



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(CIVIL SUIT [OS] NO113 OF 2009 [ELC DIVISION])

HCCC SUCCESSION CAUSE 2485 OF 2006

PRISCILLA NUNGARI KARIUKIPLAINTIFF/APPLICANT

VERSUS

AGNES WAIRIMU NDUNGU.....DEFENDANT/RESPONDENT

(sued in her capacity as legal representative of the estate of Daniel Ndungu Kariuki deceased)

JUDGMENT

INTRODUCTION

Daniel Ndungu Kariuki died on 2nd October, 1982 as is confirmed by death certificate number 24769. He is survived by;

- a) Agnes Wairimu Ndungu- widow
- b) Priscillah Nungari –daughter
- c) Joyce Wangare- daughter
- d) Ruth Wambui- daughter
- e) Jane Njeri-daughter

The deceased is also survived by

- a) Priscilla Nungari Kariuki – mother

On 25th August, 2006, the plaintiff /applicant brought together all family members; the deceased’s family and other children and grandchildren. They discussed and agreed that the mother and widow of the deceased would obtain the grant of letters of administration; so as to distribute the land in question. This is L.R. 219/2 (3.2) acres as described in Plan number 10439/68 herein referred to as suit property.

The Plaintiff/Applicant confirmed to the family, the suit property belonged to her. She bought it in 1968 but registered it in her late son’s and nephew’s names to hold her interest in the land in trust for her. They agreed to the grant being obtained by mother and widow of the deceased; whereupon the parcel would be divided into 21 plots to all family members including the deceased’s family. The family members

endorsed the agreement dated 25th August, 2006 to this effect and set out the proposed mode of distribution.

PLEADINGS

On 17th October 2006, mother and widow of the deceased applied for interim grant of letters of administration with consents of beneficiaries which was granted in February, 2007.

On 30th October, 2007 the administrators applied for confirmation of grant of the letters of administration of the deceased's estate. The proposed mode of distribution was outlined as agreed. The deceased's widow and children of the deceased signed written consents to the confirmation except Jane Njeri.

On 4th August, 2008 Jane Njeri, daughter to the deceased filed an objection and protested to the confirmation of grant because the Plaintiff /Applicant wanted to illegally transfer her late father's property to herself. She claimed the Plaintiff/Applicant purported to execute the Agreement without disclosing her intentions yet some of the family members are semi-literate. Paul Kariuki and Robert Kariuki were included as beneficiaries of the deceased's estate; yet they were not his children. The Applicant also amended the Summons and allotted herself 16 plots out of the 21 plots so as to distribute to those who in her view who are not entitled. She deposed a further affidavit on 11th March 2009 and her sister Priscilla Nungari on the same date; to the effect that the Applicant, their grandmother did not provide for them and or educate them and that she took advantage of their mother and dispossessed them of their father's land. The parties failed to agree on the mode of distribution of the deceased's estate.

The matter was presented before Court by an application filed by the Plaintiff / Applicant dated 17th February, 2009 filed on 18th March, 2009 and amended on 10th June, 2009. The matter was first filed in the Environment and Land Court (ELC) as Civil Suit 113 of 2006 and later transferred and consolidated to the present Court and Case File as per the Court order of 13th May, 2009 by Rawal J (as she then was)

The Plaintiff /Applicant's instant application seeks following orders from the Court;

- a) The deceased Daniel Ndungu Kariuki being registered owner of the suit property L.R. No. 219/2 described in Plan number 10439/68 be declared and registered as trustee or to have held the said parcel for the Plaintiff/Applicant herein Priscilla Nungari Kariuki;
- b) The Plaintiff/Applicant be declared and registered as proprietor of 3.2 acres of land or a portion thereof of the land known as Land Reference 219/2;
- c) In the alternative the deceased's title to the portion of land; Land Reference 219/2 and more particularly described in Plan Number 10439/68 be deemed to have been extinguished through adverse possession of the Plaintiff/Applicant;
- d) In the event Prayer 1 & 2 are not granted the Court orders that the Plaintiff having spent her money on development and improvement of all buildings in the suit property; she has a resulting constructive trust in her favor proportionate to the amount spent in development, improvement and maintenance including payments of rates, rents and other related bills attendant thereto;
- e) In the alternative; the Plaintiff/Applicant is entitled to damages in lieu of development and constructions carried out on the suit property, payment of rent, rates and other expenses related to management of the suit property as shall be assessed by the Court.

The Respondent filed the Replying Affidavit of 7th April, 2009 objecting to the orders sought by the Applicant and stated as follows;

- a) She is the widow of the deceased Daniel Ndungu Kariuki who purchased the suit property Plot LR 219/2 with his cousin Endias Nguro (also deceased) for KSH 8,000/= from the vendor Margaritas Evaceu

Margaritas on 25th September, 1968 as per the Sale Agreement attached to the Applicant's Application and marked "PNK 1".

- b) The Agreement makes no mention of the Applicant or a trust by the deceased of her interest in the suit property. The trust was not expressly provided for in the Agreement for Sale.
- c) The suit property was registered as a first registration which under the Registered Land Act Cap 300 laws of Kenya (now repealed) was absolute and infeasible.
- d) The Respondent lived on the suit property with the deceased upto the time of his death and the Applicant did not claim the property until 7 years later after his death.
- e) After her husband's death, the Applicant; her mother in law asked her if she could live on the property with her as she brought up her young children then. She agreed and allowed her to live with them on the suit property. The Applicant can only be a licensee as she is entitled to life interest in the suit property and thereafter to revert to the children of the deceased.
- f) The Applicant brought the application to pre-empt the distribution of the deceased's estate to the beneficiaries; the widow and children of the deceased only.
- g) The Plaintiff /Applicant cannot successfully plead adverse possession on the suit property as she acted in furtherance of the deceased's ownership interest in constructing houses; receiving rent; paying water electricity rates and rents; cultivating and allowing the deceased's family to settle on the same property without alienating any portion of the property, fencing off or evicting the deceased's family.

The Respondent denied attendance, discussion and agreement in the meeting that brought the Plaintiff/Applicant's family members together and culminated in the Agreement prepared by the Applicant's advocates and signed by all members of the family. The Respondent claimed she was not properly briefed and made aware of the consequences of the Agreement. She did not understand the contents of the agreement; she was not represented by her own lawyers and being semi-literate she did not fully understand the agreement. She did not agree that the suit property did not belong to her husband and that it was to be distributed to the larger family. The Applicant should not inherit from her late son as she has adult children to inherit from their late father's estate.

HEARING

On 20th May, 2009, the Court gave directions that in determining proprietorship of LR 219/2; the matter proceeds to full hearing upon respective parties filing affidavits and submissions.

The hearing begun before Kimaru J on 8th March, 2011. The Plaintiff/Applicant Priscilla Nungari Kariuki (PW1) told the Court that she did not know when she was born but in her adulthood she conducted business by brewing and selling traditional brews; chang'aa, busaa and muratina and other conducted other business ventures in Kariobangi, Nairobi.

She was married to her late husband, Kariuki Nguya who died 15 years ago. He was employed but then he left employment. They were blessed with 3 children; Ndungu the deceased was the eldest child; he was married to the Respondent and had 4 children. There was Lucy Njoki (deceased) and Ruth Wairimu (deceased). Her children and grandchildren all live with her on the suit property. She worked and got money which she bought land; the suit property from an Indian lady called Margaritas through the Chief then called Kamau. She bought the land with Endious Nguro (deceased) and put her son's name as the buyer because she did not want her husband to know or make it part of their joint property. Her late husband was a drunkard, and moved around with women he had 8 wives. The Applicant did not want this property subjected to division and sharing with other women.

After she bought the land she built houses with her own money, the deceased her son did not contribute to purchasing materials or constructing the houses and her late husband did not contribute to building on the

plot.

She has been collecting rent herself and banking it; she pays water, electricity bills; rates and land rents and keeps receipts. She lives with the grandchildren on the plot and they do not pay rent. She provides for them and she educated them. Jane Njeri the objector, sells water in the Plot, she gave the Respondent a house to live in and she gave her land to settle in Muranga.

The suit property belongs to her she bought developed it and lives on it. She put her son's name to safeguard the property from her husband. They did not pay for it.

She wants the land registered in her name so as to distribute it to her children and grandchildren. They had all agreed but later refused to consent to confirmation of grant.

PW2 Mungai wa Kamau swore an affidavit on 18th June 2009. He said he is the cousin of the Plaintiff/Applicant. He told the Court he grew up in the Applicant's home when he lost his mother at a young age. Later, after the emergency they both came to Nairobi. The Applicant was married to the late Kariuki. The applicant was a chang'aa brewer and the husband chang'aa driver. He had many women, so when the Applicant wanted to buy land she kept it from her husband and on buying the land she had her first born son's name as the buyer. Daniel Ndungu was a young man working at the Airport. He did not buy the land; it was bought by the Applicant. From the time she bought the land, she lived on the said land to date. At the time she bought the land there was only 1 house; the Applicant built several residential houses and 2 storey buildings on the land. There are temporary structures and a cowshed where the Applicant keeps cows for zero-grazing. From the time the deceased died in 1982, the applicant built 3 storey buildings.

PW3 Simon Kariuki Kanja swore an affidavit on 18th June, 2009. He told the Court he is the youngest brother of the Applicant. The Applicant came to Nairobi in 1945 while he stayed in Kandara. Later he came and assisted the Applicant in the business. When he visited her, he found she brewed traditional liquor and sold it in Mathare. The Applicant was married and she had 3 children Daniel Ndungu, Wairimu and Njoki all who later died. The applicant bought land from an Asian and it was in her first child's name. She did not want her husband to know as he had another wife.

The land was purchased in 1968, Daniel Ndungu was in school; he dropped out in Standard Six and worked as a casual laborer at the Airport and later in Eastleigh. The Applicant developed the suit property. The deceased did not contribute, he did not collect rent or pay the utility bills. Agnes Ndungu; the deceased's wife was given a house by the Applicant and some land and cows at home in Muranga. She and her children are dependent on the applicant. When Daniel Ndungu died in 1982, the respondent fled from the home and she was a drunkard. She was not chased away by anyone. The Applicant remains on the suit property; she keeps cows, goats, chicken, ducks and plants bananas.

At this point the matter proceeded from where it stopped before this Court after Kimaru J moved to Criminal Division of the High Court. The Counsel agreed that due to the advanced age of the Plaintiff/Applicant it was not prudent to restart the hearing all over again. The proceedings were legible. They were typed and both Counsel consented the Court proceeds from where the matter stopped.

On 26th January 2015 **PW4** Ednes Nungare confirmed she swore an affidavit on 18th June, 2009 and stated in Court that she is a grandchild of the Applicant through her last born daughter Lucy Njoki Kariuki. Their mother died in 2006 and she brought up her 6 siblings on her grandmother's property.

Her late mother was unemployed and she helped the Applicant to collect rent, pay bills and manage the properties and in construction of new residential premises. Her mother took all the children to school as the Applicant provided the financial support. The applicant catered for all children and grandchildren

After her mother passed on, Joyce Wangare Ndungu the deceased's daughter, took over the management of the property on behalf of the Applicant until she got married and moved from the suit property. Thereafter, Ednes took over the running of the houses on the suit property. She collected rent and

deposited it in the Applicant's account as evidenced by attached slips marked "EN1".

She is responsible for paying rents, rates, electricity and water bills owed to relevant government bodies from the Suit property as shown in copies of bills attached and marked "EN2".

She also is responsible for paying school fees and other expenses for her siblings and other grandchildren of the Applicant as illustrated by copies attached and marked "EN3".

She takes her grandmother, the Applicant to hospital for medical attention and pays the medical bills and expenses as shown by "EN5".

In 2005, she discovered the lease of the suit property expired. She informed her grandmother and they wrote to Ministry of Lands who advised that they were to present letters of administration. That is when the family meeting took place and they sought legal services in 2006. The witness confirmed the family resides on the suit property they all depend on the Applicant to provide for their upkeep. Therefore the property belongs to her to distribute to all members of the family.

The Respondent; Agnes Wairimu Ndungu **DW1** testified that she swore the Replying affidavit on 7th April, 2009 and relies wholly on its content.

She said she was married by the deceased and they lived together from 1965 up to his death in 1982. They had 4 children. After her husband's death; she remained in their home in Mathare. It is not true what Samuel Kariuki Kanja said that she left home.

When she came from her mother's home when she was married by the deceased, she was given a house to live in by the Plaintiff/Applicant her mother in law and later they built a house with her husband.

She told the Court the house she lives in Thika she was helped by the Applicant and her daughter Joyce Wangare to build the house she lives in. All her 4 children went to school. The Applicant helped pay school fees of the children.

The suit property L.R. 219/2 was bought by her late husband. He bought the land after they had their first 2 children. She did not know how much was paid for the land or its acreage, however, she pointed out that they carried out the chang'aa business together; the Applicant, the deceased and herself. The proceeds were given to the Applicant. She said her daughter Joyce Wangare helped build the high rise storey buildings before she left and got married. Ednes took over collecting rent, banking and maintaining the buildings and she would know the amount of rent paid per month.

The Respondent agreed that they were called for a meeting by the Applicant on 25th August 2006, and they agreed to obtain the grant of letters of administration of the deceased's estate jointly. They got the grant. She asserted that at no time did she agree that the land belonged to her instead she was adamant the land belonged to her husband. She proposed the land be divided equally between the 3 children of the Applicant; her late husband and 2 daughters and not the grandchildren. When the advocate was called, the Applicant refused to subdivide the land as she proposed. The land has not been subdivided as parties cannot agree on the subdivision.

DW2 Jane Njeri Ndungu testified that she relied wholly on the Summons of objection and protest to confirmation of grant of letters of administration of her late father's estate. She also relies on the affidavit of Protest filed in August, 2008 and the affidavit in support of the Objection filed on 11th March, 2009. She objected to confirmation of grant as the beneficiaries included other members of the Applicant's family and not the children of the deceased only as the law requires. She admitted when her father died the Applicant her grandmother took over taking care of all of them. She confirmed signing the Agreement of 25th August, 2006 and the application for interim grant of letters of administration but refused to sign consent of confirmation of grant and the proposed mode of distribution. She agreed that the Plaintiff/Applicant her grandmother built the storey buildings and temporary structures on the land. Her sister Joyce Wangare collected rent and bought building materials which Ednes Wangare supervised the

construction and paid all utility bills.

SUBMISSIONS

The Respondent through Counsel Mr. Ochieg Opiyo filed written submissions on 21st April, 2010 and stated as follows;

The Applicant realized that she could not distribute the estate of the deceased to persons not entitled in law; her other grandchildren that is why she filed this matter in Court. Since one must come to equity with clean hands; she is estopped from claiming ownership of the suit property when she had accepted to be co-administrator of the Respondent in this Succession Cause where the suit property is the crux of the matter.

The Applicant claimed she allowed the deceased to be registered in his name in trust for her as she did not wish her husband to know of the property. If that was the reason; her husband died in 1975 and therefore the basis of registration by the son in trust for her diminished.

Section 64 of Evidence Act Cap 80 Laws of Kenya is to the effect that contents of documents are proved by primary or secondary evidence.

The terms of the Agreement for Sale cannot be altered by parole evidence.

Section 27 of the Registered Land Act (repealed) is clear that registration of a person as proprietor of land shall vest in that person absolute ownership of that land with all rights and privileges belonging or appurtenant to.

Adverse possession cannot apply in the instant case as the Applicant was invited to live upon the land by the Respondent after the demise of her husband and therefore she is a guest if not a licensee on the land.

The rights of the Applicant ought to be adverse to that of the owner /the deceased and she failed to show that she had alienated land to herself. The Applicant paid land rents and rates in the name of the deceased and put up buildings and temporary structures on the deceased's behalf. Therefore, adverse possession was not applicable.

Section 121 of the Evidence Act provides that no person who came upon any immovable property by the license of a person in possession thereof shall be permitted to deny that such a person had a right to such possession at the time when the license was given. The Applicant cannot deny the deceased's title to the land as she was a licensee.

Section 116 of the Evidence Act prescribes that when the question is whether any person is owner of anything which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Section 126 (1) of the Registered Land Act states that a person acquiring land, a lease, or a charge in fiduciary capacity maybe describes by that capacity in the instrument of acquisition and of so described shall be registered with the addition of the words 'trustee' but the Registrar shall not enter particulars of any trust in the register. The Applicant's claim that the suit property was held in trust for her beneficial rights over the property is not borne out by the requirements of this Act.

The Plaintiff /Applicant filed through Counsel Mr. A. T. Oluoch the following documents;

- a) Skeleton Submissions on 16th April 2010;
- b) List of Documents on 14th April, 2010;

c) Bundle of Authorities on 16th February, 2015

d) Plaintiff's Submissions on 16th February, 2015

The Applicant's Counsel submits as follows;

The Applicant bought the parcel of land known as L.R. No 219/2 in 1968 for consideration of Ksh. 8,000/-. She bought the land with one Endias Nguro Mwangi (deceased) who knew and agreed to register the land jointly with her son the deceased in trust for her.

The Applicant's late husband was a drunkard and had many women and she feared in the ensuing battle by these women. They would claim property she had bought even after he died. She also feared her husband would take offence that she bought and registered land in her name without his consent and permission.

The fact of the Applicant's ownership of the suit property is confirmed by family members culminating to the agreement signed on 25th August, 2006. They are estopped from reneging on the said agreement that she owns the said property. The applicant relied on creation of a resulting and constructive trust;

In **PECORE VS PECORE CANADA SUPREME COURT 2007**; the Court observed;

“A resulting trust arises when title to property is in one's name but that party, because he or she is a fiduciary or gave no value for the Property, is under an obligation to return it to the original owner.”

IN HUSSEY VS PALMER [1972] WLR 1286

The Court held the property on a constructive trust for the Plaintiff proportionate to her payment.

IN ARUMBA VS MBEGA & ANOTHER CIVIL APPEAL NUMBER 114 OF 1986

The Court held that payment of purchase price by one party for registration of another gives rise to an implied resulting trust;

“.....the policy of justification of the resulting trust, is that having jointly contributed money or skill in acquiring property, justice and fair dealing requires that such venture should be reflected in its beneficial enjoyment”

In **ROCHEFOUCAULD VS BOUSTEAD; COURT OF APPEAL 1CHANCERY DIVISION 1896**; the Court held; that the evidence which partly consisted of letters signed by the defendant, completely proved that the defendant purchased as a trustee for the Plaintiff and held the estate as such trustee subject to a lien for his expenditure.

In the alternative, the Applicant also relies on the doctrine of adverse possession prescribed by **Section 13 of the Limitation of Actions Act**.

Adverse possession is the process by which a person can acquire a title to someone else's land by continuously occupying it in a way that is in consistent with the right of the owner.

The Applicant bought the suit property in 1968 and she has remained resident to date on the same property exceeding the statutory 12 years. Her stay is continuous, open and hostile to the registered owner by exercising both proprietary and possessory rights over the suit property.

Adverse possession is also recognized by **sections 27 and 28 of the Registered Land Act (repealed)**. **Section 30 (g) of the same Act** recognizes that all land shall be subject to overriding interests as may

from time to time subsist and affect the same ; without their being noted in the Register.

In ALAN KIAMA VS NDIA MATHUYA OTHERS & MBUI VS MBUI 2005 1 E.A.L.R. pg 256 the Courts confirmed that; customary law rights may give rise to a trust which would be subject to protection under the Act and would constitute an overriding interest recognizable under **section 30 of the Registered Land Act.**

Registration of a person as proprietor of the property does not exempt the appropriator from duty and obligation of a trustee where a trust is inferred

A Plaintiff's right to adverse possession stems from possession and occupation of the land and it amounts to an overriding interest under **sections 28 & 30 (g) of the Registered Land Act (repealed)**

ISSUES

This court is called upon to determine the following issues presented from the evidence contained in pleadings, *viva voce* evidence and legal principles outlined above. These issues are;

- a) Who is the proprietor of the land parcel 219/2 the Plaintiff/Applicant of the Deceased represented by the Respondent?
- b) Was the Deceased a trustee of the plaintiff/Applicant's interest in the suit property?
- c) Did the plaintiff/ applicant acquire the suit property by adverse possession?
- d) Is the Plaintiff entitled to damages in lieu of construction and development carried out on the suit property?
- e) Is the suit property part of the deceased's estate?

ANALYSIS

This court has been presented with evidence that constitutes divergent and parallel positions with regard to ownership of the suit property.

The Applicant claims to have bought the property in 1968 from the vendor Margaritis Evangelu Margaritis for KSH. 8000/-. She bought the land with partner Endias Nguro Mwangi. Both are deceased. The Applicant registered the Land in her first born son's name to hold in her trust. He died in 1982, leaving his widow the Respondent herein and 4 children.

Mungai Kamau (**PW2**) and Samuel Kariuki Kanja (**PW3**) cousin and brother to the Applicant confirm the Applicant bought the land; she lives on the same property with all family members. She developed the land.

The Respondent claims, her late husband bought the land and she did not say for how much money the land was purchased and could not give its acreage. She presented no evidence of purchase or ability or proof of raising and paying the purchase price. She relied on the Sale Agreement that shows the land was bought and in the name of the deceased, Daniel Ndungu Kariuki.

The records; the death certificate confirms the deceased died in 1982 at the age of 36 years. So in 1968 he was 22 years old. The Respondent said they were married with the deceased in 1965 at 19 years of age. The evidence of **PW2** and **PW3** is to the effect that the deceased left formal education in Class 6 and was a casual laborer in Eastleigh and at the Airport.

The Plaintiff/ Applicant PW1 stated she could not tell when she was born and she came to Nairobi during the emergency, she was married and had children among them the deceased. She was carrying out

businesses of brewing and selling traditional brews. She made money from this business and used it to buy the land in question, she did not want it registered in her name due to the matrimonial problems pertaining at the time. So to avoid further acrimony in her marriage she allowed her son to have his name as registered owner on her behalf.

This Court is inclined to believe the plaintiff/Applicant's version of evidence. Her age and business engagement at the time put her in a position to be able to buy land than the deceased. He was very young to have completed formal education, married the Respondent and worked long enough to accumulate enough funds to buy the land. The Respondent **DW1** apart from relying on the Sale Agreement which shows the deceased as the registered owner of the land did not adduce any other evidence to buttress this fact, her daughter **DW2** who objected to confirmation of grant, as the last born of the family; she could not possibly attest to the purchase of the land.

This Court finds that the Plaintiff/Applicant's version of evidence is plausible compared to the Respondent. The Court believes her testimony that she bought the land and had it registered in her son's name to ensure non-interference from 3rd parties.

Is the Plaintiff /Applicant the owner of the suit property?

LAW

Section 27, 28 & 30 of the Registered Land Act (repealed) allude to absolute proprietorship rights of a first registered owner of the land subject to overriding interests and adverse possession.

In MICHAEL GITHINJI KIMOTHO VS NICHOLAS MURATHA MUGO

Civil Appeal no 53 of 1995; the Court held;

“The protected rights of a proprietor under section 28 of the registered land Act (repealed) cannot be defeated except as provided in that Act and certainly not at the instance of a trespasser”

In MACHARIA MWANGI MAINA & 87 OTHERS VS DAVIDSON MWANGI KAGIRI

Civil appeal 26 & 27 of 2011 The Court held;

Section 28 of the Registered Land Act

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration.....shall not be defeated except as provided in the Act.....”

(b) Unless the contrary is expressed in the Register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting in the Register”

Section 30 of the Registered Land Act Provides;

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may from time to time being subsist and affect the same without them being noted on the registers.....”

The rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such a person and the rights are not disclosed”

The Court found that the Respondent having put the appellants in possession of the suit

property they created an overriding interest in favor of the appellants in relation to the land in question.

In the instant case, the Plaintiff/Applicant has been or was put in possession and occupation of the suit property L.R. 219/2 since 1968 to date; a span of 41 years. For the Respondent to claim ownership of the suit property now after her husband is deceased and on the basis that he is the registered owner; the Court finds the evidence on record reveals the Plaintiff/Applicant bought the land in question and therefore the deceased's title is vitiated by the overriding interest in form of the plaintiff/Applicant's beneficial interest.

In ROSE NASWA MASINDE vs LILIAN NEKESA SIMIYU MUKOPI

HCCC 985 OF 2012 The Court held

Where an agent a sister in law bought land on behalf of the Principal who worked abroad; she registered it in her name as absolute proprietor. It was held that as registered proprietor she held that suit property in trust for the owner who had the beneficial interest.

In DYER vs DYER 1788

2 Cox Eq 92, 93 held

Trusts can be created expressly, informally or implied. One of the recognized categories of this form of trust; is where a person purchases the property, but the same is conveyed in the name of someone other than the purchaser.

Section 25 of the Land Registration Act, 2012 provides;

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of the Court, shall

not be liable to be defeated except as provided in this Act.....Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

In the instant case; the evidence confirms that though the deceased is registered as proprietor of the suit property, the rights of absolute proprietorship are vitiated by the fact that it is the Plaintiff /Applicant who purchased the land, the deceased did not contribute to the purchase of land. He held it on behalf of his mother as trustee for her beneficial interest.

The Respondent if at all was owner of the land as widow of the deceased; she did not challenge the Applicant from the onset; the land had only 1 house at the time of purchasing it; now there are 6 storey building and other structures. Yet from 1968 to 2010 the deceased then or Respondent did not raise any issue with the Applicant's exclusive use of land; occupation, building, cultivating and zero-grazing activities she carried out on the land.

Section 13 and 38 of the Limitation of Actions Act prescribes adverse possession and the right of a party to apply to the High Court after satisfying the Court, the Applicant has been occupier (s) of the land continuously for 12 years and seeking orders to be registered as proprietor of that land.

In VIRGINIA WANJIKU MWANGI vs DAVID MWANGI JOTHAM KAMAU

HCCC 86 OF 2011;

The Court alluded to the requirements to be met for an occupier of land who is not the owner to successfully plead adverse possession. They are;

- 1) *The party must prove that he has been in occupation and possession of the land exclusively and openly and as of right and without interruption for a period of 12 years;*
- 2) *Open and notorious use of property; the adverse party use of property is so visible and apparent that it gives notice to the legal owner that someone may assert claim; the condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings or animals that a diligent owner could be expected to know about;*
- 3) *Continuous use of property; the adverse party must hold the property continuously for the entire limitations period and use it as a true owner would for that time;*
- 4) *Exclusive use of the property; the adverse party holds the land to the exclusion of the true owner;*
- 5) *Actual possession of property; the adverse party physically uses the land as the property owner would and must change the state of the land; by clearing, mowing, planting, harvesting, logging, mining, fencing, running livestock and constructing buildings;*
- 6) *Non permissive; hostile or adverse use of the property; the adverse party entered and used land without permission*

In the instant case; the Plaintiff /Applicant bought and settled on the land in 1968. The Respondent **DW1** stated in her pleadings that when the Applicant's husband died in 1982; she agreed to her mother in law residing on the land as she had a young family. So she was a licensee or at most a guest on the land. Yet in her testimony to the Court she said it is the Plaintiff/Applicant who gave her a place and house to live in when she was married. She and the deceased helped in the traditional brew business and the proceeds were given to the Applicant and he catered for the whole family.

Due to the Respondent's inconsistency in her evidence; the Court is inclined to accept the evidence of the Applicant that she was on the land from the time she bought it. She has been in continuous possession and occupation for 41 years. She openly occupied and developed the suit property. The Plaintiff /Applicant has exercised rights over the said property by developing and constructing buildings, residential houses and temporary structures. She installed electricity, sells water, collects rents, maintains the suit premises and she is responsible for paying rents, rates and other utility bills in her own name as evidenced by the receipts attached.

She constructed a house for herself built other semi -permanent houses for her grandchildren and 6 fully developed residential/commercial flats and houses. She carries out farming of bananas and does zero grazing by keeping cattle. She settled her whole family; her 3 children who later died and all 11 grandchildren. The evidence on record reveals the Plaintiff/Applicant has been the occupier of the suit premises and has utilized the same as an actual owner.

The genesis of the dispute is following the demise of the deceased, the Plaintiff/Applicant's son in 1982, on 26th August, 2006 the plaintiff/Applicant called all family members to a meeting. Those who attended included the deceased's wife, the Respondent and her 4 children namely;

Agnes Wairimu Ndungu- widow to son deceased

Priscilah Wangare – daughter to deceased

Joyce Wangare- daughter to deceased

Ruth Wambui- daughter to deceased

Jane Njeri- daughter to deceased

(Ruth Wairimu Kariuki – deceased daughter to Plaintiff/Applicant)

Paul Kariuki – son to Ruth Wairimu Kariuki

(Lucy Njoki- Deceased- Daughter to Plaintiff /Applicant)

Robert Kariuki – son to Lucy Njoki

Ednes Nungari – daughter to Lucy Njoki

Cathrine Wairimu- daughter to Lucy Njoki

SarahMuthoni- daughter to Lucy Njoki

Daniel Ndungu- son to Lucy Njoki

Gabriel Njuguna- son to Lucy Njoki

Moses Kanuri- Lucy Njoki

They all agreed that the plaintiff/Applicant and the Respondent obtain the grant of letters of administration of the deceased's estate so as to distribute the suit property amongst all family members. They all signed the Agreement of 25th August, 2006 which was in recognition of the Plaintiff's beneficial interest even if registered in her late son's name as the registered owner,

On 17th October, 2006 the grant was sought and obtained on 5th February, 2007.

On 30th October, 2007 they applied for confirmation of grant and the proposed mode of distribution was as follows;

- a) Plaintiff/ Applicant to retain -6 plots
- b) Agnes Wairimu Ndungu – 5 plots for her and each of her children
- c) Paul Kariuki- 5 plots
- d) The 7 children of Lucy Njoki – 5 plots

On 4th August, 2008, Jane Njeri filed who signed for the interim grant and mode of distribution filed the objection and protest.

This Court has considered all the evidence on record and found;

The plaintiff /Applicant is the matriarch of the family; she bought the suit property, made it home for all her children and grandchildren who live there to date. In her early years, she engaged in traditional brew business and involved her children and the Respondent; she brought up their children by providing shelter, subsistence and education fees as demonstrated by attached receipts. She has over the 41 years on the land developed it to include 6 storey buildings, and temporary structures. She pays rent and rates, water and electricity bills as shown annexures attached to the bundle. She also conducts water selling business, and farming on the same land. She continues to provide for her family and has proposed apportioning the 31/2 acres to distribute to all existing family members. These actions strongly suggest her honest intention to continue taking care of all family members especially now that she is advanced in age.

Against these circumstances; the Respondent has not shown evidence of her husband having bought the suit property apart from the fact he is the registered owner of the land. If as alleged, he bought the land, the deceased did not during his lifetime challenge his mother's occupation and use of the suit property in

any forum. Be it before elders, local administration or the Courts. No evidence of any documents that were produced to confirm the deceased carried any developments on the suit property from 1968 to 1982.

On the other hand all the grandchildren have been born and brought up by the plaintiff/ Applicant, as adults they have continued their stay and reliance on their grandmother. Their only claim to this property is based on ownership by the deceased but in fact their intention is to pursue distribution of the Plaintiff/Applicant's property to them at this time due to her advanced age.

The Respondent claims the land belongs to the deceased and should be inherited by only his 4 children. If that is true, why did she agree to take letters of administration with the Applicant if she was not the owner or had any legal interest in the land? If as she proposed that the land be divided among 3 children of the Applicant and not the grandchildren; why would she make the said proposal again if the Applicant has no legal interest. If the land belonged to his late husband then his late sisters should not inherit!

Finally, if the Applicant agreed to the proposed subdivision of land by the Respondent, each home of her children would have a portion, and

it would be inherited by the grandchildren yet they are not children of the deceased; husband of the Respondent.

The proposal if implemented would mean that the Applicant forgoes all the investments she made on the land over the years and not inherit any land but leaves it all to her grand children and daughter in law.

In light of the present circumstances as shown by the evidence adduced it would not be fair and just to the Plaintiff/Applicant.

The totality of the evaluation of the above evidence and applicable law is that;

The Plaintiff /Applicant is the beneficial owner of the suit property L.R 219/2 described in Plan Number 10439/68; she has been in occupation and in possession of the suit property from 1968- to date 41 years;

The Deceased, Daniel Ndungu Kariuki is the registered owner of the suit property as shown in the Sale Agreement of 25th September, 1968 between Daniel Ndungu Kariuki and Endias Nguru Mwangi as purchasers and Margaritis Evacelu Margaritis as the vendor.

In spite of the deceased being the registered owner with absolute proprietorship rights provided by section 27, 28 & 30 of the Registered Land Act (repealed) and **Section 25 of the Registration of Land Act, 2012**; the deceased's title is vitiated by the overriding interest to the title and beneficial interest of the Plaintiff /Applicant as one who paid the KSH 8,000/-the purchase price for the land.

The Deceased held in trust for the Plaintiff / Applicant the suit property because her interest as actual purchaser and owner of the land.

The Plaintiff/Applicant has been in adverse possession of the suit property having settled on the land since 1968, brought all family members to settle on the land, carried out vast construction developments and business activities on the land, paid land rents and rates and utility bills in her name; all these activities without any intervention or interference from the registered owner at least until 1982 and from the legal representative until 2010.

The Deceased also held in trust the suit property for the Plaintiff/Applicant's beneficial interest but in proportion to the vast developments and activities carried out on the land whose compensation would be quantified upon valuation. These developments are depicted in photographs attached to the plaintiff's bundle of 21st April, 2010.

FINAL ORDERS

Therefore this Court declares the following;

- a) Priscillah Nungari Kariuki the Plaintiff/Applicant is the legal owner of the suit property L.R 219/2 described in Plan Number 10439/68;
- b) The Registered owner of the suit property; L.R 219/2 described in Plan Number 10439/68; Daniel Ndungu Kariuki (Deceased) was the trustee of the Plaintiff/Applicant in the constructive trust over the land for her beneficial interest arising from payment of purchase price and cost of developments, construction , maintenance, business activities on the suit property and utility payments
- c) The Plaintiff/Applicant has been on occupation and possession of the suit property for 41 years in adverse possession, By virtue of **section 13 and 38 of the Limitation of Actions Act** she is entitled to and will be registered as the legal owner of the suit property.
- d) The Suit property L.R. 219/2 described in Plan Number 10439/68;

Is hereby removed as an asset of the deceased's estate and is not available for distribution of the deceased's estate;

- e) The Agreement of 26th August, 2006 is invalidated and the suit property belongs to the Plaintiff/Applicant and she is entitled to dispose as she wishes to the family members either in gift *inter vivos*, by will or the property left to be distributed intestate.
- f) Each party is at liberty to apply
- g) Being a family matter each party to bear its own costs.

DATED AT NAIROBI THIS 24TH DAY OF APRIL, 2015

M.W.MUIGAI

JUDGE

READ AND SIGNED IN OPEN COURT IN THE PRESENCE OF;

Mr. A. T. OLUOCH for the petitioner/Applicant