



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**ELC CASE NO. 9 OF 2013 (OS)**  
**IN THE MATTER OF TRUSTEES ACT (CAP 167)**

**GACHURE GICHURE (Alias GICHUHI ) .....  
PLAINTIFF**

**VERSUS**

**DEDAN GICHUHI GACHURE .....  
DEFENDANT**

**JUDGEMENT**

The plaintiff herein is the father to the defendant. He has filed this suit citing both the *Trustee Act* and the *Limitation of Actions Act* seeking orders that he has acquired by way of adverse possession the parcels of land being L.R No. GATURI/WERU/2392 and L.R No. GATURI/WERU/2393 (herein referred to as the suit property) having lived on the same since 1974. The suit properties are a result of the sub-division of L.R No. GATURI/WERU/223 which the plaintiff claims to have jointly purchased with the defendant who therefore holds the same in trust for the plaintiff and which should therefore be equally sub-divided between the two and in that respect, the plaintiff sought orders that the defendant do execute the transfer of the suit property in the names of the plaintiff so that each owns 7 ½ acres and in default, the Deputy Registrar of this Court do execute the said transfer. Apart from the parties having jointly purchased the suit property, it is the plaintiff's case that he has lived on the same for over thirty six (36) years and has therefore acquired them by way of adverse possession.

However, in response to those claims, the defendant filed a replying affidavit denying that he owns the suit property in trust for the plaintiff or that the plaintiff contributed towards the purchase of the same. The defendant added that he bought the suit property himself and had them registered in his names and that the plaintiff did not make any contribution. Defendant added that he only allowed the plaintiff to live on the land together with his younger brother (Waihumbu) and that in 2007 when Waihumbu died, he was buried in plaintiff's land in Kiambu where the plaintiff moved to.

The parties having agreed on the issues to be determined, the trial commenced on 29<sup>th</sup> July 2013 with each party calling two witnesses in support of their respective cases after which their counsels made written submissions.

I have considered the evidence on record and the submissions.

It is not in dispute that the suit property is registered in the names of the defendant. It is the plaintiff's case that prior to the sub-division of the suit property into GATURI/WERU/2392 and GATURI/WERU/2393, the land was known as GATURI/WERU/223 measuring 15 Acres which the parties bought jointly from one NDIRA GATEMANYEKI in 1973 at Ksh. 12,000/= of which the

plaintiff contributed Ksh. 6,000/= and the defendant Ksh. 6,000/=. He then went to live on the suit property where he has lived for 35 years while the defendant went to live in Kiambu. Although the parties had agreed that they would buy another property next to the suit property which would be registered in the plaintiff's names, the defendant did not keep his part of the bargain but instead subdivided the land without plaintiff's consent. In 2005, the plaintiff moved to his other land in Kiambu after the defendant refused to allow his brother Waihumbu to be buried on the suit property.

The defendant's case however is that he bought the suit property in 1973 at Ksh. 6,000/= and that the plaintiff and one Muchiri were only his witnesses. He added that he did not live on the land as he was working in Nairobi so he allowed the plaintiff to live on the suit property together with his mother and that he developed the same and gave the plaintiff money to plant coffee and in 1990, he sub-divided the suit property into two portions measuring 10 and 5 acres respectively giving rise to the two properties mentioned above and all this time, the plaintiff did not raise any objections. He added that the plaintiff moved from the land in 2007 and went to live in Kiambu following the death of his (plaintiff's) son Waihumbu whose remains the defendant refused to be buried on the suit property. He added that although the Land Dispute Tribunal had ordered him to give the plaintiff part of the land, that decision was quashed by the High Court in Embu Civil Application No. 12 of 2009.

Although the plaintiff's case was that he and the defendant jointly purchased the suit property at Ksh. 12,000/= of which he paid half the purchase price and the defendant the other half, it transpired during cross-examination that infact he did not have any money to make any contribution towards the purchase of the suit property. In cross-examination by the defendant's counsel, he said as follows:-

***“It is true that when the land was bought, the defendant was the only one who was working. He allowed me to live on it as he was working elsewhere. I was not employed by the time we went to Embu but I had my cows. I did not have enough money to buy 15 acres”***

The above evidence by the plaintiff confirms the defendant's evidence that at the time the suit property was purchased, the defendant was employed as a Technician at the Kenya Industrial Estate. He added that the plaintiff had no money and could not have contributed to the purchase of the land and has infact relocated to his own land in Ruaka Kiambu. The plaintiff's own witness GEOFFREY KINUTHIA (PW2) who is his son admitted that he did not accompany the plaintiff and defendant to Embu when the land was purchased and so he was not in a position to confirm that the plaintiff contributed towards the purchase of the suit property. Plaintiff's other witness JAMES KAMAU NGETHE (PW3) testified that he saw the plaintiff hand over Ksh. 6,000/= to the vendor of the suit land but he was not in a position to say who gave the plaintiff the money. In view of the plaintiff's own admission that he had no money at the time the land was purchased, the Court can only conclude that whatever money was used to purchase the suit property could only have come from the defendant. The plaintiff cannot therefore be heard to say that the suit property was jointly purchased by him and the plaintiff and that the plaintiff therefore holds the same in trust. That claim must fail.

Further, there is evidence that when the plaintiff's son (Waihumbu) died, the defendant objected to him being buried on the suit property and the plaintiff not only buried him in Kiambu but also proceeded to move out of the suit property. That is clear evidence that the plaintiff had no proprietary interest in the suit property and was only living on it at the invitation of the defendant. There is really no evidence of a trust. Whether or not a trust exists is a matter of evidence. In **MBOTHU AND 8 OTHERS VS WAITIMU AND 11 OTHERS 1986 K.L.R. 171** the Court of Appeal stated as follows at **page 189**

***“The law never implies, the Court never presumes a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied”.***

Looking at the evidence in this case, there is nothing to suggest the existence of a trust that would impose a duty on the defendant to share the suit property with the plaintiff as sought in this suit. That claim must

therefore be dismissed.

The plaintiff has also founded his claim on adverse possession arguing that he has lived on the suit property for over thirty six (36) years and is therefore entitled to an order that he has acquired by way of adverse possession the suit property. In a claim for adverse possession, the plaintiff has to show the following:-

1. ***That he has been in continuous and un-interrupted possession of the land for 12 years or more.***
2. ***That such possession has been open and notorious to the knowledge of the owner.***
3. ***That such possession was without the permission of the owner.***
4. ***That the plaintiff has asserted a hostile title to the owner of the land.***

It is not in dispute that the suit property is registered in the names of the defendant and has been so registered from the time that it was purchased. The defendant's evidence is that since he was working in Nairobi, he allowed the plaintiff and indeed other family members to live on the said land. In his evidence in chief, the defendant said:-

***“I did not live on the land because I was working in Nairobi so I asked my father the plaintiff to live on the land. He started staying there with my mother but I used to visit the land and developed it. I gave my father money to plant coffee”***

The plaintiff himself confirmed that evidence by the defendant when he said the following in cross-examination by defendant's counsel Ms Wanjiku:-

***“I have lived on the land for 35 years but currently, I am not living on it. My son the defendant had given me permission to live on it but he later claimed it and chased me away. When he said I could not bury my son on that land, I agreed and went to bury him on my land in Kiambu”.***

It also transpired in the course of the trial that the plaintiff had infact written a will expressing his wish to be buried in his land in Kiambu where he also buried his wife.

From all the above, it is clear that the plaintiff was living on the suit property with the permission of the defendant. And when the defendant asserted his right to the property and asked the plaintiff to vacate, the plaintiff obliged and did so. That was around 2007 when the plaintiff objected to his brother being buried on the suit property. By the time that this suit was filed in July 2010, the plaintiff had already moved out of the suit property. In the circumstances, his claim to be declared as having acquired ownership of the suit property by adverse possession cannot be sustained.

Ultimately therefore, after considering all the evidence in this dispute, I find no evidence to sustain plaintiff's claim to the suit property on the basis of either trust or adverse possession. The plaintiff's suit is therefore dismissed and as the parties are father and son, each shall meet his own costs.

It is so ordered.

**B.N. OLAO**

**JUDGE**

**14<sup>TH</sup> NOVEMBER, 2014**

14/11/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Mburu for Kahuthu for Plaintiff – present

Mr. Anzala for Ms Fatuma for Defendant – present

COURT: Judgment delivered this 14<sup>th</sup> day of November, 2014 in open Court

Mr. Mburu for Kahuthu for Plaintiff present

Mr. Anzala for Ms Fatuma for Defendant present.

**B.N. OLAO**

**JUDGE**

**14<sup>TH</sup> NOVEMBER, 2014**