



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 226 OF 2015**

**PETER MURIITHI WANJOHI..... 1<sup>ST</sup> PLAINTIFF**

**JOHN WACHIRA WANJOHI .....2<sup>ND</sup> PLAINTIFF**

**CHARLES NJONJO WANJOHI ..... 3<sup>RD</sup> PLAINTIFF**

**JOSEPH MBUTHIA WANJOHI .....4<sup>TH</sup> PLAINTIFF**

**GRACE WANGECHI WANJOHI ..... 5<sup>TH</sup> PLAINTIFF**

**-VERSUS-**

**JOHN MWANGI WACHIRA..... DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By their Complaint dated 11<sup>th</sup> August, 2015 as filed herein on 13<sup>th</sup> August 2015, Peter Muriithi Wanjohi, John Wachira Wanjohi, Charles Njonjo Wanjohi, Joseph Mbuthia Wanjohi and Grace Wangechi Wanjohi (*hereinafter the Plaintiffs*) prays for:

(a) *A declaration that half of land parcel number Nyeri/Uasonyiro/82 belongs to them and their siblings Dorcas Wangui by virtue of an established trust and should therefore be availed to the Plaintiffs and their siblings;*

(b) *A permanent injunction to issue restraining the Defendant or anyone claiming a right under the Defendant from evicting them from the said land parcel number Nyeri/Uasonyiro/82 or interfering with their quiet occupation and usage;*

(c) *An order directing the Defendant or anyone who has acquired a right from the Defendant to transfer, assign and or convey half of Nyeri/Uasonyiro/82 or the resultant parcels to the Plaintiffs and their siblings;*

(d) *An order and declaration that the Plaintiffs and their siblings have acquired equal interest in land parcel No. Nyeri/Uasonyiro/82 by virtue of adverse possession;*

(d) *General damages and costs and interests of the suit; and*

(f) *Any other remedy which the Honourable Court may deem just.*

2. Those prayers are borne out of the Plaintiffs contention that the Defendant is their cousin and that they have occupied the suit property with their now deceased father Edward Wanjohi Wachira since 1987 on the understanding with the Defendant that the land would be shared equally between them.

3. The Plaintiffs aver that their father passed away in 1998 and that the Defendant has since disposed off their father's assets located elsewhere thereby marginalizing them and leaving them totally dependent on the suit property. It is their case that by virtue of their relationship and the circumstances surrounding the ownership and occupation of the suit property, they have become entitled by trust and the Defendant holds the title thereof as a trustee for themselves as beneficiaries.

4. The Plaintiffs accuse the Defendant of recently writing a demand notice seeking to have them evicted from the suit land despite the fact that they have since acquired the same by virtue of adverse possession.
5. But in his Statement of Defence and Counter-claim dated 14<sup>th</sup> September 2015, John Mwangi Wachira (*the Defendant*) avers that the suit herein is still borne and a non-starter in law as it does not meet the requirements for trust and/or adverse possession.
6. While admitting that the Plaintiffs' father Edward Wanjohi Wachira was his uncle, the Defendant asserts that he had only granted a licence to his uncle to farm on the land for his upkeep and that of his children as he doubled up as the Defendant's farm hand.
7. The Defendant avers that the suit property is neither ancestral nor shared in any way as he purchased the same from one John Nderitu Kimeria in 1984 and the issue of trust does not therefore arise. He further avers that all the developments on the land, including the house occupied by the Plaintiffs were built by the Defendant for his use.
8. By way of his Counter-claim, the Defendant asserts that he terminated the licence allowing the Plaintiffs to be on his land on 10<sup>th</sup> August, 2015 and that since then the Plaintiffs have embarked on wanton destruction of the suit property. Accordingly the Defendant prays for:
  - (a) *Dismissal of the Plaintiffs suit;*
  - (b) *Vacant possession and in lieu of delivery thereof, eviction order for the Plaintiffs from the suit property;*
  - (c) *A permanent injunction restraining the Plaintiffs from in any way, entering upon, trespassing and/or continuing to trespass or commit any acts of waste of whatever nature on land parcel number Nyeri/Uasonyiro/82;*
  - (d) *Damages for trespass; and*
  - (e) *Costs of the suit and the Counter-claim.*

#### **THE PLAINTIFFS' CASE**

9. At the trial herein, the Plaintiffs called 3 witnesses who testified in support of their case.
10. PW1 – Peter Muriithi Wanjohi is the 1<sup>st</sup> Plaintiff. He told the Court the 2<sup>nd</sup> to 5<sup>th</sup> Plaintiffs are his siblings while the Defendant is their cousin. PW1 testified that his father settled on the suit property in 1987 and that some of his siblings were born while they lived on the suit land which is registered in the name of the Defendant.
11. PW1 told the Court that when his father died in 1998, the Defendant took over the burial arrangements and interred his remains in a parcel of land in Ruringu which belongs to the Defendant. Thereafter PW1 and his siblings continued living in the house left by their father on the suit land.
12. PW1 testified that about a year after their father's death, the Defendant became hostile to them and even got him arrested and charged in Court on allegations that he had stolen the Defendant's livestock. PW1 was acquitted of the charge. Though he had not seen any written documents between the Defendant and his father, PW1 knows the property is held in trust for them by the Defendant as that is what their father told him. The Defendant equally holds other parcels of land in Ruringu where PW1's father is buried and in Mutune Village in trust for PW1's family.
13. On cross-examination, PW1 testified that he was born on 20<sup>th</sup> May 1980 and that his father moved into the suit property around 1985. He did not know for how long the Defendant had owned the land. They learnt he was the owner of the land when he served them with a demand letter.
14. PW1 told the Court his family is entitled to half of the suit property and that a trust relationship was created after their father settled on the land in 1987. PW1 conceded he had not taken out letters of administration for his father's estate. PW1 testified that the land was initially registered in the name of his aunt (*a sister to his father*).
15. PW1 further testified that he had written a letter acknowledging the land belonged to the Defendant to facilitate settlement of the criminal case that he had been charged with. He further told the Court his siblings were tricked by the Defendant into signing a letter dated 10<sup>th</sup> August 2009 in which they stated they had no claim to the suit property.
16. PW1 told the Court his father was not employed by the Defendant but was taking care of the land registered in the Defendant's name.
17. PW2 – Agnes Njoki Mutabai is a farmer. She told the Court that she knows both the Plaintiffs and the Defendant. The Plaintiffs father occupied the suit property in 1987 and used to tell PW2 that he is entitled to the suit land.
18. On cross-examination, PW2 told the Court the Plaintiffs father was married to her sister before the two separated. She told the Court she did not know whether or not the Plaintiffs' father purchased the property but he used to cultivate the same.
19. PW3 – David Murage is a resident of Mweiga. He told the Court the Plaintiffs and their father had lived on the land since 1987

cultivating the same and grazing their sheep and goats thereon.

20. On cross-examination, PW3 testified that the Defendant was already cultivating the land when the Plaintiffs' father arrived there.

### **THE DEFENCE CASE**

21. The Defendant – John Mwangi Wachira testified as the sole witness in his case. He told the Court he is currently a businessman having retired. He testified that he had bought the suit property in 1984 and invited the Plaintiffs' father who is a brother to his mother to act as his caretaker in the property in the year 1988.

22. The Defendant told the Court he allowed his uncle to utilize a portion of the land. In 1999, his uncle asked him to allow his children (*the Plaintiffs*) to join him on the land as his wife had ran away.

23. On cross-examination, the Defendant told the Court he was working in Nairobi in 1984 when he purchased the suit land and that he processed title for the same in 2008. He testified that even though the Plaintiffs' father was his employee, he did not have any record of his employment.

24. The Defendant further told the Court the uncle's children had entered the land with his permission but after his uncle died, they continued living on and cultivating the land without his permission. The Plaintiffs left the suit property in 2004 and went to live at their grandmother's home.

### **ANALYSIS AND DETERMINATION**

25. I have carefully considered the pleadings filed herein, the testimonies of the witnesses and the evidence adduced at the trial. I have similarly considered the submissions and authorities placed before me by the Learned Advocates for the parties.

26. The five (5) Plaintiffs herein have urged the Court to declare that they together with their sibling one Dorcas Wangui are entitled to half of all that parcel of land known as Nyeri/Uasonyiro/82 measuring 22.5 Ha on the basis of an established trust. At the same time, they urge the Court to declare that they have acquired equal interest in the said parcel of land by virtue of adverse possession.

27. As was stated in **Peter Moturi Ogutu -vs- Elmelda Basweti Matonda & 3 Others (2013) eKLR:**

**“Where a claim of trust has been raised, the Plaintiff had to establish the existence of a trust on which his case could be hinged or mounted.”**

28. In support of their case the 1<sup>st</sup> Plaintiff (PW1) testified that their father Edward Wanjohi Wachira first entered the suit land in 1987 and that ever since, they have always lived on the land which is registered in the name of the Defendant who is their cousin. PW1 told the Court that even though he had never seen any written document executed between their father and the Defendant, there was an understanding between their father who passed away in 1998 and the Defendant, that the suit land would always be the Plaintiffs' home.

29. PW1 told the Court that their father was not an employee of the Defendant and that even though they had lived on the land for so many years, they were not paying any rent. The Plaintiffs' witness Agnes Njoki Mutabai (PW2) also supported that position and told the Court that the Plaintiffs' father had told her that he was entitled to the suit land.

30. On the other hand, the Defendant testified that he purchased the suit land in the year 1984 and he thereafter in the year 1988 invited the Plaintiffs father who was his uncle (*brother to his mother*) to act as his caretaker on the property since he was working in Nairobi. The Defendant further told the Court that after his uncle took over the role, he (*the Defendant*) allowed his uncle to utilize a portion of the land for subsistence farming.

31. According to the Defendant, sometime in the year 1999, his uncle requested him to allow his children to come and stay with him on the land as their mother with whom they were previously staying had ran away. The Defendant agreed and the Plaintiffs herein then moved onto the land.

32. The Plaintiff did not say much in their submissions on the nature of the trust relationship that they had with the Defendant. It was however clear to me that there was no express declaration of a trust and that any such claim could only arise out of a resulting or constructive trust.

33. In reference to a resulting trust, **Halsbury's Laws of England, Fifth Edition, Vol. 72** provides as follows at Paragraph 280:

**“Subject to any express declaration of trust, where property is purchased in one party's name but both parties contribute to the purchase prices, the other party acquires an interest under a resulting trust proportionate to his or her contribution to the purchase price, or alternatively may make a claim under a constructive trust. On such a claim the first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to the acquisition, or exceptionally at some later date, been any agreement or understanding reached between them that the property is to be shared beneficially. This common intention, which has been said to mean a shared intention communicated between them and which must relate to the beneficial ownership of the property can only be based on evidence of express discussion between the parties, however imperfectly**

**remembered and however imprecise their terms may have been. Once a finding to this effect is made, it will only be necessary for the party asserting a claim to a beneficial interest against the party entitled to the legal estate to show that he or she had acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppels.”**

34. Taking guidance from the above text, it is apparent that for a resulting trust to be established, there must first be some proof shown of a financial contribution to the purchase of the property. Secondly, a resulting trust can only arise at the time of acquisition of the property, and the financial contribution must be made to the purchase price that is paid to the vendor.

35. In the matter before me, the Defendant testified that he purchased the suit property in 1984 before processing the title later in the year 2008. A copy of the sale agreement between the Defendant and one John Nderitu Kimeria dated 11<sup>th</sup> February, 2084 was produced in support of that position. A perusal thereof reveals that the Defendant singularly purchased the property at a consideration of Kshs.280,000/-.

36. All the three witnesses who testified for the Plaintiffs were unanimous that the Plaintiff's father moved onto the suit land in the year 1987. That would be some three (3) years after sale of the suit land had been concluded. That being the case, it was not possible to make a finding of a resulting trust in favour of the Plaintiffs as they had clearly made no financial contribution to the purchase of the suit property.

37. That then leaves me with the question whether the evidence put forward by the Plaintiffs point to a constructive trust. The requirements for such a trust are explained in **Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. 48 at Paragraph 690** as follows:

**“A constructive trust will arise in connection with a legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.”**

38. In the matter before me, there was no evidence rendered by the Plaintiffs that after the Defendant acquired the suit property in 1984, there had been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. As it were, the Plaintiffs have not demonstrated that their father made any direct or indirect contribution toward the acquisition of the suit property. Their case does not therefore again meet the test and threshold of a constructive trust.

39. The other aspect of the Plaintiffs' claim was that they had acquired the suit property by virtue of adverse possession. In this respect, the Plaintiffs submitted that the Defendant had acknowledged that they had occupied the land way back before their father passed away in 1998 and that the Plaintiffs had had an uninterrupted occupation and possession of the land ever since.

40. It was rather difficult for me to reconcile how this claim for adverse possession could be made alongside a claim for the same land based on trust. A perusal of the pleadings reveals that the Plaintiffs do not make this prayer in the alternative but alongside the other prayers made in the Plaint.

41. Be that as it may, the Plaintiffs have by their own pleadings stated that they were on the suit land by virtue of an understanding between their father and the Defendant herein. Their entry onto the land could not by virtue of that fact have been hostile to the interest of the Defendant. At paragraph 12 of the Plaint, the Plaintiffs give the Particulars of their said adverse possession. A perusal of the same does not allude to them having occupied the land and exercising therein any rights hostile to the Defendant's.

42. It was also clear to me that even though he purchased the land many years back in 1984, the Defendant was only issued with a title in his name on 11<sup>th</sup> June, 2008. As it were, for a claim of adverse possession, time starts running when the title is issued. Between 11<sup>th</sup> June, 2008 and the time this suit was filed in 2015, only some 7 years had gone by. A claim for adverse possession is unavailable prior to the expiry of 12 years.

43. In his Counter-claim, the Defendant has prayed for the eviction of the Plaintiffs. In support of his case, he has availed all the documents indicating the process he went through to acquire title to the suit property. He has exhibited the sale Agreement and transfer documents executed in relation to the land in 1984. He has also availed the Land Control Board consent to transfer. All this culminated in him being issued with a title to the suit land in the year 2008.

44. In that respect, **Section 24 of the Land Registration Act No. 3 of 2012** provides thus:

**“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”**

45. What that means is that the Defendant has the right enshrined under **Article 40 of the Constitution** to enjoy the use of the suit property without any hindrance from any quarter.

46. The upshot is that the Plaintiffs have failed to prove their claim either on the basis of a trust or adverse possession. On the other hand, I find merit in the Defendant's counterclaim. Accordingly I hereby make orders as follows:

1. *The Plaintiffs' suit is dismissed.*

2. *The Plaintiffs are hereby directed to give vacant possession of the suit property to the Defendant within 30 days from the date hereof and in default eviction orders shall issue forthwith for their removal at their cost.*

3. *Upon expiry of the 30 days, a permanent injunction shall issue forthwith restraining the Plaintiffs from in any way entering upon, trespassing and/or continuing to trespass or commit any acts of waste of whatever nature on land parcel No. Nyeri/Uasonyiro/82.*

4. *The Defendant shall have the costs of both the suit and the Counter-claim.*

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 17TH DAY OF MARCH, 2022.**

In the presence of:

Mr. Karweru for the Defendants

No appearance for the Plaintiffs

Court assistant - Kendi

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**J. O. OLOLA**

**JUDGE**