM's Court at Tulaga in Case No. 18 of 1978 – In the Matter of the Estate of Kahia Thurasha. The Plaintiffs were not parties to those proceedings because the Defendant never notified them of the proceedings in the first place. The same Defendant cannot turn round and argue that the Plaintiffs never challenged the certificate of succession issued in those proceedings. It would be impracticable to expect the Plaintiffs to re-open the succession proceedings concluded in 1979 for the purpose of staking their claim.
28. In the case of Mbui Mukangu –vs- Gerald Mutwiri (supra) it was held that possession and occupation of land was key in determining the existence of a customary trust. In the instant suit, there was contradicting evidence among the parties as to whether or not the Plaintiffs were in occupation of the suit property. However, in the Defendant's counterclaim he prayed for the eviction of the Plaintiffs and for vacant possession of the suit property. The court is of the opinion that the issue of possession is no longer a necessary ingredient of proving customary trust in view of the Court of Appeal decision in the case of George Mbiti Kiebia & Another –vs- Isaya Theuri M'Lintari & another [2014] eKLR which holding was upheld by the Supreme Court in Isack M'Inanga Kiebia –vs- Isaaya Theuri M'Lintari & Another [2018] eKLR.
29. In the latter case the Supreme Court of Kenya held, inter alia, that:

“In the foregoing premises, it follows that we agree with the Court of Appeal's assertion that “to prove a trust in land; one need not be in actual physical possession and occupation of the land.” A customary trust falls within the ambit of the proviso to Section 28 of the Registered Land Act, while the rights of a person in possession of actual occupation, are overriding interests and fall within the ambit of Section 30(g) of the Registered Land Act.

Although the respondents herein were not in possession or actual occupation of Parcel No. Njia/Kiegoi Scheme 70, both the High Court and Court of Appeal were entitled to enquire into the circumstances of registration, to establish whether a trust was envisaged. Since the two superior courts were satisfied that indeed elements of a customary trust in favour of the respondents pertaining to the parcel existed, we see no reason to interfere with their conclusions.”

30. The court is thus satisfied that the Plaintiffs have proved the existence of a customary trust and that the Defendant is holding a portion of the suit property in trust for the Plaintiffs. The suit property was the property of the deceased and he was residing there during his lifetime. There is no good reason why the Defendant would solely inherit the suit property to the exclusion of his sisters. The fact that they were married or they were not in actual physical possession would not be valid or legitimate reasons to exclude them from the suit property.

c. Whether the Plaintiffs are trespassers on the suit property

31. The Defendant pleaded in his counterclaim that the 1st Plaintiff's occupation of part of the suit property was unlawful and that it constituted trespass. His evidence at the trial was to the same effect. His case was that he was the absolute owner of the suit property hence the 1st Plaintiff had no right to occupy any part thereof. It was his further evidence that even after offering alternative land to the 1st Plaintiff at Gilgil, she had refused to vacate the suit property.



32. The court has already found and held that the Defendant obtained registration of the suit property through inheritance from the deceased who was the father of the 3 parties to the proceedings. The court has further found and held that the Defendant is holding the suit property on his own behalf and on behalf of the Plaintiffs. In the premises, the Plaintiffs are entitled to a share of the suit property hence they cannot be termed as trespassers.

d. Whether the Plaintiffs are entitled to the reliefs sought in the suit

33. The court having found that the Plaintiffs have an interest in the suit property and that the Defendant is holding part thereof on their behalf it would follow that the Plaintiffs are entitled to some of the reliefs sought in the suit. However, the court is of the opinion that the Plaintiffs are not entitled to the acreage sought.
34. The Plaintiffs sought to have the entire suit property sub-divided into 3 equal portions so that the 3 parties in the suit could share out the land to the exclusion of the other 3 married sisters who were not parties to the suit. So, if the other 3 siblings were to demand their share of the suit property how would they get it?
35. The court is of the opinion that if the suit property had been shared equally amongst the Defendant and the 5 daughters of the deceased each person would have obtained no more than 1.866 ha out of the 11.2 ha comprised in the suit property. The Plaintiffs should therefore be put in the same position they would have been if the suit property had been shared equitably in the succession cause of 1978. The Defendant may still continue holding the remainder of the suit property in trust for the other siblings who were not parties to the suit. Consequently, the court is inclined to grant each of the Plaintiffs 1.866 ha out of the suit property.

e. Whether the Defendant is entitled to the reliefs sought in the counterclaim

36. The reliefs sought in the counterclaim were based on the Defendant's perception that the 1st Plaintiff was a trespasser on the suit property. The court has already found and held that the 1st Plaintiff is not a trespasser on the suit property and that she is entitled a share of the suit property. In the premises, the Defendant is not entitled to the reliefs sought in the counterclaim, or any one of them.

f. Who shall bear costs of the suit and counterclaim

37. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap. 21). Accordingly, the successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See – Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. It is obvious from the material on record that all the parties herein are siblings. The court is thus of the opinion that the appropriate order to make in the circumstances is for each party to bear his own costs of both the suit and counterclaim.

h. Conclusion and Disposal Order

38. The upshot of the foregoing is that the court finds and holds that the Plaintiffs have proved their claim against the Defendant to the required standard. The court also finds and holds that the Defendant has failed to prove his counterclaim to the required standard. Consequently, the court makes the following orders for disposal of the suit and counterclaim:



- a. A declaration be and is hereby made that the Defendant holds land reference No. Nyandarua/Mkungi/145 and/or the subdivisions thereof being Nyandarua/Mkungi/5022 all the way to 5024 both numbers inclusive in trust for himself and for the Plaintiffs.
- b. An order is hereby made for cancellation of the title deeds for the subdivision of L.R. Nyandarua/Mkungi/145 being Nyandarua/Mkungi/5022 all the way to 5024 both numbers inclusive to have them revert to the original shape and size of their mother title.
- c. An order be and is hereby made directing the Defendant to subdivide Title No. Nyandrua/Mkungi/145 measuring 11.2 ha into 6 equal portions of 1.866 ha and transfer 2 of the said portions to the 1st and 2nd Plaintiffs respectively.
- d. In default of the Defendant's compliance the Deputy Registrar of the court shall execute all relevant forms, documents and instruments to facilitate the registration of the 1st and 2nd Plaintiffs as proprietors of their respective portions of 1.866 ha each.
- e. The order of permanent injunction sought is declined in view of the orders granted herein.
- f. The Defendant's counterclaim is hereby dismissed in its entirety.
- g. Each party shall bear his own costs of the suit and counterclaim.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 23RD OF FEBRUARY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Mathea for the Plaintiffs

Ms. Swaka holding brief for Mr. Njenga for the Defendant

C/A - Carol

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Y. M. ANGIMA

JUDGE

