



REPUBLIC OF KENYA



**Wamae & 3 others v Gikuhi & 7 others (Environment & Land Case
169 of 2014) [2023] KEELC 795 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 795 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 169 OF 2014
JO OLOLA, J
FEBRUARY 16, 2023**

BETWEEN

**ESTHER WANJIRU WAMAE 1ST PLAINTIFF
ESABELL NYATURO MURIITHI 2ND PLAINTIFF
CHARITY NJERI MBURUNGO 3RD PLAINTIFF
PATRICIA WAMBUI NJUGUNA 4TH PLAINTIFF**

AND

**LOISE WAIRIMU GIKUHI 1ST DEFENDANT
ISAIAH KINYUA GIKUHI 2ND DEFENDANT
JACKLINE GAKENIA GIKUHI 3RD DEFENDANT
WINCREW WANGECHI GIKUHI 4TH DEFENDANT
PETER NDERI 5TH DEFENDANT
JAMES NGUYO MURIITHI 6TH DEFENDANT
MATHEW MUCHANGI MWANGI 7TH DEFENDANT
JOYCE MUGURE MWENJA 8TH DEFENDANT**

JUDGMENT

Background

1. By a Plaint dated April 17, 2014 as amended on November 4, 2019, and further amended on December 16, 2021 the Four (4) Plaintiffs pray for Judgment against the Eight (8) Defendants for:



- (i) A declaration that the Defendants hold land parcel numbers Konyu/Baricho/4175, 4176, 4177, 4178, 4179, 4180, 4181, 4182, 4283, 4184, 4185, 4186, 4187, 4188, 4190, 4191, 4192, 4193, 4194, 4195, 4196, 4197, 9198, 4199, 4200, 4201, 4202, 4203, 4204, 4205, 4206, 4372 and 4373 in trust for themselves and the Plaintiffs in equal shares;
 - (ii) Termination of the trust and subdivision of land Parcel Nos Konyu/Baricho/4175, 4176, 4177, 4178, 4179, 4180, 4181, 4182, 4283, 4184, 4185, 4186, 4187, 4188, 4190, 4191, 4192, 4193, 4194, 4195, 4196, 4197, 9198, 4199, 4200, 4201, 4202, 4203, 4204, 4205, 4206, 4372 and 4373 and reinstatement of the original parcel No Konyu/Baricho/447;
 - (ii)(b) Cancellation of the newly registered parcels of land numbers Konyu/Baricho/4175, 4176, 4177, 4178, 4179, 4180, 4181, 4182, 4283, 4184, 4185, 4186, 4187, 4188, 4190, 4191, 4192, 4193, 4194, 4195, 4196, 4197, 9198, 4199, 4200, 4201, 4202, 4203, 4204, 4205, 4206, 4372 and 4373.
 - (iii) That the Deputy Registrar be authorized to sign all the relevant documents to facilitate the sub-division and issuance of separate titles;
 - (iv) Costs of the suit and interest thereof.
2. Those prayers arise from the Plaintiffs' contention that at all times material, they were sisters to George Gikuhi Mburungo (the deceased) and sisters in law to the 1st Defendant. The Plaintiffs aver that their father who died on March 8, 1968 was the registered owner of land parcel No Konyu/Baricho/447 and that their deceased brother got registered as the proprietor of the said parcel of land after their father's death in trust for himself and the Plaintiffs in equal shares.
 3. The Plaintiffs further aver that the deceased passed away on 2nd June, 2008 before giving them their shares and that the 1st Defendant subsequently acquired title to the land subject to the overriding interests including those of the Plaintiffs. It is the Plaintiffs' case that after they filed the suit, the Defendants sub-divided the said LR No Konyu/Baricho/447 into the thirty-three listed portions and hence the prayers sought herein.
 4. The 1st Defendant – Loise Wairimu Gikuhi is opposed to the suit. In her Statement of Defence dated September 29, 2014, the 1st Defendant states that her husband was registered as proprietor of the parcel of land in 1976 and if the Plaintiffs had any claim nothing would have stopped the Plaintiffs from raising their claim then and or before his death.
 5. The 1st Defendant avers that neither her husband nor herself was registered as proprietor of the land in trust for the Plaintiffs and that the suit herein is meant to harass her and her children for malicious reasons.
 6. The 2nd, 3rd and 4th Defendants are equally opposed to the suit. In their joint Statement of Defence dated June 22, 2020, the 2nd, 3rd and 4th Defendants aver that their father George Gikuhi Mburungo (the deceased) did not hold the suit land in trust for anyone and that the land was registered in his name absolutely upon the succession of the Estate of Mburungo s/o Muruambiri.
 7. The 2nd, 3rd and 4th Defendants aver that the Plaintiffs never demanded a share of the land from the deceased and that it was only in the year 2013 that the Plaintiffs began to claim the land. It is their case that it was their mother the 1st Defendant who caused the land to be sub-divided whereupon the 2nd, 3rd and 4th Defendants had their portions transferred and registered in their names.
 8. The 2nd, 3rd and 4th Defendants further aver that the 6th, 7th and 8th Defendants are strangers to them and they have no knowledge of their relationship to the land in question.



9. From the record, it was apparent that the 5th, 6th, 7th and 8th Defendants neither entered appearance nor filed a Statement of Defence. By a consent dated November 18, 2021 and filed in Court on November 26, 2021, the National Land Commission was enjoined in the suit as an Interested party. The Interested party did not file any pleadings herein.

The Plaintiffs' Case

10. At the trial herein, the Plaintiffs called one witness in support of their case.
11. PW1 – Esther Wanjiru Wamae is a resident of Mariaini Village in Baricho. She told the Court the 1st Defendant herein is a wife to her brother George Gikuhi Mburungo who passed away on June 2, 2008.
12. PW1 testified that LR No Konyu/Baricho/447 belonged to their father Mburungo s/o Muruambiri. When her father died on 8th November 1968, he left the land to all his 6 children. When her father died, PW1's five (5) other sisters were utilizing the land but PW1 left to go look for employment. Her brother George was taking care of the land but the sisters did not know when he registered himself as the owner of the land. PW1 further told the Court she was unaware how the 1st Defendant came to be registered as the owner of the land.
13. On cross-examination, PW1 told the Court she was born in 1940 and that she was already an adult when her father died in 1968 and had by then left home to look for employment. PW1 further told the Court she was married in 1966 when her father was still alive. She lived at her husband's place but was also going home.
14. PW1 told the Court she was the eldest in the family and that the 2nd Plaintiff was the third born. PW1 testified that the 2nd Plaintiff also got married during their father's lifetime although she could not recall exactly when she got married. The 3rd Plaintiff passed away in 2021. Both the 3rd and 4th Plaintiffs got married when their brother George was still alive. Their mother died on July 27, 1987.
15. PW1 testified that they were all unaware that their brother filed any succession proceedings and that he never involved them. She told the Court she was unaware how the 1st Defendant came to be registered as the proprietor of the land and that it was the 1st Defendant who sold the land to the 5th to 8th Defendants.

The Defence Case

16. The Defence equally called one witness in support of their case at the trial.
17. PW1 - Loise Wairimu Gikuhi is a farmer in Mathira and the 1st Defendant herein. DW1 testified that she was married to the Plaintiffs' brother George in 1982 and they started living on the suit land. By then her mother-in-law was still alive. DW1 told the Court she lived with her mother-in-law on the land until her death in 1987 and that she never mentioned anything about the land.
18. DW1 testified that none of the Plaintiffs lived with them on the land except the 3rd Plaintiff who lived there for a while after separating with her husband. She later remarried and left.
19. DW1 told the Court that when her husband died in 2008, the Plaintiffs went to her and wanted to know in whose name the land was registered. When her husband was alive, nobody had claimed the land. DW1 testified that her husband had registered her as the proprietor of the land in 2004. After his death, DW1 got the title and commenced sub-division to transfer to the names of her children in the year 2014.



20. DW1 told the court she sold a portion of the land to the 5th Defendant and that she did not know the 6th, 7th and 8th Defendants. She further told the Court she has developed the land and uses the same for farming. She denied that her husband was holding the land in trust for the Plaintiffs.
21. On cross-examination, DW1 conceded that the land belonged to her father-in-law before it was registered in her husband's name. She further conceded that the Plaintiffs were her sisters-in-law and that when she got married she found them.

Analysis And Determination

22. 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 representing the Parties herein.
23. The Plaintiffs claim is for a declaration of trust over the suit properties. Their main plea is that the original parcel of land LR No Konyu/Baricho/447 was clan land and that the same was registered in the name of their father Mburungo s/o Muruambiri who died in the year 1968. It is their case that their father left the said parcel of land to his six (6) children being five (5) sisters and their sole brother George Gikuhi Mburungo.
24. It is the Plaintiffs case that they are unaware how their brother who passed away in the year 2008 came to be registered as the sole proprietor of the land and how the title later passed to his wife who is the 1st Defendant herein.
25. The Defendants, particularly the 1st Defendant, resist the claim contending that the late George Gikuhi Mburungo was registered as the sole proprietor of the original parcel of land way back in 1976 as the sole beneficiary entitled thereto. It is their case that by then, the Plaintiffs were all married and residing elsewhere and that they were hence not entitled to any beneficial share in the land or any sub-division thereof.
26. The Defendants assert that the late George Gikuhi Mburungo transferred the original parcel of land to the name of his wife (the 1st Defendant) during his lifetime in the year 2004 and that after his death, the 1st Defendant commenced the process of sub-division for the purposes of transferring portions thereof to their children who are sued herein as the 2nd, 3rd and 4th Defendants.
27. The 1st Defendant conceded to having sold a portion of the sub-divisions to the 5th Defendant but denies knowledge of the 6th to 8th Defendants herein.
28. From the material placed before me, it was common ground that the original parcel of land LR No Konyu/Baricho/447 was family land and that it was registered in the name of the Plaintiffs' father Mburungo s/o Muruambiri on July 11, 1958. It was further common ground that the said registered proprietor had five daughters and one son. Four of the daughters are the Plaintiffs herein while the only son – George Gikuhi Mburungo was the husband to the 1st Defendant herein.
29. According to the Plaintiffs, their father passed away on March 8, 1968 and it was their case that their brother George subsequently came to be registered as the proprietor of the suit property measuring approximately 8.8 acres in trust for himself and the Plaintiffs in equal shares.
30. It was apparent from the material placed before me that the said Mburungo s/o Muruambiri died intestate and that he had not distributed any of the land to the Plaintiffs at the time of his death in 1968. His son George was subsequently issued with a Certificate of Title for the suit property on 26th



April, 1976. It is the Plaintiffs' position that his registration as such was in trust for all family members in equal share.

31. While the Plaintiffs have not specified how this trust arose, it is clear to me that their claim was based on an alleged customary trust over the original parcel of land.
32. In her testimony before the Court, the 1st Plaintiff (PW1) stated that she was married in 1966 before her father's death. It was further her position that her co-plaintiffs were equally married as at the time their father died and were living away from the land although they would occasionally visit the same. The 1st Plaintiff further testified that they had not utilized the land for any other purpose from the time their father died.
33. It was clear to me that right from the time of their father's death in 1968, the Plaintiffs had nothing much to do with the suit property. While they gave evidence that their mother lived long after the death of their father and only came to pass away in 1987, there was no evidence that they had sought any share of the land from herself or even their brother George before he passed away in the year 2008.
34. While indeed under the *Law of Succession Act* [Cap. 160 of the Laws of Kenya] the Plaintiffs could demand to be given an equal share of their father's estate, Section 2 of the said *Act* provides as follows:

“2(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all succession to the estates of deceased persons dying after the commencement of this Act and to the administration of the estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

35. As it were, the *Law of Succession Act* (Cap. 160) came into operation on July 1, 1981 and the matters of succession for the estate of the late Mburungo s/o Muruambiri can only be dealt with as per the Kikuyu Customary Law that was applicable as at the time of his death in 1968.
36. Considering a similar matter in *Francis Gichohi Kambo –vs- Esther Wanjiku Mwangi* (2022) KECA 524 (KLR), the Court of Appeal after considering several authorities held as follows:

“We have applied the tests in the Isaack M’Inanga Kiebie case (Supra) to the rival positions herein and proceed to make findings thereon as follows: the original suit property was family land before it was registered in the name of Waweru as an absolute proprietor. Upon Waweru’s demise in 1978, it fell for inheritance under Kikuyu Customary Law. The case law assessed above is explicit that under Kikuyu Customary Law land falls for inheritance by sons and unmarried daughters. In the instant appeal, the only male claimant to Waweru’s estate was Ephantus, while the only unmarried daughter contender was Jane. These two were the declared beneficiaries of Waweru’s estate as per the final orders issued by the Chief Magistrate’s Court in Succession Cause No 131 of 1989, and which orders still stand to the present date.”

37. Arising from the foregoing it was clear to me that under Kikuyu Customary Law land such as the suit property herein could only be inherited by a deceased person’s son(s) or his unmarried daughter(s). Having admitted to being married before the late Mburungo s/o Muruambiri’s death in the year 1968,



the Plaintiffs had clearly disqualified themselves from inheriting the suit property. The deceased had only one son George and it is to him that the suit property was transmitted upon his death.

38. The Plaintiffs must have been aware of that custom and hence their failure to make any claims on the land during their parents' and their brother's lifetime.
39. It follows that I am not persuaded that there was any basis for this claim. Accordingly, the Plaintiffs suit is hereby dismissed with costs to the 1st, 2nd, 3rd and 4th Defendants.

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

In The Presence Of:

Ms Wambui Mwai holding brief Warutere for the plaintiffs

Mr. C. M. King'ori for the defendants

Court Assistant - Kendi

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J. O. OLOLA

JUDGE

