



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELC CIVIL CASE NO. 812 OF 2003

APOLINA MUTHONI WAITHUGURI

**(Suing as the personal representative of
the estate of the late Peter Waithuguri Kinuthia).....PLAINTIFF**

-VERSUS-

SAMUEL MWANGI KINUTHIA.....DEFENDANT

JUDGMENT

1. The plaintiff brought this suit via an amended plaint dated 5th August 2003 suing in her capacity as legal Administratrix of the estate of Peter Waithunguri, the deceased. She claims that her deceased husband and the defendant agreed in writing to purchase a piece of land L.R. Chania/Mataara/103 measuring 10 acres with each contributing equal shares towards the purchase of the said parcel of land. They also agreed that the defendant be registered as a trustee for his younger brother the plaintiff and that in the spirit of brotherhood they all made use of the land in common. However, soon after the said registration the defendant refused to transfer to the deceased his 5 (five) acres. The plaintiff therefore prays that judgment be entered against the defendant as follows that;

- a. A declaration that the defendant is holding the parcel of land known as Chania/Mataara/103 partly as a trustee for the estate of Peter Waithunguri Kinuthia
- b. An order directing the Registrar of Lands Kiambu to subdivide the parcel of land in two equal parts to be registered in the name of the plaintiff being the Administratrix of the estate of Peter Waithunguri and the other part in the name of the defendant
- c. Costs of the suit and interest thereof.

2. The defendant filed a defense dated 10th September, 2003. He avers that he will raise a preliminary objection that the issues raised in this suit was litigated abated in HCCC No. 394 of 1980 and thus res judicata, that the deceased was the plaintiff in HCCC No. 394 of 1980 and the Court orders in the said suit bind the plaintiff who being the personal representative of the said plaintiff did not substitute herself as the plaintiff in the matter and it has abated; that the parcel of land Chania/Mataara/103 was not bought in equal shares and is absolutely owned by the defendant ; that the deceased was a tenant at will of the defendant and that with the same reason the deceased failed to prosecute and/ or proof any right making the Court dismiss the case referred to and that this suit was commenced immediately thereafter; that he has the absolute proprietary rights of the suit land and thus is within the law to deny the plaintiff any right of use or occupation; that the suit is misconceived, bad in law and is intended to circumvent the Court order in HCCC No. 394 of 1980.

PLAINTIFF'S CASE

3. The plaintiff called 2 witnesses. PW1 Dominic Thuku Muhika *testified* that he was a cousin to the two brothers that he is the one who wrote the sale agreement dated 23/7/72 between Peter Waithunguri and Samuel Mwangi Kinuthia when he was chief of Mataara sub-location in Kiambu, the agreement was over shamba number 103. He testified that the brothers were doing hotel and charcoal burning business together and shared the proceeds; that Mwangi divided the shamba equally but Mama refused that he was to get a bigger share since he was older. That they were each to get 5 acres each; that Mwangi refused with the shamba and that Mwangi is the one planting there alone and Peter's family was not given the half as agreed, that the shamba is in the defendant's name.

4. During cross examination PW1 testified that he that Mwangi ran a butchery business while Peter was a nurse at Gertrude's Hospital in Nairobi; that he did not know who actually bought the shamba or the amount of money contributed by each of the brothers; ;that he was informed the shamba was 7 acres by Mwangi and that he does not know if the shamba was bought at Kshs. 2,700/- in 1966, that Peter was in school in 1966, that their family land was demarcated and each has their shamba. He reiterated his evidence in chief in cross-examination. In reexamination he stated that the shamba has not been subdivided and that he signed the agreement voluntarily.

5. PW2, Appolinn Muthoni Waithunguri the plaintiff testified that she knows that the deceased bought the shamba with his brother between 1964 and 1965. They were staying together then her husband was a nurse at Kiriko Mission in Thika, they also bought the trees together. That they had a hotel in plot No. 9 Maatara. That the brothers sought to subdivide the shamba. The shamba was 10 acres, her husband was to get half 5 acres as per the agreement , she was present when it was decided that the shamba was to be divided into 5 acres each, but her husband died before he was given his share. That he husband died before the case was finalized. That the title is in the name of the defendant who was holding the title in trust for her husband as per their traditions. That before this happened they were friends but not now. That her mother in law intervened and directed that the defendant gives her husband his share but he refused. That the High Court file disappeared and to trace it was a problem and since he had the letters of administration he lodged the case.

6. During cross examination PW2 admitted that she did not know the cost of the shamba, she denied having seen the notebook mentioned by PW1, that since 1965 she has not entered the shamba that Samuel stayed at the shamba. She stated that her husband filed HCCC No. 494 of 1980 but that he died before the case ended; that she knew of 5 acres of land and not refund of Kshs. 12,000/- she didn't know the amount the brothers got per month from their business. She reiterated her evidence in chief. In re-examination she testified that they did not call a surveyor to measure the shamba but that they looked at it and the shamba looked like 10 acres.

DEFENCE CASE

7. The defense called 2 witnesses. DW1, KARIUKI GATIMA he filed a statement dated the 26th of September 2012, he states as follows; that he knows the defendant they are neighbors. He recalled that on the 30th June 1966 the defendant purchased L.R Chania Mataara/103 measuring 7.8 acres from the late Ngugi Nderebu at a price of Kshs. 2712.50. That he was present when the defendant paid Kshs. 1,818.85 that his name appears as one of the witnesses. In court he testified that he knew the two brothers from childhood. He testified that he was present when Mwangi paid Kshs.2, 712/50 to the seller Ngungi Ndereba and Peter was not present.

During cross examination DW1 stated he did not know Peter's wife, that the shamba was measured by a surveyor, that he does recall the defendant's mother, that he does not know where Peter was in 1966, that the 2 are his good neighbors, that the defendant occupies the shamba and he has the title, that he was not present when they wrote the agreement nor does he know who wrote it, that he does not know the business they conducted.

DW2, Jemimah Njeri Mwangi wife to Samuel Mwangi filed a statement dated the 26th of July 2011, she

gave evidence in Court. This is her evidence, that Samuel is 95 years old or more that he cannot hear well and she has been given a power of attorney dated the 2nd of September 2011. That the plaintiff is her sister in law and her deceased husband was known to him; that the shamba is 7.8 acres and was purchased by Samuel from Ngugi Ndereba for Kshs. 2,712/50; that the defendant paid the deposit and paid the rest of the instalments until he cleared in 1967. That since June 1966 Mwangi Waithunguri was the one tilling the land; that Peter and Samuel did not work together, that her husband ran a butchery and charcoal burning business while Peter was employed. She denied ever seeing the said note book and insisted that the shamba belonged to Samuel and should not be subdivided; that the plaintiff has a shamba where she is currently staying. That sometimes in 1980 one of their sons Francis Waithunguri constructed his homestead in the suit land and is currently staying there and that the deceased did not contribute a single cent towards the purchase of the suit property. She sought to have the plaintiff's suit dismissed.

During cross examination she stated that she had nothing to show that the husband had a lapse of memory and that the brothers had a good relationship which broke down when the deceased got married, she denied that she encouraged her son to build on the said land. She admitted their relationship with the plaintiff is sour.

SUBMISSIONS

8. Parties filed written submissions. The plaintiff in her submissions reiterated her evidence and submitted that she filed suit after obtaining letters of administration following her husband's death seeking a legal declaration that the defendant who is the brother to the plaintiff was holding suit premises Chania Mataara/103 as trustee to her late husband Peter Waithunguri Kinuthia and also sought orders directing the Registrar Kiambu to subdivide the same into two equal parts and register one in the name of the plaintiff being the administratrix of the estate of Peter Waithunguri. She submitted that the two witness called by the prosecution gave uncontroverted evidence. The plaintiff submitted that DW1's evidence lacked substance as he was an imposter and did not know what was going on, did not know the plaintiff and did not witness anything between the two brothers or their transaction. She argued that he only assisted the Court to confirm that the defendant was not incapacitated but was just evading trial; that DW2, Jemima Njeri was the one who was influencing the husband not to share the parcel of land and that he confirmed that there was an agreement and even offered to repay the purchase money the plaintiff's husband contributed. She submitted that the plaintiff had proved its case beyond reasonable doubt and that although they were cultivating the said parcel they cautiously settled their son in one part.

9. The defendant submitted that the plaintiff had not adduced any documentary evidence in the form of a partnership deed, receipts and/or bank statements to support a joint venture business between the deceased and the defendant and that it is trite law that he who asserts must prove. he submitted that the defendant has been in occupation of the said parcel of land since he purchased it and no evidence has been adduced by the plaintiff to prove common ownership; that the plaintiff claims that the deceased contributed Kshs. 12,000/- towards the purchase of the said parcel of land while DW2 had testified that the same cost Kshs. 2,712.50 and he was present when he paid the 1st installment of Kshs. 1,818.85. that no agreements between the deceased and the defendant and no eye witness was brought in Court claiming to having witnessed the signing of the said contract and submitted that the plaintiff had not made out a prima facie case to warrant the order to split the suit premises, that the plaintiff has only made mere allegations and has not supported her claims; that the purported agreement of 23.7.1972 is not enforceable at all as the same is time barred as provided under section 4 of the Limitation of Actions Act Cap 22; that previous case filed by the deceased HCCC 494 of 1980 abated and he referred the court to the order of 8th June 2009 issued by this court and that the plaintiff should have sought to reinstate this case instead of filing a different suit on this he relied on the case of ***Jairo Ongote Okonda –vs- Kenya Commercial Finance Company Limited, Civil appeal 216 of 1999.***

He submitted that the plaintiff based her claim on trust and that a trust being an equitable remedy is time barred by virtue of section 4(1)(e) of the limitation of Actions Act Cap 22 which provides;

“(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”

10. This Court has considered the evidence on record and the rival submissions. The defendant in his defence indicated that the issues before the Court were litigated upon in HCCC No. 394 of 1980 (this I note is a typographic error as the said suit was HCCC No. 494 of 1980) and that this suit is resjudicata. In the defendant’s list of documents the defendant attached the plaint in HCCC 494 of 1980 where the plaintiff’s husband was the plaintiff and the defendant in this suit was the defendant. I have read the pleadings and the plaintiff’s claim is the same one as the one in the current suit. The defendant filed a defence in the said suit. The defendant also attached an order dated the 30th of June 2003 where Justice Ransley made orders “ **the suit has abated and the same stands dismissed. That costs of today be paid to the defendant.**”. The plaintiff in the plaint filed in Court did not disclose the existence of the former suit. I do agree with the defendant submissions that the plaintiff ought to have sought to revive the previous suit and not file another suit, thus in filing this suit the plaintiff has abused Court process and I need not even determine the issues between the parties. Secondly the suit before this Court was filed in the year 2003, the agreement the plaintiff seeks to rely on is dated the 23/7/72. This being a land issue the plaintiff ought to have moved to court within the period provided in law under the Limitations of Actions Act chapter 22 of the Law of Kenya, further if I were to consider the provision of Section 4 (1) (e) of Cap. 22 then this suit is time barred as the plaintiff in her evidence relies on an equitable remedy “a trust” between her late husband and the defendant. As such the plaintiff’s suit is hereby dismissed. Bearing in mind that the parties in this suit are related I order that each party bears its own cost. I apologize for the delay in the delivery of this judgment. The judgment came up during the Election Petition period which this Court was sitting and was put on notice and due to pressure of work I have not been able to deliver it within time.

Orders accordingly.

Dated, signed and delivered this **18th** day of **June** 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....For the Plaintiff
.....For the Defendant
.....Court Clerk