



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANGA**

**ELC NO 467 OF 2017(OS)**

**ALICE WAIRIMU MACHARIA.....APPLICANT**

**VS**

**KIRIGO PHILIP MACHARIA.....RESPONDENT**

**JUDGMENT**

**Background**

1. This is a suit pitting a daughter against a mother in pursuit of land rights. The Applicant is the daughter of the Respondent. Her father the late Philip Macharia was the husband of the Respondent. He had two wives; The Respondent and the late Rebecca Njumbi Macharia. He owned land parcel Number LOC14/KIRU/492 (original land) measuring 22.31 hectares. Upon his death in April 1967 the two wives succeeded him vide a Succession Cause at Kangema Land Succession Cause No 18 of 1980. According to the certificate of succession dated the 8/5/1980, the land was to be subdivided equally between the two wives of the late Philip Macharia.

**The Applicant's case and evidence**

2. The Applicant filed this Originating summons on the 2/10/17. She claims to be entitled to LOC 14/KIRU/3963, 3964 and 3969 as a beneficiary with other beneficiaries of the estate of the late Philip Macharia. She sought the determination of the following questions;

- a. Were parcels No LOC 14/KIRU/3963, 3964 and 3969 (suit lands) derivatives from the original LOC14/KIRU/492 owned by Philip Macharia, deceased?
- b. Was the Respondent registered as owner in transmission for herself and in trust for the Applicant and other siblings' beneficiaries?
- c. Has the Respondent while registered as a trustee acted (?) to subdivide the land and grant some beneficiaries benefit from the land while excluding the Applicant?
- d. Has the Respondent acted equitably and with equality in allocating benefit from the deceased land as trustee?
- e. Is the Applicant entitled, together with all the other beneficiaries entitled to equally and equitably share and benefit of the suit lands?
- f. Should the trust created herein be determined and the above stated properties shared equitably and equally while taking into account past benefits had by other beneficiaries to the trust herein created.
- g. Who should bear the costs of this Originating Summons?

3. The Applicant avers that upon successful subdivision of the original land the suit lands were registered in the name of her mother to hold in trust for her household.

4. She stated that in 2000, her mother's portion, LOC 14/KIRU/3730 was subdivided without her knowledge into 8 titles namely LOC 14/KIRU/3963-3969. The subdivision was registered, *inter-alia*, in the name of Full Gospel Churches of Kenya, the Respondent and her sons who later sold to third parties. That she did not get a share of the proceeds. Currently she claims that there are only 3 parcels remaining in the name of the Respondent namely, LOC 14/KIRU/3963,3964 and 3969 (suit lands) as seen in the annexed certified copies of certificate of official searches dated the 28/6/17.

5. In the year 2016, the Applicant filed a caution to prevent further subdivisions of the suit lands but the Land Registrar dismissed it upon which she appealed to the Chief Land Registrar. The appeal is yet to be determined. She averred that her mother gave her a consoling share

of 1.35 acres but she declined as this was disproportionate to the 4 acres each that her brothers got from the family land. Her other complaint was that in the earlier subdivisions she was denied access to the river which is useful for drawing water for her use.

6. It is her case that the Respondent holds a continuing trust over the suit lands and being one of the beneficiaries, she is entitled to equal share. She urged the Court in arriving at the equitable sharing of the suit lands to take into account the parcels sold by her brothers.

7. At the trial she insisted that though her mother may have been registered as absolute owner of the land, she held it in trust for her children and therefore she cannot deal with it as she wishes. She stated that the Respondent, she and her brothers live on the said suit lands.

### **The Respondent's case and evidence**

8. The Respondent stated that the Applicant is her daughter and lives on the suit lands with her. She admitted being the absolute registered proprietor of the suit lands having succeeded them from her husband, the Applicant's father. She insisted that the cautions lodged by the Applicant on the suit lands are baseless. That she does not hold the suit lands under any trust. She explained that out of her benevolence, she offered the Applicant 1.35 acres because she is one of her children and also because she desired peace in her home but not out of any obligation to give her land.

9. Further she stated that she sold part of the plots out of her original entitlement. She also informed the Court that the land given to the Applicant does not access the river. Asked why she gave the sons 4 acres each, she stated that she cannot take them equal and figuratively explained that even the fingers on one hand are not equal, that is to say her children are not equal so much so that some will get more and others will get less. That other than the Applicant she has another daughter Hannah, who is unmarried and has been given her land.

### **The submissions of the parties**

10. The Applicant submitted that she is being discriminated on account of her marital status. Quoting sections 35-41 of the Law of Succession Act, the Applicant submitted that where the surviving spouse held land in trust the said land would devolve to the beneficiaries in equal shares with the wife being added as a unit in her house. That the Respondent having been registered as owner by way of transmission, a legal trust was created by operation of law. Relying on section 37 of the Law of Succession, the Applicant reiterated that the Respondent, as a surviving spouse of the deceased, held a life interest in the suit lands, which she holds in trust for herself and for the children in equal shares. That the acts of the Respondent in disposing the land and excluding the Applicant from the proceeds and proposing to give the Applicant a smaller share than the sons are unauthorised acts under section 37 of the Law of succession Act. Finally, that it matters not that the trust was not noted on the title, it subsists as an overriding interest in favour of the Applicant.

11. The Respondent in her submissions opposed the Applicant's claim and stated that she is the sole owner and she cannot be directed or forced by any one on what to do with her lands. That for a trust to exist it is important for the person claiming it to establish it through evidence. She averred that the certificate of succession did not indicate that the two wives of the late Philip Macharia were to share the land equally and no beneficiaries, Applicant included, were disclosed thereto. That the Court cannot now infer a trust when the succession Court did not see it fit to do so in the first place. The mere fact that the Applicant is the daughter of the late Philip Macharia does not entitle her to a claim of trust over the suit lands. She challenged the Applicant to name the nature of the trust allegedly created in the 1980. Is it an express, constructive or resulting trust, she posed?

12. Parties have framed a number of issues for the Court to determine. I have taken the liberty to draw the issues below which when determined will dispose of the suit.

- a. Whether the Respondent is an absolute proprietor.
- b. Whether the Respondent held the suit lands in trust for the Applicant?
- c. Who meets the cost of the suit?

13. It is not in dispute that the suit lands are rooted in the original title owned by the family patriarch Philip Macharia. The said original land devolved to the two wives upon his death and the succession Court ordered that they share the land equally which they did. It is also not in dispute that the Respondent has sold some portions of the land and that she did give her sons 4 acres each and the applicant was offered 1.35 acres when she protested what she termed as discrimination.

14. Section 23, 24 & 26 of the Land Registration Act ( whose provisions were similar to section 27 and 28 of the repealed Land Registration Act cap 300) provides that a registered proprietor with title issued by the land Registrar has prima facie evidence of title and such person is deemed as the absolute owner with all rights and privileges appurtenant thereto. Section 25 provides that such title shall only be subject to such restrictions and encumbrances that are registered against title while section 26 provides that title (which is absolute) can only be impeached where it was acquired fraudulently or through a corrupt scheme in which the person was a party.

15. The Applicant has availed a certificate of official search of L.R. Loc. 14/Kiru/3963, L.R. Loc. 14/Kiru/3963 and Loc. 14/Kiru/3969 registered in the name of the Respondent as the proprietor. The Applicant does not dispute that these titles are prima facie evidence of title and proprietorship of the Respondent .It is trite that such title is held exclusively and the Defendant proprietor enjoys possession, occupation and further privileges appurtenant to her title. In the case of **ESTHER NDEGI NJIRU & ANOTHER =VS= LEONARD GATEI [2014] eKLR** the Court held that :

“the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which a person must be proved to be a party. The second is where the certificate of title has been acquired through a

corrupt scheme”.

16. In the absence of proof to impute title, there is prima facie evidence that the Respondent is the registered owner of the titles. This evidence is also affirmed by the fact that the certificate of succession was for equal subdivision of the mother title between the two intended proprietors by dint of the succession cause aforesaid. Section 23 of the Land Registration Act provides that proprietary rights can be obtained through transmission in the event of a deceased proprietor.

17. Notwithstanding the holding that the Respondent is the prima facie registered owner of the suit lands per dint of the titles issued in her name, Section 27 of the Land Registration Act Cap 300 (now repealed) under which the suit land was registered provides that the registration of one as a proprietor of land while conferring on him all the rights and privileges shall not be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee. Section 28 of the current Registration of Land Act 2012, provides that unless the contrary is expressed in the register all registered land shall be subject to various overriding interests without their being noted on the register. Customary trust is one of such interests.

18. The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must prove that:- (a) the suit properties were ancestral clan land; (b) during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; (c) the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. In essence, one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.

19. In the case of **Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others [2005] eKLR** which quoted with approval the holding in the case of **Muthuita –vs- Muthuita [1982 – 88] 1 KLR 42**, the Court of Appeal held that customary law trust is proved by leading evidence. Trust is a question of fact which must be proved by whoever is claiming a right under customary trust.

20. In the case of **Isack Kieba M’Inanga Vs Isaaya Theuri M’Lintari & Another SCoK No 10 of 2015** the Supreme Court Justices held that;

“...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 v. 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 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:- (a) The land in question was before registration, family, clan or group land; (b) The claimant belongs to such family, clan, or group; (c) 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; (c) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and, (d) The claim is directed against the registered proprietor who is a member of the family, clan or group.

21. A trust can never be implied by the Court unless there was intention to create a trust in the first place. **In Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR** where the Court held,

*“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”*

22. In **Juletabi African Adventure Limited & Another v Christopher Michael Lockley [2017] Eklr** the Court also held that .... It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-

*“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”*

23. Going by the decision of the SCOCK referred to in para 20, it follows that evidence must be led that points to the root of the land. Pertinent question that must concern this Court are such as; how was the land first registered? Was it clan, communal or family land before registration? Was the land inherited or passed down from the family lineage of Mr Macharia? How did Macharia acquire this land? Did he inherit or he acquired by way of purchase or a gift? From the evidence led by both parties they agree that the land was registered and owned by their father and husband respectively and upon his death it devolved to the two mothers as per the 2 houses that he had as a polygamist. There is no evidence tendered before this Court to show that the land is such as is a customary land that is to say is land that was encumbered with a trust.

24. From the forgoing it is clear that the Applicant failed to satisfy her burden of proof during evidence as to how the trust was created, the circumstances under which it was created and the common intention as to its establishment and or creation. The Applicant simply averred that trust was created in 1980’s. She also averred that the property belonged to her late father and as a beneficiary she ought to be allowed to inherit or have equal share with her brothers and her mother.

25. It is noteworthy that the succession of this land took place before the enactment of the current Law of Succession Act, which came into force on the 1/7/82. According to the certificate of succession dated the 8/5/1980, the land was succeeded in 1980s before the enactment of the current laws. The Court notes that there is no evidence on the record of the certificate of succession to denote the presence of customary or family trust. Be that as it may it is apparent from the record that the Respondent got land from the estate of her late husband as a beneficiary.

26. The Court understands the case of the Applicant to be that she is a beneficiary of the estate of her late father for which is in the hands of the mother. She derives her alleged trust from succession of the suit lands. I also understand her claim to be that she has not been sufficiently provided for in the said estate. That the Respondent has taken certain actions which lead to the state of affairs that she is unhappy with; which is that she has sold some of the land without her consent as a beneficiary; she did not account or share the proceeds of the sale with her; she appropriated the proceeds to some of the beneficiaries and left her out despite being entitled; she has subdivided the land and given to some beneficiaries (sons) 4 acres each; she has offered her 1.35 acres, which in her own words, is neither equal nor equitable provision; she has offered her land which does not access the river for water resources that she so needs. The Respondent has averred that she has made provisions for the Applicant in form of 1.35 acres but she has rejected it for more.

27. The long and short of her case is that it relates to a claim in succession. This Court is not seized with the jurisdiction to determine matters succession.

28. The upshot is that the Applicant has not proved her case. It is dismissed.

29. Since the parties are related, I order that each party to meet the costs of the suit.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2019.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of;**

Ms Njoka HB for Karweru for the Plaintiff.

T M Njoroge HB for Waiganjo Gichuki for the Defendant.

Irene and Njeri, Court Assistants