



REPUBLIC OF KENYA



**Kimaru & 3 others v Kimaru (Environment & Land Case 647 of 2014)  
[2023] KEELC 769 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 769 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 647 OF 2014  
JO OLOLA, J  
FEBRUARY 16, 2023**

**BETWEEN**

**JOHN WACHIRA KIMARU ..... 1<sup>ST</sup> PLAINTIFF  
MICHAEL MURAGE KIMARU ..... 2<sup>ND</sup> PLAINTIFF  
JOSEPH MURAGE KIMARU ..... 3<sup>RD</sup> PLAINTIFF  
MURIITHI GACHAGIA ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**PAUL MURAGE KIMARU ..... DEFENDANT**

**JUDGMENT**

1. This suit was initially instituted on September 28, 1994 as Nyeri HCCC No. 334 of 1994. It was transferred to the Environment and Land Court and given its current reference number on 2<sup>nd</sup> December, 2014.
2. By a Plaint dated September 28, 1994 as amended on March 6, 2008, John Wachira Kimaru, Michael Kinyua Kimaru, Joseph Murage Kimaru and Muriithi Gathigia (hereinafter the Plaintiffs) pray for Judgment against Githua Murage (hereinafter the Defendant) as follows:
  - (a) A declaration that the Defendant is registered (as) proprietor of LR (No.) Magutu/Gatei/201 in trust for himself and one Paul Kimani Murage on the one hand and the Plaintiffs jointly on the other hand in equal shares;
  - (b) An order determining the trust;
  - (c) An order requiring the Defendant to transfer one half of LR (No.) Magutu/Gatei/201 into the Plaintiffs names jointly free from any encumbrances;



- (d) In the alternative and without prejudice a declaration that the Plaintiffs have jointly acquired title to one half of LR (No.) Magutu/Gatei/201 by adverse possession, and an order requiring the Defendant to transfer the same unto the Plaintiffs jointly free from any encumbrances; and
- (e) Costs of the suit and interest thereon at Court rates.
3. Those prayers arise from the Plaintiffs contention that the Defendant is their first cousin and uncle to the 4<sup>th</sup> Plaintiff. The Plaintiffs aver that the original Defendant is the registered proprietor of the said LR No. Magutu/Gatei/201 measuring approximately 4.5 acres and situated in Mathira Division, Nyeri (the suit property). It is their case that the suit property comprises the fragments of land that initially belonged to their grandfather – one Nderu Murage who died before the declaration of the State of Emergency in Kenya in 1952.
4. The Plaintiffs aver that their own father Kimaru Nderu consolidated the fragments of land and had them registered in the name of the Defendant whose father Murage Nderu had by then died, to hold the same in trust for the entire Nderu Murage family who included the Plaintiffs and the Defendant together with the Defendant's brother Paul Kimaru Murage.
5. The Plaintiffs further aver that after land consolidation and registration in 1959, the suit property was informally sub-divided into two equal portions. The Plaintiffs have been occupying one portion as of right since then while the Defendant and his said brother have occupied the other portion.
6. The Plaintiffs accuse the Defendant of breaching the trust by seeking to have the entire suit property registered in his name and his brother to the exclusion of the Plaintiffs and hence the prayers in the Plaint.
7. But in his Statement of Defence and Counter-claim dated November 24, 1994, the Defendant denies that the suit property belonged to the late Nderu Murage and or that it was the Plaintiffs' father who caused the Defendant to be registered as the proprietor of the suit property.
8. In addition, the Defendant denies the Plaintiffs' claim that they have been occupying a half portion of the suit property. It is his case that he had allowed the Plaintiff's father a bare licence to occupy a small portion of the suit land and as such the Plaintiffs and their father did not occupy the suit land as of right.
9. The Defendant further denies that he holds the suit property in trust for the Plaintiffs and asserts that he is entitled to deal with the same as he wishes as the Plaintiffs have no rights thereon. He further denies that the Plaintiffs are entitled to the land by virtue of adverse possession.
10. By way of his Counter claim, the Defendant avers that the Plaintiffs are trespassers on the suit property since December 10, 1993 when their father whom the Defendant had given a licence to occupy the suit land died. Accordingly the Defendant prays for Judgment to issue against the Plaintiffs as follows:
- (a) That the Plaintiffs are trespassers in Land Reference (No.) Magutu/Gatei/201;
- (b) That the Plaintiffs do deliver vacant possession of the portion of the suit land that they occupy to the Defendant;
- (c) The Plaintiffs do meet the costs of this suit; and
- (d) Interest on (c) above.



## **The Plaintiffs' Case\***

11. At the trial herein the Plaintiffs called a total of 4 witnesses who testified in support of their case.
12. PW1 – John Wachira Kimaru is the 1<sup>st</sup> Plaintiff and a farmer in Gatei Sub-Location. Relying on his Statement dated and filed herein on January 29, 2015, PW1 testified that he is a brother to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff while the 4<sup>th</sup> Plaintiff is their nephew.
13. PW1 told the Court that his father and the Defendant's father were brothers and that during the time for land consolidation and adjudication the suit property LR No. Magutu/Gatei/201 was registered in the name of Githua Murage who is his deceased cousin. PW1 further told the Court the deceased was so registered to hold the land on behalf of his father – Kimaru Nderi's family as well as the family of Murage Nderu.
14. PW1 testified that the two families have always lived on and have intensely developed the suit property measuring 4.7 acres with each family occupying half of the land.
15. On cross examination, PW1 testified that he was born in 1948 and that the land demarcation was done in the area in 1958, He told the Court the Defendant was regarded as the eldest son as he was above 18 years and that PW1's father allowed the Defendant to be registered as the proprietor in trust for the family.
16. PW1 told the Court they had all along lived on the land and that the dispute only started in 1993 after his father's death. PW1 conceded that his father had filed Nyeri SRMCC No. 83 of 1973 over the same parcel of land. He told the Court he was unaware that the case was dismissed. He told the Court he was not party to the case that was filed by his father.
17. PW1 further testified that he had 3 uncles but none of them had come to Court since they had been given their own parcels of land by PW1's grandfather Nderu Murage. He told the Court even his own father was given land.
18. PW2 – Michael Kinyua Kimaru is the 2<sup>nd</sup> Plaintiff and a brother to PW1. He told the Court the Defendant is his first Cousin being the son of his father's elder brother. PW2 reiterated the testimony of his brother PW1 and asked the Court to have the land sub-divided and distributed to the Parties.
19. On cross-examination, PW2 told the Court his grandfather had 4 sons – Murage, Ngari, Kimaru and Miano. PW2 told the Court his uncles do not live on the suit property and that he was unaware if they had sued the Defendant for the land. He told the Court the Defendant was registered as the proprietor of the land by his father as the Defendant was the eldest son in order to hold in trust for the family.
20. PW3 – Anthony Kimaru is a driver and a resident of Karatina. He reiterated the testimony of PW1.
21. In cross-examination PW3 told the Court that PW1 is his uncle. He told the Court his mother Jacinta Gathigia Kimaru was not married and that he was born on the suit land. PW3 conceded that he had not been born when the land was registered in the Defendant's name and that he did not know why it was so registered. He further told the Court his mother passed away in 2003 and urged the Court to cause the land to be sub-divided and given to each of them.
22. PW4 – George Kinyua Thamaini is a farmer and a resident of Gatei. He told the Court he had known the parties herein since the colonial times as they were living in the same village. He further told the Court the suit property should be shared equally between the Parties herein.



23. On cross-examination, PW4 told the Court he was born in 1959 and that he shared the same clan with the Plaintiffs. He conceded that the suit property was registered in the year he was born and told the Court that what he had stated in his testimony is what he was told by the elders.

### **The Defence Case**

24. Paul Kimaru Murage (DW1) testified as the sole witness for the defence. He told the Court his brother Githua Murage who was initially sued as the Defendant passed away and that he (DW1) was substituted in his stead.
25. Relying on his Statement dated 26<sup>th</sup> May 2017 as filed herein on 29<sup>th</sup> May 2017, DW1 told the Court that his grandfather Nderu Murage had 4 sons, namely; Murage (who was his father), Ngari, Kimaru and Miano. DW1 further told the Court his father died earlier than his grandfather who passed on in 1954.
26. DW1 testified that during land consolidation and demarcation, each of his uncles got their portions registered under their names except the Plaintiff's father who had sold his portion. DW1 told the Court the Plaintiffs' father was allowed to till a small piece of land by his brother Ngari but was evicted in 1973 after which DW1's brother allowed him to till some portion.
27. DW1 further testified that in 1973, the Plaintiff's father in an attempt to take over the land filed a suit against his brother Ngari and DW1's brother claiming a right to a part of their property. The case was dismissed. He further told the Court the Plaintiffs stayed in the suit property by the virtue of the licence DW1's brother gave to their father and the licence terminated on 10<sup>th</sup> December 1993, with the death of the Plaintiffs' father.
28. On cross-examination, DW1 conceded that the Plaintiffs' father and their sister had been buried on the suit land. He further conceded that the Plaintiffs had been living on the suit property for more than 30 years.

### **Analysis and Determination**

29. 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 written submissions and authorities placed before me by the Learned Advocates acting for the Parties.
30. The four (4) Plaintiffs herein pray for a declaration that the Defendant is registered as proprietor of LR No. Magutu/Gatei/201 in trust for himself and one Paul Kimaru Murage on the one hand and the Plaintiffs jointly on the other hand in equal shares. Accordingly they urge the Court to determine the trust and order the Defendant to transfer one half of the suit property unto themselves. In the alternative, the Plaintiffs pray for an order that they have acquired title to one half of the suit property under the doctrine of adverse possession.
31. The suit as it were was originally filed against one Githua Murage. As fate would have it, Githua Murage passed away on 17<sup>th</sup> March 2012, some eighteen (18) years after the suit was instituted. Subsequently, his brother Paul Kimaru Murage (DW1) was substituted in his stead.
32. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are brothers while the 4<sup>th</sup> Plaintiff is their nephew. In support of their case, the Plaintiffs told the Court that the Defendant is a first cousin to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs. It was their case that the suit property measuring approximately 4.5 acres comprises of various fragments of land that initially belonged to their grandfather one Nderu Murage who died in the colonial era before land consolidation and registration was done in the area.



33. It was further the Plaintiffs case that the father to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs and uncle to the 4<sup>th</sup> Plaintiff – one Kimaru Nderu is the one who consolidated the fragments of land and caused the same to be registered in the name of the original Defendant Githua Murage to hold the same in trust for the entire Nderu Murage’s family which family included the Plaintiffs as well as the now substituted Defendant herein.
34. The Plaintiffs told the Court that after land consolidation and registration in 1959, the suit property was informally sub-divided into two equal portions. They have since been occupying one portion as of right while the original defendant and his substitute herein occupied the other half.
35. By their suit herein, the Plaintiffs accuse the original Defendant of breaching the said trust by seeking to have the entire suit property registered in his name and that of his substituted brother herein to the exclusion of the rest of their family.
36. The original Defendant however denies that he holds the suit property in trust for the Plaintiffs. In addition, he denies that the Plaintiffs have been occupying half a portion of the suit property as stated. It is the Defendant’s case that the Plaintiffs were mere licencees on the land after he allowed the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs’ father to occupy and till a small portion of the suit land. The Defendant asserts that the said licence terminated on 10<sup>th</sup> December, 1993 when the said Plaintiffs’ father died and that hence the Plaintiffs should be declared as trespassers on the land and ought to forthwith deliver vacant possession of the portion of land they currently occupy.
37. From the material placed before me it was not in dispute that all the Plaintiffs on the one hand and the original as well as the substituted Defendants were the grandchildren of one Nderu Murage who was said to have passed on in the 1950s before land consolidation and registration was done in the area where the subject property is situated.
38. In his testimony before the Court, the Defendant stated that his grandfather had four sons, namely, Murage (who was his father); Ngari; Kimaru (who was the father to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs) and one Miano. From the testimony of the Plaintiffs’, it was also apparent that the said Nderu Murage was survived by the 4<sup>th</sup> Plaintiff’s mother one Jacinta Gathigia Kimaru who was said to have remained unmarried.
39. According to the substituted Defendant (DW1) their father Murage Nderu passed away before their grandfather Nderu Murage whose date of death he cited as 1954. Contrary to the Plaintiffs’ case that their father Kimaru Nderu consolidated the fragments of land and caused them to be registered in the original Defendant’s name, DW1 told the Court that during land consolidation and demarcation, each of his uncles got their portions registered under their names except for the Plaintiffs’ father whom he told the Court had sold his portion.
40. It was DW1’s case that subsequently, the Plaintiff’s father was allowed to till a small piece of land belonging to his brother Ngari Nderu but the said Ngari Nderu evicted the Plaintiff’s father from the land in 1973. According to DW1, it was then that his brother – the original Defendant herein allowed the Plaintiff’s father to occupy and till some small portion of land on which the Plaintiffs remain to-date.
41. While the original and the substituted Defendants were quite categorical in denying the existence of a trust on the suit property, they were themselves unclear on how the original Defendant came to be registered as the proprietor of the suit property. In response to the Plaintiffs’ contention that the suit property was the result of a consolidation of various fragments of land by their father before he caused



the same to be registered in the original Defendant's name, the Defendant states as follows at Paragraph 4 of the Defence and Counter Claim:

“ 4. The Defendant avers that the suit land consists of former fragmented portions of his father's land which he consolidated and had registered in his name as by then his father had passed away.”

42. While it was not clear when the Defendants' father Murage Nderu had passed away, both sides were unanimous that he passed on before their grandfather Nderu Murage died. According to the Plaintiffs, their grandfather passed on around the period of the declaration of the State of Emergency in Kenya by the Colonial Government in 1952. The Defendant's however place the death of their grandfather in the year 1954.

43. Testifying before this Court upon cross-examination, DW1 told the Court that their grandfather died when they were still very young. It follows therefore that when their father died, both the original and the substituted Defendants were even much younger. Asked on cross-examination how his brother came to get the land, DW1 stated as follows:

“ Parcel No. 201 (the suit property) was inherited by my brother from his father. I don't know from where my father got the land.

It is true the Plaintiffs have been living (on) the land for over 30 years. They were born there.”

44. On the other hand testifying as to the circumstances under which the land came to be registered in the name of his first cousin, John Wachira Kimaru (PW1) told the Court as follows:

“ Murage Nderu (the Defendants' father) died before the demarcation. The Defendant is his eldest son. When the Defendant's father died, he was brought up by my father.

I was born in 1948. The title was given during demarcation in 1958. I was about 11 years when demarcation was done.

The Defendant was registered as the eldest son. He was above 18. My father was also there. My father allowed him to be registered in trust. It is true there is nowhere in the title indicated the registration was in trust. My father told us the registration was in trust. We have all along lived on the land and used it.”

45. I have looked at the pleadings and the testimonies of the original and the substituted Defendants and there is nowhere where they denied that following their father's death when they were of tender years, they were brought up by the father to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs. The fact that the said Plaintiffs were themselves very young at the time of consolidation and demarcation of land is corroborated by DW1 who told the Court the Plaintiffs were all minors in 1959 and that the 1<sup>st</sup> Plaintiff joined Primary school in 1960. That being the case, it was apparent that the father to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs had considered the original Defendant herein as his own eldest son and hence his registration as the proprietor of the land.

46. That the Plaintiffs' father Kimaru Nderu played a role in the registration of the original Defendant as the proprietor of the suit property can be discerned from the fact that throughout his lifetime, the Defendants did not make any effort to expel him together with his biological children from the suit land and that it was only after his death in 1993 that the original Defendant made efforts to take over the suit land and to sub-divide the same to his brother the substituted Defendant herein.



47. It was indeed quite ironical that while he denied the existence of a trust in respect to the suit property, the substituted Defendant himself had no property inherited from his father. The only reason he had been on the land and why his elder brother Githua Murage sought to sub-divide the land to himself in 1993 after the death of the father to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs was the understanding by his elder brother that he held the land in trust for his siblings who include the substituted Defendant.
48. It was therefore apparent that this was the family's ancestral land and that the original Defendant had been so registered as proprietor in trust for the rest of the Nderu Murage family. That is why when Nderu Murage passed on in the 1950s, he was buried on the suit land. When Kimaru Nderu passed away on 10<sup>th</sup> December 1993, he was also buried on the suit land. The 4<sup>th</sup> Plaintiff's mother, a sister to Kimaru Nderu was equally buried on the land without any protest from the Defendants.
49. Arising from the foregoing, I was persuaded that the Plaintiffs evidence was probable and believable. It was clear to me that the Plaintiffs have had a long stay and possession of the land consistent with a claim under customary trust. Accordingly this Court finds and holds that the Plaintiffs have proved their case on a balance of probabilities that a customary trust subsists on the suit land in their favour.
50. Accordingly I hereby make the following orders:
- (a) The Defendant's Counter claim is hereby dismissed.
  - (b) A declaration is hereby made that the late Githua Murage was registered as the proprietor of LR No. Magutu/Gatei/201 in trust for himself and one Paul Kimaru Murage on the one hand and the Plaintiffs jointly on the other hand in equal shares;
  - (c) The said trust is hereby determined forthwith;
  - (d) An order is hereby issued requiring the Defendant to transfer one half of LR No. Magutu/Gatei/201 unto the Plaintiffs jointly free from any encumbrances; and
  - (e) Each party shall bear their own costs.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**In the presence of:**

**Ms Wambui Mwai for the Plaintiffs**

**Ms Njoroge for the Defendants**

**Court assistant – Kendi**

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**J. O. OLOLA**

**JUDGE**

