



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 217 OF 2014

FLORENCE WAMBUI MAINAPLAINTIFF

VERSUS

STEPHEN MURIUKI NJUNGU.....DEFENDANT

JUDGMENT

The parties herein are siblings both being the children of the late NJUNGU NJURUNGA. The defendant is the younger of the two and it is the plaintiff's case that during the life time of the deceased, he had instructed that the land parcel No. KIINE/RUIRU/161 (the suit land) be registered in the names of the defendant to hold in trust but the defendant has refused to share the land equally and has instead evicted her from the same. The plaintiff therefore moved this Court by the plaint dated 11th July 2014 and filed on 18th July 2014 seeking that the trust be determined and an order be made that the suit land be subdivided into two (2) equal parts one to be registered in the name of the plaintiff and the other in the name of the defendant. Alternatively, the plaintiff claims that she has been on ½ portion of the suit land since 1976 and should be declared to be entitled to the said portion by adverse possession.

The defendant resisted this claim and in his defence, he pleaded that although the plaintiff is her sister, she is married to one MAINA KIINGATA and her full names are FLORENCE WAMBUI MAINA and that he is the registered absolute owner of the suit land whose title was issued to him on 19th November 1985. He denied that the plaintiff was cultivating on the suit land during the life time of their father. Defendant added further that there is a pending suit between the parties being Kerugoya CMCC No. 39 of 2014 and therefore the suit contravenes the provisions of **Section 6 of the Civil Procedure Act**. The defendant pleaded that a claim for adverse possession ought to be made by way of Originating Summons as provided under **Order 37 Rule 7 Civil Procedure Rules**. He therefore sought the dismissal of this suit with costs.

In her reply to the defence, the plaintiff pleaded that her marriage to MAINA KIINGATI irretrievably broke down in 1976 and she returned to her father's land where she was apportioned a portion on which she has been cultivating 300 coffee trees which she has been tending until her unlawful eviction by the defendant. And with regard to Kerugoya CMCC, the plaintiff pleaded that the same was withdrawn and a notice of withdrawal served upon the defendant. With regard to the filing of a plaint and not an Originating Summons, the plaintiff stated that that alone does not oust the jurisdiction of this Court to determine this suit.

The trial commenced before me on 30th September 2015 with Mr. Miano advocate appearing for the plaintiff and Mr. Magee advocate representing the defendant.

The plaintiff called two witnesses CHARLES MUITA (PW2) and CYRUS KIGOTHO KARIUKI (PW3)

in support of her case. In her testimony, the plaintiff testified that the suit land belonged to their late father and she and the defendant are the only children, she being the elder of the two. She asked the Court to adopt her written statement wherein it is stated that following her separation from her husband in 1976, she went back to her father's homestead who registered the suit land in defendant's name to hold in trust for both of them but the defendant has instead evicted her therefrom despite her requests to have it sub-divided into two equal portions. She added that although she had filed Kerugoya CMCC No. 39 of 2014, it was withdrawn because the subordinate Court did not have jurisdiction.

CHARLES MUITA (PW2) testified that the parties are residents of Kiine Location Ruiru Sub-location of which he was the Assistant Chief between 1968 to 1996 and both have been utilizing the suit land which belonged to their late father.

CYRUS KIGOTHO KARIUKI (PW3) testified that he was the Vice-chairman of Kibirigwi Farmers Co-operative Society and recalled that in 1976, the late NJUNGU NJURUNGA requested the factory to allow the plaintiff to be planting and selling coffee. The plaintiffs' father also informed him that he wanted her to plant 300 stems on his land. The factory Committee accepted that request and the plaintiff was allowed to take coffee to the factory under her father's name. He added that during his time as a Committee member of the factory, he did not hear any dispute between the parties.

On his part, the defendant called MURIUKI KINGURU (DW2) as a witness. In his testimony, the defendant told the Court that the suit land was transferred to him by his late father and therefore this suit should be dismissed. He too asked the Court to rely on his statement in which he has denied that the plaintiff was cultivating on the suit land during their father's life time.

On his part, MURIUKI KINGURU testified that the parties are his cousins and come from the same clan. He too asked the Court to rely on his filed statement in which he has stated that the defendant has exclusive possession of the suit land which was transferred to him by his father long before his demise and the plaintiff has never utilized it and is instead married to MAINA KIINGATA.

Both Mr. Miano advocate for the plaintiff and Mr. Magee wa Magee advocate for the defendant filed their respective submissions at the end of the trial.

I have considered the evidence by the parties together with their documentary exhibits and the submissions by counsel.

The following are not in dispute:-

- 1. The parties are siblings with the defendant being the younger of the two.**
- 2. The suit land has been registered in the defendant's names since 1985 as per the Land certificate.**
- 3. The parties late father died in 1994 as per the Death certificate.**

The issues for my determination are whether:-

(a) The suit land is registered in the defendant's names to hold in trust for the plaintiff in equal shares or

(b) The plaintiff has been in open and exclusive possession of ½ portion of the suit land as of right without interruption for a period of 12 years after dispossessing the defendant and therefore entitled to be registered as proprietor of that portion by adverse possession.

Before I delve into those issues however, I must address two important matters raised by the defendant in his defence at paragraph 8 when he pleaded that this suit is incompetent and bad in law because it seeks orders in adverse possession yet it is not brought by way of Originating Summons as provided under

Order 37 Rule 7 of the Civil Procedure Rules. That provision reads:-

1. ***“An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.***
2. ***The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.***
3. ***The Court shall direct on whom and in what manner the summons shall be served”.***

Although the defendant had pleaded that a Preliminary Objection would be raised, that was not done. Does the fact therefore that this claim was instituted by way of a plaint rather than an Originating Summons makes this suit in-competent? I do not think so because the plaintiff’s claim includes an action under trust and also under adverse possession and she could only file one pleading. It is also well settled that failure to claim adverse possession by way of an Originating Summons is not fatal – **MARIBA VS MARIBA (2007) 1 E.A 175.** I am of course aware that the Court of Appeal has previously held that failure to institute a claim for adverse possession by way of Originating Summons renders the suit incontestably bad in law – see **NGETHE GITAU 1999 1 E.A 225** and also **KENYENGA VS OMBWORI 2001 K.L.R 103.** However, it would appear that with the advent of the new Constitution in 2010, Courts can now entertain a claim for adverse possession even if it is by way of a plaint. In the recent case of **SAMMY LIKUYI ADIEMA VS CHARLES SHAMWATI SHISIKANI COURT OF APPEAL CIVIL APPEAL NO. 3 OF 2014 (KISUMU)**, the Court of Appeal faced with a similar situation where a claim for trust and adverse possession were brought by way of plaint addressed itself as follows:-

“Given the provisions of Article 159 (d) and (e) of the Constitution 2010, the respondent need not have filed a separate suit (Originating Summons) claiming the subject piece of land by way of adverse possession”

In the circumstances, this suit is not incompetent for having been brought by way of plaint rather than Originating Summons. The other issue is that this suit is caught up by the provisions of **Section 6 of the Civil Procedure Act** because there is civil case No. Kerugoya CMCC No. 39 of 2014 pending at this Court. No evidence was led on this pleading and in any event, among the plaintiff’s list of document is a notice of withdrawal of that suit dated 11th July 2014. That plea cannot therefore be sustained.

I shall now revert to the claims herein which, as I have stated, are based both on adverse possession and trust.

With regard to the claim for adverse possession, what the plaintiff needs to prove in order to be entitled to a portion of the suit land is as set out in the case of **KASUVE VS MWAANI INVESTMENTS LTD & 4 OTHERS 2004 K.L.R 184** where the Court of Appeal held as follows: _

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”

The plaintiff’s evidence is that following her separation from her husband in 1976, she moved back to her father’s home but following his death, the defendant evicted her from the suit land. It is not clear when she was evicted but in paragraphs 6 and 7 of her statement, she says that it was following her eviction that she filed Kerugoya CMCC No. 39 of 2014 which she later withdrew because the subordinate Court had no jurisdiction. She then filed this suit. That would mean therefore that she was evicted in 2014 or shortly before. The suit land was registered in the defendant’s names on 19th November 1985 as per the copy of land certificate exhibited by the plaintiff in her list of documents. It is settled law that mere change of ownership of land occupied by an adverse possessor does not interrupt such possession – **GITHU VS NDEETE 1984 K.L.R 776.** However, in order to sustain a claim for adverse possession, that possession must be hostile, that is, without the consent of the registered owner. Since the plaintiff says

she moved onto the suit land in 1976 with her father's permission and even planted coffee, time for adverse possession could only begin to run after her father's death on 19th August 1994 (see death certificate). This is because, prior to that date, she could only have been utilizing the suit land or at least a portion of it with her father's consent and therefore her presence on it was with the owner's permission. In his defence, however, the defendant has stated that the plaintiff has never lived on the suit land and instead lives in Kibirigwi. He also denied that the plaintiff planted any crop on the suit land. Possession of land is a question of fact hinging on several circumstances and may depend on the nature of land and the manner in which it is enjoyed although as was held in the case of **GEORGE WIMPEY LTD VS SOHN (1967) CH 487**, enclosure is the strongest possible evidence of adverse possession. However, occasional cultivation of land by another would not amount to sufficient evidence of adverse possession. In the case of **JOHN OYALO – WABALA VS CORNE LIUS OTATAYA OKUME C.A CIVIL APPEAL NO. 208 of 1997**, the Court held that to be able to acquire a title to registered land in the name of another person, one has to be literally in occupation of the land and the mere fact that a crop is present on the land may not necessarily mean that the grower of the crop is asserting a claim of ownership to the land. In this case now before me, it is not clear if the crop of coffee is still on the suit land and if the plaintiff has been harvesting it following the death of her father. On the evidence before me, I am not satisfied that a claim for adverse possession has been made out by the plaintiff. While there is evidence that the plaintiff was allowed to grow a crop of coffee on the suit land during her late father's lifetime, it is not clear if that continued following his death in 1994. In the circumstances, the claim for adverse possession has not, in my view, been established and must be dismissed.

The other claim is that of trust and it can only have been hinged on a resulting trust. It is not in dispute that the suit land is now registered in the names of the defendant. It is provided under **Section 25 of the Land Registration Act**, however, that while such registration confers upon the registered proprietor all the rights and privileges that go with such registration, that alone does not relieve the said proprietor from any duty or obligation to which he is subject as a trustee. Similar provisions are found in **Section 28 of the repealed Registered Land Act** under which the suit land was registered. In **KANYI VS MUTHIORA 1984 K.L.R 712**, the Court held that the registration of land in the name of one party does not extinguish the rights of other parties who may be entitled to the same by virtue of a trust. Evidence must be led upon which a trust can be determined as the Court will not presume a trust except in cases of absolute necessity – **MBOTHU & OTHERS VS WAITIMU & OTHERS 1986 K.L.R 171**

In her evidence, the plaintiff told the Court that her late father allowed her to plant a crop of coffee and she had 300 coffee trees which she was tending until her eviction. The defendant denied all this adding that the suit land was transferred to him by his father. Both the defendant and his witness MURIUKI KINGURU (DW2) placed much emphasis on the fact that the plaintiff is married to one MAINA KIINGATA. The suggestion therefore is that by virtue of that marriage, the plaintiff cannot lay a claim to her late father's land. **Article 27 of the Constitution** is very clear that every person is equal before the law and one shall not be discriminated upon any ground including sex or marital status. In cross-examination by Mr. Magee advocate for the defendant, the plaintiff said that before the defendant chased her away, she was growing coffee on about 3 acres of the suit land but in her father's names. Her witness CHARLES MUITA (PW2) who was the Assistant Chief of the area confirmed that during their late father's life time, both the plaintiff and the defendant were utilizing the suit land and he did not hear of any dispute between them. On his part CYRUS KIGOTHO KARIUKI (PW3) testified that when he was the vice-Chairman of Kibingoti Farmers Co-operative Society in 1976, the father to the parties herein took the plaintiff to their factory and requested that she be allowed to be planting and selling coffee which was accepted and he bought seedlings for her. The plaintiff thereafter sold coffee to the factory but under her father's name and during the period that he served on the Factory's Committee and until he left in 1985, he did not hear any dispute between the parties. I found these two witnesses to be credible and at no time did the defendant or his witness rebut the evidence that CYRUS KIGOTHO KARIUKI (PW3) and CHARLES MUITA (PW2) was not an official of Kibirigwi Co-operative Society or area Assistant Chief respectively. In my view, the fact that the parties father allowed the plaintiff to grow a crop of coffee on the suit land and even went ahead to request the local factory to allow her to sell coffee to them coupled by the undisputed fact that the parties are the only two siblings of their parents, is evidence upon which this Court can conclude that the registration of the suit land in the defendant's names could only have been with the intention that the defendant holds it in trust for his sister the plaintiff. This is fortified

by the fact that the plaintiff's marriage had collapsed and she had been accepted back home by her father no doubt in recognition of her right to a share in the suit land. In view of all that, it is highly un-likely that the parties' father would have wanted the plaintiff to remain a destitute. In his defence, the defendant had pleaded that the plaintiff and their late father were not in good terms at the time of his demise. No evidence was led on that and the fact that their late father allowed her to utilize part of the suit land seems to rebut that claim. From the totality of the evidence before me, I am persuaded that though the suit land is registered in the defendant's names, there was a clear intention on the part of the parties late father that the defendant should hold it in trust for both himself and the plaintiff. I am therefore satisfied that the plaintiff's claim in trust has been established as required in law. In paragraph six (6) of the plaint, she seeks the following order:-

“The plaintiff thus prays that this Honourable Court do determine the Trust aforementioned and a specific order that land parcel No. KIINE/RUIRU/161 be sub-divided into 2 equal parts, one to be registered in the name of the plaintiff and the other in the name of the defendant”

On the material before me, she is entitled to that order.

Judgment is therefore entered for the plaintiff against the defendant in the following terms:-

- 1. An order that the defendant holds land parcel No. KIINE/RUIRU/161 in trust for himself and the plaintiff.***
- 2. A determination of that trust with a specific order that the land parcel No. KIINE/RUIRU/161 be sub-divided into two equal portions one to be registered in the name of the plaintiff and the other in the names of the defendant.***
- 3. The parties to share equally the costs incidental to such sub-division and registration.***
- 4. The Deputy Registrar of this Court is authorized to sign any relevant document on behalf of the defendant to effect such sub-division and registration.***
- 5. As the parties are siblings, each shall meet their own costs.***

B.N. OLAO

JUDGE

26TH FEBRUARY, 2016

Judgment delivered this 26th day of February 2016 in open Court

Mr. Mwai for Mr. Gacheche for Plaintiff present

Ms Kiragu for Defendant present

Right of appeal explained.

B.N. OLAO

JUDGE

26TH FEBRUARY, 2016