



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL SUIT NO. 108 OF 2000

PAUL GATHARA KIHARA.....PLAINTIFF

VERSUS

STEPHEN MUCHAI KIHARA.....DEFENDANT

J U D G M E N T

The plaintiff, **Paul Gathara Kihara**, is the registered proprietor of land parcel **No. Trans Nzoia/Suwewa/653** measuring 8.755 hectares and an elder brother to the defendant, **Stephen Muchai Kihara**, whom it is alleged is unlawfully and illegally occupying seven (7) acres of the said land on the ground that the entire parcel is family property having been acquired by funds available to the plaintiff by their father which allegation is denied by the plaintiff with the contention that he acquired the land as an individual without any assistance from family members. The plaintiff is therefore praying for a declaration that he is the sole proprietor of the suit land and an order of eviction against the defendant.

In his defence, the defendant pleaded that he is in legal occupation of 7 ½ acres of the suit land being his shares of the same. That, his parents sold their land in central Kenya and used the proceeds to purchase the suit land which was registered in the name of the plaintiff being the eldest (first born) child in the family to hold in trust for himself and his younger brothers (i.e the defendant and one David Muturi). That, the land was not acquired individually by the plaintiff such that in 1997 the family decided to sell two (2) acres of the land to off-set a loan obtained from Agricultural Finance Corporation (A.F.C).

The defendant contends that after selling their ancestral land in Central Kenya, his parents settled with all the children on the disputed land and therefore an order of eviction against him cannot obtain since that is his only home since 1966. He counterclaims against the plaintiff by reiterating that the suit land is held in trust by the plaintiff on his own behalf and that of the defendant and their younger brother, David Muturi.

The defendant contends that the land was purchased by their parents in 1966 and prays for a declaration that it is held in trust by the plaintiff for himself and his two younger brothers. He also prays for a dismissal of the plaintiff's suit with costs.

At the hearing of the case, the plaintiff, **Paul Gathara Kihara (PW2)**, testified that he was a farmer at Cherangani and the elder brother of the defendant having been born in 1940 while the defendant was born in 1952. He worked as a cook for **Abraham Kiptanui (PW1)**, who assisted him to acquire the suit land as he sat in the board responsible for interviewing potential land owners. He (plaintiff) sat for the necessary interview in 1965 and acquired the suit land in 1966. He was interviewed by a lands officer called David Wambugu. He paid a deposit of Kshs.647/= given to him by Abraham Kiptanui. He was thereafter given a loan, three cows, barbed wire, gallon and bucket to use in milking the cows. He was

required to repay the loan within a period of thirty (30) years. He made periodic repayments through deductions from farm proceeds including milk sales. The payments were made to the Settlement Fund Trustees.

The plaintiff produced a bundle of receipts and documents (P.Ex 2, 3, 4) showing that he repaid the SFT loan. He also produced a letter of discharge from the District Lands Settlement Officer dated 12th August, 1997 accompanied by a statement (PMFI 5) and went on to testify that he also took a loan from the AFC and that he sold two (2) acres of the suit land to obtain money to repay the loan. He said that the suit land originally measured twenty two (22) acres. He paid the AFC loan partly through a Co-operative Society called Kapterit and using proceeds from milk. He produced the necessary receipts (P.Ex. 6) and further testified that he obtained the title deed (P.MFI 1) after paying the loan. His parents moved into the land in 1968 and were buried there.

The plaintiff testified that the parents did not sell any land in central province to come and live on the suit land neither did they give money to buy the land. His brothers including the defendant continued to live on the land after the death of their parents. He produced an agreement dated 12th February, 1998 (P.Ex. 7) showing that he sold two (2) of the land at Kshs.140,000/=, and that the defendant was a witness to the agreement. He contended that he solely paid the AFC loan without any contribution from the defendant who filed a case before the elders whose decision was quashed by the High Court.

The plaintiff contended that he did not purchase the land on behalf of his brothers nor does he hold it in trust for himself and his brothers. He offered to give the defendant two (2) acres of the land but he declined and is not even entitled to 7½ acres that he claims. As a result of the land they do not talk to each other neither do they visit each other.

The plaintiff thus seeks a declaratory order that the lands belongs to him and an order to evict the defendant therefrom.

The plaintiff's employee at the material time (PW1) stated that he was an agricultural officer at Suwerwa Settlement Scheme and in 1966, the plaintiff expressed a desire to purchase a plot of land for which a deposit of Kshs.647/= was required. The plaintiff did not have the money and was therefore given Kshs.500/= by him (PW1) in February, 1966. The plaintiff was required to top the amount and raise the deposit. Later, he (Plaintiff) informed him (PW1) that he had succeeded in purchasing the land.

On 11th April, 1990, the employer (PW1) wrote a letter to the area chief asserting that the plaintiff purchased the land as an individual and it was not therefore family land as claimed by other persons. The letter was produced (P. Ex.1).

The title deed (P.MFI 1) was later produced by consent of the parties together with the necessary search certificate (i.e P. Ex. 1 – b).

In his testimony, the defendant stated that he is a farmer cum pastor and that the plaintiff is his eldest brother. Their late father was Kihara Gathara who sold a piece of land at their ancestral home in Kiambu and handed over the money to the plaintiff for purposes of purchasing land in Trans-Nzoia for use by the family. The suit land was thus purchased in 1966 by the plaintiff for sharing between three brothers (i.e the plaintiff, the defendant and a younger brother). The land measured 22½ acres and was occupied by the three brothers and their parents. It was on a settlement scheme and was purchased by loan which was repaid with contributions from the three brothers through the plaintiff. In 1978, the land was divided into three portions for each of the brothers. The plaintiff received nine (9) acres of the land, the defendant seven and a half (7 ½) acres and the younger brother six (6) acres. After the loan repayment was completed in 1991, an agreement dated 13th February, 1991 (D. Ex.1) was signed by the three brothers in the presence of witnesses.

The defendant stated further that a separate portion of land at Kaplamai belonging to their later mother was sold and the proceeds shared by the three brothers. He (defendant) contended that the suit land was not purchased by the plaintiff as an individual but rather, it was purchased by him on behalf of their later

father and was treated as family land. In 1998, a title deed for the land now measuring approx. 21½ acres was obtained by the plaintiff. The deed represents three portions owned by each of the three brothers. The defendant further contended that the title deed was wrongly issued to reflect that the entire portion of the land belonged to the plaintiff. It is therefore the defendant's prayer that the plaintiff's suit be dismissed and the defendant's counter-claim be allowed.

Veronica Njeri (DW2), a sister to both the plaintiff and the defendant testified that the suit land was purchased by their late father through the plaintiff as the eldest child. This happened after their father sold a portion of land located in Kiambu and after the death of their mother in 1978, the family agreed that the suit land be divided among the three brothers who are all in occupation of the same to date.

Veronica (DW2) stated that the three brothers have been in occupation of the land since 1968 but the plaintiff is entitled to 9 acres, the defendant, 7 acres and their young brother 6 acres. She contended that the titled deed for the land was obtained in a secretive manner by the plaintiff and therefore his claim against the defendant is not genuine as he holds the land in trust for himself and his two brothers.

The former chief of Makutano location Trans Nzoia County, Stanley Kiplangat Tanui (DW3), testified that he was the chief from 1980 to 1996 and that he knew both the plaintiff and the defendant as brothers.

He said that in 1991, the two brothers went to his office and made an agreement in relation to the division of the suit land which they occupied. The agreement was made after the death of their father and was dated 13th February, 1991 (D. Ex 1). He (DW3) witnessed the agreement which was signed by the plaintiff, the defendant and their younger brother. The three brother agreed to off-set the AFC loan by selling part of the land and indeed the loan was repaid.

The chief indicated that the land belonged to the late father of the three brothers and that they agreed to divide it among themselves.

From all the foregoing evidence and the pleadings, what comes out as the basic issue for determination is the ownership of the suit land as between the plaintiff and his late father and by extension the defendant.

The defendant claims an interest in the land on account of its alleged ownership by their late father and seemingly his long occupation of the same. He made a clear suggestion that the land is family land which is held in trust by the plaintiff on his own behalf and that of the defendant and their younger brother. The said young brother, David Muturi, is not party to the present dispute pitting his two elder brothers. Indeed, this is a sad story which has suddenly caused untold misery among the members of the family of the late Mzee Kihara Gathara and in particular, the plaintiff and the defendant.

It beats logic and is difficult to understand as to why a portion of land which has been occupied for a long period of time by a family would separate and tear apart two brothers such that they do not see eye to eye and would rather disintegrate the family than lose the land. But then again, in any African society, land is said to be a very sensitive and emotive subject. What litigants ought to know is that in a court of law sympathy takes a second stand as courts are governed by statutes.

Be that as it may, it has herein been shown that the disputed land has been in occupation by the plaintiff, the defendant and their younger brother since 1968. It was also occupied by their parents prior to their respective demise. Suffice to say that the entire family composed of parents and their three sons have been in occupation of the land and that the origin of the occupation and hence the ownership of the land appears to have ignited and current dispute and is in fact, the bone of contention in the matter.

The plaintiff's stand is that the land was "discovered" and purchased by himself in his own right and not on behalf of his family. That, he invited his parents and siblings into the land. He thus implied that his father and the rest of the family came into occupation of the land at his behest and with his consent.

The defendant on the other hand took the position that the land was purchased by their father who had to sell ancestral land in central province and move into the land with his entire family. That, the purchase

transaction was conducted by the plaintiff on behalf of their father being the eldest son. That, after the death of their father, the family agreed to divide the land into three portions for each of the three sons. However, the plaintiff took the entire land and registered it in his name on his own behalf but not that of the three sons as was expected.

Veronica (DW2), a sister to both the plaintiff and defendant, agreed with the position taken by the defendant while the then chief of the area (i.e DW3) tendered in a document dated 13th February, 1991 (D. Ex. 1) described herein as an agreement indicating that the land was purchased by the plaintiff's/defendant's father after he sold a portion of land located in central province.

The said agreement (D. Ex.1) is clearly the only tangible evidence available and relied upon by the defendant to show and establish that the suit land was purchased by their late father and not the plaintiff thereby implying that the land belonged to their father under whom the family came into occupation thereof. The defendant further implied that the plaintiff was only an agent of their father in the purchase of the land and that the father purchased the land for the benefit of his entire family.

The defendant also implied that by the plaintiff registering the land in his own name was improper if not fraudulent and he must therefore be taken as holding the land in trust for his benefit and that of his two brothers.

In disowning the aforementioned agreement (D. Ex.1), the plaintiff said that the area chief slapped him twice and forced him to sign it. He therefore found it necessary to request his employer (PW1) to write a letter to the chief explaining that the land belonged to him (plaintiff).

The employer (PW1) confirmed as much. He also confirmed that the plaintiff purchased the suit land as an individual and not a representative of his family. He further confirmed and indicated that he provided financial assistance to the plaintiff to allow him raise a deposit for the purchase of the land in the year 1966. This was a clear indication that the plaintiff was already in the land before the arrival of his parents and brothers in the year 1968 thereby implying that he was the first person to occupy the land and lending credence to the allegation that the land was purchased by himself in his individual capacity after which he invited his parents and siblings to join him thereon. He produced documents including receipts (P. Ex. 2, 3, 4 & 6) to show that he purchased the land using loans obtained from the Settlement Fund Trustees (SFT) and the Agricultural Finance Corporation (AFC). He said that he obtained the title deed (P. Ex. 1(a)) after clearing the loans in full and without the assistance of his family.

The title deed was issued on the 2nd September, 1998 under the existing Registered Land Act (RLA) (Cap 300 L.O.K). It was a first registration and its effect was to vest in the plaintiff the absolute ownership of the suit land together with all rights and privileges belonging or appurtenant thereto as provided under section 27 (a) of the RLA.

Under section 28 of the same Act, the rights of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of the court are indefeasible except as provided in the Act and were held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interest and claims whatsoever. However, section 28 RLA did not relieve a proprietor from any duty or obligation to which he was subject as a trustee.

Section 27 and 28 of the RLA (now repealed) were imposed to the current Land Registration Act, 2012 by dint of its section 24 and 25.

Therefore, the position which existed in 1998 when the suit land was registered regarding the effect of registration still exists to date under the Land Registration Act, 2012.

Since the plaintiff is the registered proprietor of the suit land, it would follow that the defendant's claim of a beneficial interest in the land based on long occupation is not tenable.

The first registration of his suit land under the Registered Land Act created in favour of the plaintiff

absolute and indefeasible ownership which could not be disturbed even by allegation of fraud which have not been made herein against the plaintiff.

The registration confirmed that the land was indeed purchased by and belongs to the plaintiff in his individual capacity and not as a trustee on his own behalf and that of his two brothers. If he was indeed a trustee, the same ought to have been recorded in the register pursuant to section 28 of the RLA as was required by section 126 (1) of the Act.

There was no substantial evidence from the defendant to establish that land was sold in central province to facilitate the buying of the suit land by the defendant's late father. The evidence by the plaintiff's former employer (PW1) clearly indicated that the plaintiff's late father did not feature anywhere in the sale transaction. Neither the defendant nor the sister (DW2) furnished any evidence to establish that family members other than the plaintiff made contributions towards the loans taken by the plaintiff for the purchase of the land.

It was indicated by the defendant and the sister (DW2) that in 1978, after the death of their mother, the family agreed to divide the land into three parts for each of the three brothers such that the plaintiff was granted 9 acres while the defendant was granted 7 ½ acres or 7 acres and their younger brother was granted 6 acres. However, no evidence was produce to establish the fact. The existence of the said agreement was not even established.

The only agreement produced herein by the defendant was the one dated 13th February, 1991 (D. Ex. 1) but its validity was disputed by the plaintiff and is rather suspicious considering that apart from the chief (DW3) none of the other twenty (20) witnesses was called to testify herein in its favour. The chief cannot be said to have been a reliable witness as it was alleged that he was biased against the plaintiff.

The defendant's sister (DW2) did not her testimony mention the agreement yet she clearly supported the defendant's claim against the plaintiff.

It may also be noted that the original copy of the agreement was not tendered in evidence. Instead, an uncertified photocopy of the original was produced bearing a recent stamp of the area chief which stamp cannot be said to be the certificate signifying that the copy is a true and certified copy of the original.

No explanation was given as to why the original copy could not be availed yet the copy produced herein was signed and stamped by the current chief who was not called to testify.

A close perusal of the document (D. Ex. 1) indicates that it is not actually an agreement but seemingly proceedings before a group of elders over a land dispute between the plaintiff and the defendant involving a plot No. 335 which may have been the current suit land. It is therein shown that it was the elders who resolved that the land was family land and purported to divide it into three parts for the plaintiff, the defendant and their younger brother.

None of those elders testified before this court to confirm and establish the credibility and hence, the validity of the so-called agreement (D.Ex.1). It is thus worthless documents for purposes of establishing the defendant's claim against the plaintiff and to show that the plaintiff's proprietorship of the suit land is based on a trust which may even be implied from the circumstances or be presumed where it is expressly pleaded.

In essence, the defendant has failed to establish that the legal title to the suit land is in the plaintiff but that he has an equitable right over the land. Nor has he established that there was a clear intention by the family to create a trust over the land. His claim against the plaintiff and his objection to the plaintiff's claim against him was essentially founded on his long occupation of the land as a family member. However, the plaintiff is the registered proprietor and if he (defendant) was entitled to any interest in the land, some interest or right ceased to exist on the registration of the plaintiff as the absolute proprietor (**see, Obiero Vs. Opiyo & Others (1972) EA 226**).

Where land has been registered, the registration individualized ownership and therefore the concept of ancestral or family ownership does not arise.

In any event, the defendant did not specifically plead acquisition of rights over the land under customary law which are not overriding interests under section 30 RLA (see Esiroyo Vs. Esiroyo [1973]C.A 388) but would fall under the provision to section 28 of the RLA. It is generally recognized that the concept or notion of trust is inherent in African customary law such that the registration of land under the RLA would not extinguish a trust originating from customary law.

Suffice to hold that the suit land was properly and lawfully registered in the name of the plaintiff after its purchase by himself in his own right such that the concept of holding part thereof in trust for the defendant does not arise. Absolute ownership of the land is vested in the plaintiff to the exclusion of any other person including the defendant who cannot claim a beneficial interest by his mere occupation thereof. He is in occupation at the behest of the plaintiff and therefore, a licensee. He occupies the land at the mercy of the plaintiff who may chose to donate or sell part thereof to him. He cannot “force” the plaintiff to donate part of the land to him by invoking the concept of trust. In the upshot the plaintiff's claim is merited to the extent that prayer (a) of the plaint dated 12th July, 2000 be and is hereby granted.

The defendant is however given a period of four (4) months to agree with the plaintiff on the continuation of his occupation or on the sale of part of the land to him by the plaintiff or on voluntary surrender of part of the land to him by the plaintiff or on any matter intended to preserve the property and provide peaceful co-existence of members of the family of the late Mzee Kihara Gathara. In default, the plaintiff be at liberty to apply for an eviction order.

The defendant's counter-claim be and is hereby dismissed.

Each party to bear own costs of the suit.

Ordered accordingly.

J. R. KARANJA

JUDGE

28/10/2014

[Delivered & signed this 28th day of October, 2014]