



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERUGOYA

ELC CASE NO. 24 OF 2013

PAUL WANJUE T. WARUI.....PLAINTIFF

VERSUS

JAMES KATEGWA T. WARUI.....DEFENDANT

JUDGMENT

On 10th May 2010, the plaintiff herein invoking the provisions of **Section 38 of the Limitations of Actions Act and Order XXXVI of the Civil Procedure Rules** filed this Originating Summons seeking the following orders against the defendants:-

- 1. That the plaintiff be declared to become entitled by adverse possession for over 12 years to half of that parcel of land registered under the Registered Land Act and comprised in the title numbers L.R. KIINE/SAGANA/3221, KIINE/SAGANA/3222, KIINE/SAGANA/3223, KIINE/SAGANA/3224, KIINE/SAGANA/3237, KIINE/SAGANA/3232, KIINE/SAGANA/3233 and KIINE/SAGANA/3234.***
- 2. That the plaintiff be registered as the sole proprietor of half the said parcels of land namely L.R KIINE/SAGANA/3221, KIINE/SAGANA/3222, KIINE/SAGANA/3223, KIINE/SAGANA/3224, KIINE/SAGANA/3237, KIINE/SAGANA/3232, KIINE/SAGANA/3233 and KIINE/SAGANA/3234***
- 3. That the Land Registrar Kirinyaga do register the plaintiff as proprietor of the title numbers of half of L.R. No. KIINE/SAGANA/3221, KIINE/SAGANA/3222, KIINE/SAGANA/3223, KIINE/SAGANA/3224, KIINE/SAGANA/3237, KIINE/SAGANA/3232, KIINE/SAGANA/3233 and KIINE/SAGANA/3234.***
- 4. That the defendants be ordered to pay the costs of this suit***
- 5. That such further or other orders be made as may be just and expedient.***

The same was supported by the plaintiff's affidavit in which he deponed, inter alia, that on 22nd May 1962, the defendant was registered as proprietor of L.R No. KIINE/SAGANA/370 measuring approximately 2.729 Hectares to hold the same in trust for himself and the plaintiff who has been in uninterrupted occupation of part of the land since then although the defendant has been resisting his occupation. That plaintiff has been in adverse possession of the said parcel of land for a period of over 12 years and has therefore acquired ownership of the same by operation of the law.

That on 6th February 1991, the defendant sub-divided KIINE/SAGANA/370 into KIINE/SAGANA/2005, 2006 and 2007 which were later recombined and allocated a new parcel No. KIINE/SAGANA/3219 which was sub-divided into the parcels mentioned in paragraphs 1 to 3 of the Originating Summons including KIINE/SAGANA/3225 which was sold to one CHARLES MAITUKA GITHAIGA. That he filed a case at Baricho SRM LDT No. 2 of 2003 and a decree was issued in his favour but later the High Court in Nyeri Civil Appeal No. 62 of 2007 set aside the award.

The defendant filed grounds of opposition to the Originating Summons as well as a replying affidavit in which he deponed, inter alia, that the parcel of land No. L.R KIINE/SAGANA/370 is his property having been given to him by the Aithirandu Clan in 1960 and at no time was it registered in his names in trust on behalf of the plaintiff and that their father was allocated another parcel of land No. KIRINYAGA/GATHIGIRIRI/424 and that the plaintiff should sue their father and not him. He added that the plaintiff sued him in Baricho SRM L.D.T No. 2 of 2003 and was awarded three (3) acres out of the land but he lodged an appeal which was allowed. He pleaded further that he has only allowed the plaintiff to build a house on the land but he has now asked him to vacate and that the plaintiff no longer cultivates the land.

The parties on 21st August 2013 narrowed down the issues for determination as follows:-

- 1. Was the defendant the registered owner of land parcel No. KIINE/SAGANA/370 in trust for himself and the plaintiff?**
- 2. Has the plaintiff acquired adverse possession of over 12 years of half of KIINE/SAGANA/370 or the portion he has built his house only?**

The trial commenced before me on 22nd September 2014 with the plaintiff calling one witness and the defendant calling three witnesses.

The plaintiff's case is that the defendant is his elder brother both being the children of TIRUS WARUI NGUMBU and SALOME TIRUS both deceased and that the parcel of land L.R No. KIINE/SAGANA/370 measuring 7 acres was originally registered in the names of NGUNU WARUI who belonged to their Uithirandu Clan. Then in 1962 the same was registered in the names of the defendant by their father to hold in trust for both of them and they have been living on the said land to-date since their two other brothers were given land by the clan elsewhere. The plaintiff was born in 1960 and has lived on that land all along and their parents were also buried there. However, since 2000, the defendant has been trying to evict him so he moved to the Lands Tribunal which directed that he be given three (3) acres and the defendant retains four (4) acres but that decision was over-turned by the High Court in Nyeri Civil Appeal No. 62 of 2007. Meanwhile, the defendant sub-divided the said land into KIINE/SAGANA/2005, 2006 and 2007 which were later combined and given parcel No. KIINE/SAGANA/3219 which was itself later sub-divided into the following nine (9) portions which are the subject of this suit and which will henceforth be referred to as the suit properties:-

- 1. KIINE/SAGANA/3221**
- 2. KIINE/SAGANA/3222**
- 3. KIINE/SAGANA/3223**
- 4. KIINE/SAGANA/3224**
- 5. KIINE/SAGANA/3225**
- 6. KIINE/SAGANA/3237**
- 7. KIINE/SAGANA/3232**

8. **KIINE/SAGANA/3233**

9. **KIINE/SAGANA/3234**

L.R No. 3225 was sold to one Charles Waituka.

It is the plaintiff's case that the sub-division of the original KIINE/SAGANA/370 resulting in the suit properties was done without his consent hence this suit.

The plaintiff's evidence was supported by CYRUS KIIGE KANGANGI (PW2) who is a neighbour to the parties. He said the land KIINE/SAGANA/370 was registered in the name of the plaintiff's father who transferred it into the defendant's names to hold in trust for the plaintiff and that both parties live on the said land and even their parents were buried there.

On his part, the defendant stated that the land KIINE/SAGANA/370 is his property given to him by his Aithirandu Clan in 1960 when it was registered in his names and even his father was given land which he sold and therefore the plaintiff has no right over that land although he has built on a portion measuring 20 ft by 15 ft given to him by their father. He confirmed that the plaintiff took him to the Tribunal which ordered that he gives plaintiff 3 ½ acres but he refused to give plaintiff that land.

The defendant called as defence witnesses LEONARD GICHIRA (DW2), JOHN KABACHIA KABINGA (DW3) and CHARLES NJORI MARINGA (DW4). The totality of their evidence was that although the parties are brothers, the land parcel No. KIINE/SAGANA/370 was given to the defendant by the clan just as was the case with all other members including their father and the plaintiff can only lay claim to his father's land. They denied that the defendant hold the land in trust for the plaintiff. They however confirmed that the parties' parents were all living on that land.

Submissions have been filed by counsels for both parties which I have considered together with the parties' oral evidence and the exhibits produced by them.

It is clear from the pleadings and the issues as filed and agreed by the parties that the issues for determination are both in trust and adverse possession as set out earlier in this judgment. It is not in dispute that the parties are brothers with the defendant being the elder of the two. It is also not in dispute that the suit properties were a sub-division of L.R No. KIINE/SAGANA/370 measuring some seven (7) acres. It is also not in dispute that prior to the registration of KIINE/SAGANA/370 into the names of the defendant in 1962, it was originally in the names of one NGUNU WARUI. Both the plaintiff and the defendant agree that the land was given to the defendant by their clan. Their point of departure is that while the plaintiff insists that it was given to the defendant to hold in trust for both of them, the defendant's claim is that the land was given to him and registered in his names as his property and not to hold in trust for the plaintiff or any other party. The case being made out here by the plaintiff is that of customary trust. It is now well settled that the absence of any reference to a trust in the title document does not affect the enforceability of a trust – MUTHUITA VS MUTHUITA 1982 – 88 I K.A.R 42 in which Polter J.A. approved the decision of Madan J. (as he then was) in GATIMU VS GATHANGI (1976) K.L.R 253. In KANYI VS MUTHIORA 1984 K.L.R 712, the Court held that registration of land in the names of one under the Registered Land Act did not extinguish rights under Kikuyu Customary Law nor relieve the proprietor of his duties and obligations as a trustee. However, whether or not a trust exists is a matter of evidence as the Court never presumes a trust except in cases of absolute necessity. In MBOTHU & 8 OTHERS VS WAITITU & 11 OTHERS 1986 K.L.R 171 at Page 189, the Court of Appeal observed as follows:-

“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”

The above position of the law was also confirmed in the case of DORCAS NDOMBI WASIKE VS BENSON WAMALWA KHISA C.A CIVIL APPEAL NO. 87 of 2004.

Having set out the law with regard to trust, is there evidence in this case upon which a trust in favour of the plaintiff can be found by implication or otherwise? By his own admission, the defendant was given parcel of land No. KIINE/SAGANA/370, from which the suit properties were later sub-divided, by the clan. In his evidence in chief, he stated as follows:

“This land KIINE/SAGANA/370 is mine. It was given to me by our clan Aithirandu Mbari ya Ndwiga in 1960 and it was registered in my names”

He went on to add that only girls were not given land and that even his father was given land which he sold. In cross-examination by Mr. Magee counsel for the plaintiff, the defendant said:-

“It is true that the land was registered in my names in 1962 in exchange with another parcel KIINE/SAGANA/1049. This land KIINE/SAGANA/1049 I was given by the clan. I was young then so it was my father who made contributions. I was born in 1951. So I was young when the land was being given out. It is not true that the land was given to me to hold in trust for the family. Plaintiff was born in 1960. He was not given land”

Although the defendant claims that he could not be holding land parcel No. KIINE/SAGANA/370 in trust for plaintiff or any other person, the evidence that comes out points to the fact that he was registered as owner of the land in trust for his family including his parents. This is borne out of the fact that both their parents were buried on the land which is also where the plaintiff was born. The fact that his father sold his other parcels of land and retained parcel No. KIINE/SAGANA/370 is a clear indication that it was his intention to retain that parcel of land for the use of his family. It was never given to the defendant for his sole use. The defendant even concedes that it was his late father who made the contributions to the clan as he (defendant) was still young by then. Further, evidence of an intention by the parties' father to create a trust is found in the fact that the plaintiff has all along lived on the parcel of land until the defendant started evicting him in 2000 and finally demolished his house in 2010.

In addition to the above, a reading of *Eugene Cotron's Restatement of African Law: (Law of Succession), Sweet & Maxwell London 1969 at page 12* recognizes the concept of trustee in Kikuyu Customary Law to which the parties herein belong and although no evidence on Kikuyu Customary Law was led by either of the parties, this is a matter that this Court can take Judicial notice of. It is clear that under Kikuyu Customary Law, the eldest son holds land as trustee for himself and the other heirs – *MWANGI VS MWANGI C.A CIVIL APPEAL NO. 245 of 2004 (NBI)*.

There is also evidence that when the parties were litigating over parcel of land No. L.R KIINE/SAGANA/370 at the Land Disputes Tribunal, their father gave evidence in support of the plaintiff and asked the defendant to give plaintiff three (3) acres. In cross-examination by counsel for the plaintiff, the defendant said:-

“It is true that during the Tribunal case, our father was a witness for the plaintiff. He said I give plaintiff 3 acres”

Indeed looking at the proceedings of the Tribunal (Plaintiff's Exhibit 4), the parties' father TIRUS WARUI is recorded as having said the following:-

“He suggests that James should give his brother Paul at least one, two or three plots. The land was seven acres but James has sold four of the plots”

Clearly therefore, that evidence coming from their father was a demonstration that the plaintiff was entitled to a portion of the land in dispute and being a trustee, the defendant could not deal with it as his own private property.

In my view, having considered all the circumstances herein, I am satisfied that there is evidence which, on a balance of probabilities, a customary trust in favour of the plaintiff can be founded and I hereby find that the plaintiff has proved that the defendant holds the suit properties in trust for himself and the

plaintiff.

The plaintiff's claim is also founded on adverse possession and it is clear from **MUTHUITA VS WANOE 1982 K.L.R 166** that a claim for land under both trust and adverse possession are not incompatible.

Section 38(1) of the Limitation of Actions Act allows a person who claims to have become entitled to land in dispute by way of adverse possession to apply to the High Court for an order that he be registered as proprietor of the land in place of the registered proprietor. For a person to be entitled to an order that he has acquired the land in dispute by adverse possession, he must establish the following:-

- a. That he has been in continuous and un-interrupted possession of the land for twelve (12) years or more*
- b. That such possession was open, notorious and with the knowledge of the registered owner.*
- c. That such possession was without the permission of the registered owner*
- d. That he has asserted a hostile title to that of the registered owner*

The above are a reiteration of the Court of Appeal's decision in **KASUVE VS MWAANI INVESTMENTS LTD & 4 OTHERS 2004 1 K.L. R 184**. See also **WANJE VS SAIKWA 1984 K.L.R 284**.

Considering the evidence in this case in light of the above principles as set out in the above cases and the law, is the plaintiff entitled to the orders he seeks with respect to the suit properties by adverse possession? It is not in dispute that the plaintiff was born on the parcel No. L.R KIINE/SAGANA/370 in 1960 and has lived and worked on a portion of the same until the defendant demolished his house in 2010 when their father died. That is a period of 50 years. All this time the original KIINE/SAGANA/370 and its subsequent sub-divisions which are the subject of this suit were registered in the names of the defendant. It is also clear from the documentary evidence produced herein that the parties only started litigating over parcel No. KIINE/SAGANA/370 in 2002 when the plaintiff herein filed case No. 12 of 2002 at the Baricho Land Disputes Tribunal. By that time, the plaintiff had been in continuous, open, notorious and un-interrupted possession of a portion of L.R No. KIINE/SAGANA/370 for well over 42 years with the knowledge of the defendant. Clearly therefore, the plaintiff would equally be entitled to be declared to have acquired a portion of the suit property that he occupies by virtue of adverse possession.

Ultimately therefore, this Court is of the opinion that the interests of justice will best be served if judgment is entered for the plaintiff against the defendant on the basis of the trust as I have already found that the defendant was in fact a trustee of the plaintiff in respect of L.R KIINE/SAGANA/370 and ultimately the suit properties that resulted in the sub-division of the same. I therefore enter judgment for the plaintiff against the defendant in the following terms:-

- 1. That the defendant holds the suit properties in trust for the plaintiff*
- 2. That the said trust is hereby determined and the suit properties be shared equally between the plaintiff and the defendant*
- 3. The Land Registrar Kerugoya do register the plaintiff as proprietor of half share of the suit properties*
- 4. Each party to meet his own costs as they are family.*

B.N. OLAO

JUDGE

24TH APRIL, 2015

24/4/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Abubakar for Mr. Magee for Plaintiff – present

Ms Munene for Mr. Gacheru for Defendant – present

COURT: Judgment delivered in open Court this 24th day of April 2015

Mr. Abubakar for Mr. Magee for Plaintiff present

Ms Munene for Mr. Gacheru for Defendant present

Right of appeal explained.

B.N. OLAO

JUDGE

24TH APRIL, 2015