



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.14 OF 2009

LUCY WAIRIMU WAINAINA.....PLAINTIFF

versus

FRANCIS KUIRA WAINAINA.....DEFENDANT

JUDGMENT

By way of an amended plaint amended on 7th March, 2009, the plaintiff sued the defendant for orders:

- a) A declaration that the plaintiff is the Lawful owner of Title No. Rare/Teret Block 1/116 and that the defendant be evicted therefrom.
- b) Mesne profits and costs of this suit.

The plaintiff's claim, in a nutshell is that she was duly registered as the owner of Title No. Rare/Teret Block 1/116 on the 3rd November, 1987 and was duly issued with a title deed.

The defendant is a brother to the Plaintiff. Upon the death of their mother, one Annah Wambui Wainaina, the defendant filed Nakuru High Court Succession Cause No.17/1988, In the Estate of Annah Wambui Wainaina (deceased) and obtained a grant of letters of administration *ad colligenda Bona* Limited to the collecting, receiving and preservation of the estate of Annah Wambui Wainaina (deceased).

On 8th March, 1994, the defendant and one Njenga Wainaina, petitioned for a full grant in respect of the estate of Annah Wambui (deceased) within Nakuru High Court Succession Cause No.17 of 1998 and listed title No. Rare/Teret/Block 1/116 as one of the properties of the deceased.

The defendant shifted to the plaintiff's land after the death of their mother.

In her testimony, the plaintiff gave the history of her acquisition of the land in question.

She said that she joined a society called “*Mutukania Ngwataniro*” where she bought shares. On the 10th November, 1975, she paid Kshs.22 and a receipt was issued. Further payments were made on 5th December, 1977, 5th May, 1975, 5th December, 1975 and 5th December, 1975. The respective receipts were tendered as exhibits.

In total, she got two (2) shares. She bought share from one Mary Michael at Rongai in the Ngwataniro office. She wanted a big shamba and had asked to be informed of any willing seller. She produced four (4) receipts dated 30th July, 1978. the name of Mary Michael was cancelled.

She was issued with a Share Certificate dated 25th March, 1976 in her name – Lucy Wairimu Wainaina. She was also issued with a 2nd Share Certificate dated 25th March, 1976. She produced the Share Certificates as evidence. She took occupation of her land and built a house and fenced. The land was five (5) acres.

Her mother had a shamba at Njoro and was living alone. Her brother one John Kamonjo asked the mother to come and live with the plaintiff's children. The plaintiff lived with the mother till 1984 when her brother Kamonjo died.

The defendant laid claim to the land. Dispute was referred to elders and proceedings before the elders were produced as exhibits.

On cross-examination the plaintiff said she was married to one Kiarie who is now deceased. She said in 1975 she was using her name Lucy Wairimu Wainaina. She was shown receipt marked Pexh.5 which has the name Lucy Wairimu Kiarie. She added that she obtained her title in 1987. All the while she was being told that the process of issuance of Titles was on going. She acknowledged that her title reads two (2) acres and not 5 acres as she claimed ownership to. She did not know what happened to the three (3) acres.

Later on in the proceedings (on 21th July, 2014), the plaintiff was recalled and she produced a shares transfer form from Mary Michael to herself. The transfer mentions plot No.1112. The plaintiff explains that this was later changed to 116.

P.W.2 told the court that he knows the plaintiff's land. It is situated next to the road in Mutukanio. P.W.2's land is 3 kilometers from the plaintiff's.

In an amended defence and counter claim amended on 2nd March, 2010, the defendant denies the claim herein and raises a counterclaim.

He avers that the plaintiff unlawfully, wrongfully and fraudulently procured the registration of the subject land in her name. The defendant denies evicting the plaintiff from the land and accuses the plaintiff of contradicting herself when she avers that she was evicted in 1984 yet the land was registered in her name in 1987.

It is urged that the plaintiff's claim is time barred having been brought to court after a period of 25 years from the date of the alleged trespass.

In his counter-claim the defendant lays claim to land title No.Rare/Teret Block 1/116 which was unlawfully, wrongfully and fraudulently procured by the plaintiff and he prays that the said title be cancelled and the same to revert to the estate of the late Annah Wambui Wainaina.

In the alternative, it is urged that any registration of the plaintiff as the proprietor of the said land could only be in trust of the family of Annah Wambui Wainaina (deceased). He therefore prays for 3 orders viz:

(a) Cancellation of Title No.Rare/Teret Block 1/116 to be substituted with a title in the name of Annah Wambui Wainaina.

(aa) A declaration that the plaintiff was registered and has been holding the title No.Rare/Teret Block 1/116 in the trust for the defendant and other family members

(b) Costs of the counterclaim be paid by the plaintiff.

An important point of law that seems to have escaped both parties herein is that the counter-claim as instituted is legally untenable.

The defendant (the plaintiff in the counterclaim) brings the claim not as his individual claim but as a

claim on behalf of the estate of the late Annah Wambui Wainaina. The primary prayer is for cancellation of the plaintiff's title and an order that a fresh title deed be issued in the names of the estate of Annah Wambui Wainaina.

It was required of the defendant (plaintiff in the counter-claim) to bring the action in his capacity as the legal representative of the estate of Annah Wambui Wainaina in order for him to have a *locus standi* to claim on behalf of the estate.

Even though it is mentioned that he had applied for letters of administration in respects of the estate of the deceased, the failure to indicate in his pleading that he was suing in the counter-claim in his capacity as a legal representative is fatal to the claim. On this ground alone, the counter claim would fail.

Notwithstanding this finding I proceed to consider all issues raised in the suit on merit.

In his testimony, the defendant said that land parcel No. Rare/Teret Block 1/116 belongs to Annah Wambui Wainaina. The same was bought by Annah's son (a brother to the plaintiff and the defendant), one John Kamonjo. The mother died on 17th October, 1987. Kamonjo died in 1984. The land was five (5) acres. Kamonjo moved their mother and the plaintiff to this land. The plaintiff had three (3) children. She was not married. The defendant stated he never witnessed Kamonjo buy the land.

When Kamonjo was alive, the plaintiff never claimed the land.

Kamonjo left the plaintiff and the mother living in plot No.116. They lived till 1986. The plaintiff then caused the defendant and two (2) brothers Nganga and Mbugua to appear before a tribunal over the land. She wanted their mother removed from the land.

When their mother died, the plaintiff objected to her burial on the land and it took a court order for the burial to continue. The defendant added that the local D.O. was on the plaintiff's side in the dispute. He stated that the plaintiff took receipts from their mother's suitcase.

The defendant obtained an injunction from court against the plaintiff. The order is produced as an exhibit. The plaintiff was asked to reconcile with the family and file her claim in succession cause No.17 of 1988. She disappeared from that time. From 1988, the defendant next saw the plaintiff in 2005. The defendant and others sat in the absence of the plaintiff and decided to give her 2 ½ acres of Land since she was not married. Minutes are exhibited.

The defendant produced a ballot paper which had been issued to Kamonjo, their brother when he brought the land.

On cross-examination, the defendant stated that plot No.116 is 5 acres. There is a title deed for 2 acres in the names of the plaintiff and three (3) acres in the names of Lucy Wanjiku Muhia. Lucy Muhia's title is No.267. He said his receipts were taken from their mother's box.

He added that Kamonjo bought plot No.116 from Mutukanio. It is Kamonjo who built the house on the land and the plaintiff had been given one room there.

Questioned further, he said that ballot produced bore no names. It does not connect with Kamonjo.

D.W.2, Peter Njane Kamau told the court that he was an Assistant Manager at Mutukanio Farmers Limited and during sub-division he was a temporary Director in 1974. He remained in that position till 1982.

In the 1980s on a date he cannot recall, the chairman, one John Mbure asked to show Kamonjo plot No.116. Kamonjo was a member of Mutukanio. He showed him the beacons. Kamonjo had two shares equal to 5 acres. He explained that a transfer of shares would involve the seller and the buyer going to the offices. Receipts would be received and fresh ones would be issued not cancelled. He had never seen

receipts with alterations. He added that Rongai Ngwataniro was a branch of Mutukanio. A receipt was issued to one Lucy Wairimu Kiarie. This cannot be the same person as Lucy Wairimu Wainaina. He added that ballot papers did not have names.

D.W.3, Caribania Wainaina told the court that the plaintiff and the defendant are sister and brother respectively. He added that one of his brothers, Kamonjo, bought plot No.116 for their mother. The land was five (5) acres. The mother used to live with the youngest sister Lucy Wairimu. He said Lucy later claimed the land was hers – D.W.3 learnt that Lucy had obtained a title to the land.

On cross-examination, the witness said that he supervised the construction on plot No.116. It is Kamonjo who bought the building materials. Lucy never bought the material. Kamonjo was a shareholder at Mutukanio. He was the owner of plot No.116.

D.W.4, George Kiarie Muraya, told the court that the plaintiff was once his wife. They are no longer together. They got married in 1990 and lived together till 2010. Lucy is a sister to the defendant.

In the later stage of the proceedings, the Deputy Registrar was directed to visit the *locus in situ* and file a report. The said report is on record.

Upon application by the defendant, the court did allow the production of the map and plan of the subject land. Same are duly annexed.

Ultimately, both parties filed written submissions.

I have had occasion to consider the pleadings, the evidence and submission on record.

The issues for determination crystalize into seven (7) liz:

- 1) Is the suit herein statute barred?
- 2) Did the plaintiff secure registration of the land the subject matter of these proceedings fraudulently in her name?
- 3) Based on the answer to 2 above, is the plaintiff the lawful owner of title No.Rare/Teret Block 1/116?
- 4) Does the plaintiff hold the land in trust for the family members of Ann Wambui Wainaina
- 5) Should the defendant be evicted from the land in question?
- 6) Is the plaintiff entitled to *mesne* profit?
- 7) Who is entitled to the costs of this suit?

I have deliberately framed issue No.1 in that position because it is an important point of law for determination and which can, based on the finding determine this suit.

Both parties have extensively submitted on this point.

It is the plaintiff's submission that the suit is not statute barred while the defendant maintains that it is. It is noted from record that this suit was filed on 16/1/2009.

In determining whether the suit is caught up by the limitations of Actions Act, it is crucial to address the issue of when the plaintiff's cause of action accrued.

So what is a cause of action? A cause of action which is also known as a "*right of action*" is the totality

of the fact that make up a claim. The same has been defined variously as seen herebelow:

Bullen and Leake and Jacobs **Precedents of Pleadings** 12 Edn Page 54 states:

“Essentially, therefore, a cause of action is constituted by the “bundle” or aggregate of facts which the law will recognize as giving the Plaintiff a substantive right to make the claim against the Defendant for the relief or remedy which he is seeking.”

Mulla, **The Code of Civil Procedure** 16th Edn vol. 1 Page 412

“A cause of action is a bundle of facts which taken with the law applicable, gives the Plaintiff a right to relief against the Defendant. It must include some act done by the Defendant since in the absence of an act no cause of action can possibly accrue; it is not limited to actual infringement of right sued on, but includes all material facts on which it is founded.”

(Emphasis added)

Black's Laws Dictionary 9th Edn Page 251 defines a cause of action thus:

“A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person.” (emphasis added)

In our instant suit, the defendant is alleged to have unlawfully entered the plaintiff's land in 1984. On 7th October, 1987, Annah Wambui, the mother of the plaintiff died and the defendant filed Nakuru High Court Succession Case No.17 of 1988 on 19/11/88. On 20/1/1988 the defendant obtained an injunction in HC Succ.17/88 restraining the plaintiff from ploughing, building, selling or doing anything on title No.Rare/Teret Block 1/116 until the Succession Cause was completed and determined.

On 12th May, 2008 the plaintiff and defendant entered into a consent excluding the subject land from among assets of Annah Wambui Wainaina (deceased).

The truth of the matter from the facts on record is that between 20th January, 1988 and 12th May, 2008 the suit land herein was the subject matter in H.C. Succ. Cause No.17/88 and the defendant had obtained an injunction against my dealings on the land. When a consent order freed this land from the list of assets of Annah Wambui Wainaina on 12th May, 2008, the plaintiff proceeded to file this suit on 16/1/2009.

In essence, the consent order can be construed as a finding that the land belonged to the plaintiff and thus a determination on ownership (as per the facts and events then) can be said to have been made on 12th May, 2008. Because of the existing active litigation over the subject suit land, the plaintiff's suit could only have been time barred should it have been filed twelve (12) years after 12th May, 2008. The suit was filed on 16th January, 2009. Noting that a cause of action is not limited to actual infringement of right sued on, but includes all material facts on which it is founded, the suit herein is not time barred.

The plaintiff was already in court fighting for her proprietary rights to the land in Succession Cause No.77 of 1988. Indeed there were orders barring her from any dealings. The running of time before the consent order of 12th May, 2008 cannot be held against the plaintiff. The plaintiff certainly would not have ran two (2) parallel suits over the same subject matter. The claim is not time barred.

Was the registration of the land in the name of the plaintiff fraudulent? Was she the Lawful owner of the same?

The plaintiff maintains she bought the land through Ngwataniro Mutukanio Company. She had produced several receipts of payments.

The bundle of receipts produced shows she became a member/shareholder of Rongai Ngwataniro Company Limited. These receipts are for membership, share capital and other activities of the company.

She bought one share that was equivalent to 2½ acres. She has tendered evidence that she bought another share from one Mary Michael which was also equal to 2½ acres. Receipts were produced showing the names of Mary Michael cancelled and thereon inserted the plaintiff's name. A transfer document for this share was also produced. The same is duly executed and attested.

These receipts and the transfer document are challenged in the defendant's submissions as forgeries. It is the defendant's case that in some of the receipts the plaintiff is referred to as Lucy Wairimu Kiarie (I note from the receipts it records Kiari) and not Lucy Wairimu Wainaina. In explaining this in cross-examination, the plaintiff contended that she knew someone called Kiarie then. She later married D.W.4 who is also called Kiarie and D.W.4 has confirmed that he married her in 1990.

There is a challenge to the receipts on the basis that the ones relating to share bought from Mary Michael were crossed out and the names of the plaintiff inserted and also that some receipts were issued on a Sunday.

The applicable law and standard of proof in an allegation of fraud is stated by this court (Kneller, J.) in **Mutsonga V. Nyati** [1984] KLR 425 (at page 439):

“Charges of fraud should not be lightly made or considered..... They must be strictly proved and although the standard of proof may not be so heavy as to require beyond reasonable doubt, something more than a mere balance of probabilities is required..... Infact a high degree of probability is required It is very much a question for the trial judge whether there is evidence to support an allegation of fraud is a question of fact.....”

Again it would not be right to answer this issue on the impression any witness or party made or his demeanour alone. It would have to be tested against documentary evidence and their conduct before and after the event and the probability of the account given by them.....”

From the evidence I note that there is no challenge to the receipts produced by the issuing company over their authenticity. D.W.2, an official from the company stated in his evidence in chief that:

“It was not normal for receipts to be cancelled. I cannot tell if they are from Mutukanio. I had never seen receipts with alteration. I know Lucy. I can't tell if she was a member of Mutukanio. People were many.....”

Other than saying that it was not normal for receipts to be cancelled, this witness could not even tell whether the plaintiff was a member of the company. He therefore cannot even speak to the identity the plaintiff gave to the company. The plaintiff has stated she identified herself as Lucy Wairimu Kiarie as she knew someone by that name and her son is called Kiarie.

On the question of some receipts being issued on a Sunday, this court cannot make any conclusive finding of whether this was possible because no evidence is tendered that the company never opened its offices on Sundays.

The plaintiff produced a title deed for title number Rare/Teret Block 116 issued on 3rd November, 1987. The acreage is shown as 2½ acres. She testified that there is an error in the title deed that needs to be corrected to read five (5) acres. I note the defendant confirms that the area on the ground is five (5) acres. It is submitted for the plaintiff that she could have moved to correct the errors were it not for orders of injunction against her dealing with the land or the suit land until determination of a succession case filed.

So what is the Defendant's evidence in support of ownership of the land by Annah Wambui Wainaina?

In the defence and counterclaim the defendant avers that the plaintiff's title is fraudulent and unlawful. The same should be cancelled and the land to revert to the Estate of the late Anne Wambui Wainaina. It

is his evidence that it is one John Kamonjo (his brother) who bought the land for Annah Wambui Wainaina. He states he never witnessed Kamonjo buy the land. When Kamonjo was alive, the plaintiff did not claim the land. It is Kamonjo who moved Annah (their mother) and the plaintiff to live on the land. When their mother died in 1987, the Plaintiff opposed her burial on the land and it took a court order to enable the burial take place. He added that the plaintiff took receipts from their mother's suit case when she died. The defendant produced a ballot paper which had been issued to Kamonjo, their brother when he bought the land. D.W. 3 (a brother to the defendant), also said that it is Kamonjo who bought the land for their mother. On cross-examination he said that it is Kamonjo who bought building materials to build a house on the land. He says the land belonged to Kamonjo. D.W.2 an official of Mutukanio Farmers Limited (Assistant Manager) told the court that at one time the chairman of the company sent him to point out plot No.116 to Kamonjo. He showed him the beacons.

I have considered this evidence. The defendant and D.W.3 state Kamonjo bought the land. None testifies to have been there when the transaction(s) took place. It is alleged that the plaintiff took the receipts from the late mother's suitcase. Notably, D.W.2 does not mention anywhere that Annah Wambui Wainaina was a member of Mutukanio Farmers Company as a shareholder. He states Kamonjo was. Kamonjo has laid no claim to the land herein. He is actually deceased. Nobody claiming through him is claiming the land. The claim that the plaintiff stole the receipts of Annah Wambui Wainaina is not supported by an iota of evidence. Even assuming that was true, what was so difficult with the said Annah Wambui Wainaina or the defendant getting records from the company to show evidence of Annah's shareholding in the company?

The assertion of theft of the receipts is watered down by the proceedings before a tribunal that are produced as evidence herein where the plaintiff had sued Annah Wambui Wainaina, the defendant and another over the suit land. In those proceedings, Annah Wambui Wainaina stated:

“I had no receipts for the plot. They were all kept by my late son. When he died, I did not see them. Even if I saw them I could not read them as I do not know how to read and write. My son was not sick. He was overrun by his tractor when it overturned. So there was no room to ask for the receipts.”

From this statement, it is quite clear that the assertion that the plaintiff stole the receipts from Annah's suitcase is a figment of the defendant's imagination.

Furthermore, in those proceedings the said Annah goes ahead to testify that her plot was only 2.5 acres bordering her daughter's. The question then on what basis is the defendant claiming that 5 acres were bought for the said Annah by Kamonjo?

The inevitable conclusion is that evidence is totally lacking to support the proposition that Annah Wambui Wainaina was a shareholder at Mutukanio Ngwataniro Company.

In their findings in the tribunal proceedings alluded to hereinabove the elders reached the conclusion that:

- “1. Plot No.116 and 116B (2180) belong to Lucy Wairimu Wainaina.**
- 2. The accused Mrs. Annah Wambui Wainaina retains her plot No.356.**
- 3. Due to the mother's age, Lucy Wairimu Wainaina to continue taking care of her mother.**
- 4. Lucy Wairimu's brothers to stop interfering with her plots but could visit their mother and at the same time they should show respect to their sister.”**

It is noteworthy that this decision was by local elders who were well versed with land issues in the locality, they knew the parties and after listening to and questioning the plaintiff herein, Annah Wambui Wainaina and the defendant and other witnesses made a finding that Annah Wambui's land was plot

No.356 while the plaintiff's land was No.116.

D.W.2, the official from the company makes no mention at all of Annah Wambui Wainaina in his evidence. His evidence is that the chairman told him to show Kamonjo, a shareholder, the beacons of a plot. The ballot paper produced in defence evidence is a plain piece of paper with No.116 written on it. In the absence of other supporting evidence, this document cannot certainly form evidence of ownership of land. It is instructive that D.W.2 does not even produce any evidence that Kamonjo was a shareholder of the company and even if this was shown to be so, the claim by the defendant for land herein is on behalf of Annah Wambui Wainaina and therefore evidence of her shareholding or ownership would be necessary.

Before concluding on the issue of ownership, I need to consider the additional evidence tendered on the strength of the orders of court vide its ruling dated 29th October, 2015. The defendant had sought to produce the area map to show that Lands parcel No.Rare/Teret Block 1/1112 is not situated at Mutukanio but at Kihingo trading centre, Njoro. I have looked at the said map and the report by the Deputy Registrar dated 18th May, 2015. The report by the Deputy Registrar indicates that parcels of land No.1112 is situated at Kihingo centre on which lies Lamudiac School. The map shows two (2) parcels marked No.1112, one indicated as a "centre".

In the absence of a professional to interpret the map and the intended import by the defendant from thereon, this map is not helpful. The Deputy Registrar has confirmed that Land parcel No.116 exists on the ground (about 4-5 acres.) This is the land in dispute.

The plaintiff has testified that her two (2) shares constituted parcel No.116 after they were consolidated. It was incumbent upon the defendant to rebutt this evidence by calling evidence from the company and land professionals. The production of the map without any interpretation/explanation does not aid this court at all.

Looking at the evidence in its entirety, I am of the finding that on a balance of probability, the plaintiff has shown she is the legal owner of parcel No.Rare/Teret Block/116.

Does the plaintiff hold the land in trust for the family members of Annah Wambui Wainaina?

From the above findings, Annah Wambui Wainaina's claim to the land has been shown not to exist. I have considered the parties' submissions on this issue. Specifically, I have had regard to the decision in **Godfrey Kagua Githire V. George Kagia and 4 others**, (HCCC No.95 of 2005, 2008 eKLR) relied on by the defendants. This case is not applicable to the facts of this case. In that case, the defendants proved constructive trust due to their financial contribution in paying the loan to Settlement Fund Trustees. That is not the scenario on our instant suit. The finding of the court is that the plaintiff secured the land on her own. She is only a sister to the defendant and no form of trust arises in the circumstances of this case.

Should the defendant be evicted from the subject land?

The ready answer is yes. The defendant has not shown any colour of right allowing him to be on the plaintiff's land. His occupation is based on his belief that the land belonged to his mother Annah Wambui Wainaina. The said Annah has now been found not to be the owner on the land. The defendant is a trespasser. He must move out of the plaintiff's land voluntarily or be evicted.

Is the plaintiff entitled to *mesne* profits?

This claim was treated casually by the plaintiff. P.W.2 who was called to testify on the same indicated land is leased at Kshs.5000 in the locality. He does not from the record given a breakdown of the acreage that is leased at CKshs.5000/= per year. Is it per acre; 2 acres or 5 acres? He says he leases land for a concessionary rate of Kshs.4500/= from a friend.

This is a special damage claim that ought to have been proved. The evidence on record does not enable

the court to quantify the claimed *mesne* profits. The claim must fail.

Who is to bear the costs of this suit? Costs follow the event. The plaintiff shall have the costs of this suit.

Consequently and for the reasons above stated, there shall be judgment for the plaintiff against the defendant in the following terms:

1. The plaintiff is the lawful owner of Title No. Rare/Teret Block 1/116 and the defendant be evicted therefrom.
2. Cost of the suit.

As regards the counterclaim, the same, again for reasons above stated, is dismissed with costs to the plaintiff.

Dated, Signed and Delivered at Nakuru this 14th day of June, 2016.

A. K. NDUNG'U

JUDGE