



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

ELC NO. 150 OF 2013

DAMARIS WANJIKU KANJA..... PLAINTIFF

VS

JOHN MUTHEE KANJA.....DEFENDANT

**JUDGMENT**

By plaint dated 30/7/2013 and filed on 31/7/2013 Damaris Wanjiku Kanja (*hereinafter referred to as the plaintiff*) a sister to John Muthee Kanja (*hereinafter referred to as the defendant,*) both who are children of Kanja Ruichiria who died in 1948, claims that during the period of land consolidation, demarcation and registration one **NJIRI GITHONGO** who was a brother to the Plaintiff's father acting at the instance and behest of the ACHERA A MBARI YA THURUNGU clan (to which clan the Plaintiff's father belonged) caused land parcel No. RUGURU/KIAMARIGA/464 (*herein after referred to as the suit land*) which belonged to the plaintiff's father to be registered in the names of the defendant.

The plaintiff avers that the only reason that the defendant got to be registered as proprietor of the suit land was due to the death of the plaintiff's and defendant's father and the defendant being the only son of the rightful deceased owner, the ACHERA AMBARI YA THURUNGU clan deemed it fit that the defendant be registered proprietor of the land to hold the same in trust for KANJA RUICHIRIA'S family of which the plaintiff is a member. The plaintiff avers that her claim in the suit land is based on a continuous trust and that her interest in the suit land is an overriding one that defeats the interest of the defendant regardless and in spite of the registration of the suit land being a first registration.

The plaintiff avers that she was born raised and has been in occupation of the suit land her entire life and has been cultivating two acres of the suit land.

She further states that the mother to both the plaintiff and the defendant aged 99 years lives on the suit land with the plaintiff and the defendant has taken advantage of the mother's advanced age to frustrate the rights and interest of the plaintiff to have the rightful share of the land.

The plaintiff claims that she has tried on many occasions to have the defendant terminate the trust and share the suit land among the beneficiaries of the deceased owner KANJA RUICHIRIA but the defendant has adamantly refused to do so and therefore prays for a declaration that the defendant holds the suit land L.R. NO. RUGURU/KIAMARIGA/464 in trust for himself, the plaintiff's and other members of KANJA RUICHIRIA'S family and for an order that the trust be terminated and the plaintiff to get two acres out of the suit land.

The plaintiff avers that on the account of lack of good legal advise, her clan had advised her to file her

claim in the defunct Land Disputes Tribunal at MATHIRA which she did and whereupon the Tribunal awarded her two acres out of the suit land but the High Court at Nyeri in Judicial Review case No. 61 of 2011 quashed the award for want of jurisdiction by the tribunal and the judge observed that the plaintiff should ventilate her claim in a civil suit and hence this suit.

She prays for orders that the defendant holds Land Parcel Number RUGURU/KIAMARIGA/464 in trust for himself and the plaintiff and other members of KANJA RUICHIRIA'S family and that the trust be terminated and the plaintiff gets two acres out of the suit land and further prays for Costs of this suit.

The defendant filed defence dated 12/8/2013 on 13/8/2013. The gist of defence is that at the time of demarcation his grandfather's house was allocated 44 ½ acres for his three sons but since his father was dead his father's two siblings took all the land and only gave 5 ½ acres as one of their sons. The defendant therefore avers that if his father was alive at the time of demarcation his family would have gotten 13.5 acres which is 1/3 of the land allocated to their house by the clan.

When the matter came up for hearing, the plaintiff testified that the father was called **Kanja Ruichiria** who was married to her mother **Ekra Wairimu Kanja** now aged 100 years. Her siblings were **Eva Wakuru, Milcent Gatheri, Esther Njeri, Alice Wangu** and **John Muthu Kanja**. Land parcel No. Ruguru/Kiamariga/464 was clan land and belonged to her father who had died in 1948.

*In her statement she states that since her father was dead at the time of land demarcation in 1958, one NJIRI GITHONGO who was a brother to her late father directed that the land be registered in the names of her brother JOHN MUTHEE KANJA to hold in trust for her father's family. The plaintiff and her siblings were born on the said land and have lived on the said land all their life with their mother who is still alive. She has attempted for several years now to have her brother terminate the trust and subdivide the 5 acre land amongst, her mother, brother and herself but he has refused. Her ACHERA AMBARI YA THURUNGU clan advised her to file the dispute before the defunct Land disputes Tribunal which awarded her two acres out of the land. However the High Court at Nyeri in Judicial Review NO. 6 of 2011 quashed the award of the tribunal as the tribunal had no jurisdiction to deal with the trust and observed that the plaintiff should pursue her claim in a civil suit.*

*She therefore filed this claim the High Court to terminate the trust so that the suit land may be subdivided and she be given two acres.*

On cross examination by **Kabethi learned counsel for the defendant** she stated that she lives in the parcel of land and has never been married but has been working at Kaguthi Tea factory where she rents dwelling premises but goes to her father's home during leave. She has been utilizing the land while working at the tea factory. She has attempted to settle the matter through the chief but was unsuccessful. She went to Mathira Land Dispute Tribunal but the decision was quashed by High Court for lack of jurisdiction. The plaintiff claims to be helping her mother but the brother does not assist. She states that their father's family is comprised of six children and all are entitled to the five acres. Her mother has her portion where she has planted Tea bushes and subsistence crops. She claims that her brother was registered as trustee.

On re-examination by **Mr. Muthuri** the plaintiff claims to have lived in the land for over 50 years and that she is occupying less than one acre which she utilizes.

The plaintiff called one **Newton Muchugu** from **Magutu**, a retired officer having worked at Kenya Tea Development Authority as her witness. Mr Newton Muchugu knew Kanja Ruichiria who died in 1948 as he belongs to the same clan with Kanja's family known as **Achera Ambari Ya Thurungu**. The witness states that the suit land is registered in the name of John Muthee Kanja as the 1st born son of the deceased to hold in trust for the others because all couldn't be registered. The siblings' mother is alive but over 90 years old. The plaintiff is a daughter to the deceased and a sister to the plaintiff. The matter was determined by Elders that she gets one acre out of the 5.5 acres but the defendant refused. The other siblings did not get a portion because they are married.

The plaintiff also called **Millicent Gathoni Ndirangu** from **Endarasha** location, Kenyeri sub location,

Kieni West, Nyeri county, a farmer by profession she is a sister to both plaintiff and defendant. She knows the land as family land and that the defendant was registered as proprietor because women were not being registered as proprietors during demarcation. He states that the plaintiff stays on the land with her mother who is now aged since she was born as she has never been married.

The plaintiff closed her case and when it came to the defendant's case, he chose not to give evidence.

The plaintiff through **Mr Muthui** submits that PW 3 and the other sisters of the plaintiff being married and none of them having claimed any share of the suit land the only persons therefore left to share the suit land which measures 5.1891 acres are the plaintiff and the defendant. Equity demands that both the plaintiff and the defendant should get equal shares and that the plaintiff claim of 2 acres is extremely reasonable as she is the sole care taker of her sickly aged mother.

The **gravamen** of the defendant's submission is that the plaintiff has proved that she is entitled to 1 acre out of the defendant's land. The official search shows that the plaintiff got the land in 1978 and that there is no evidence that the defendant was given the land in 1957 during demarcation.

This court finds that since the evidence of the plaintiff and her witnesses is not controverted, the same is adopted by the court as the truth. However, the plaintiff failed to give a history of the parcel of land from the time of demarcation to the land being registered in the name of the defendant in 1978, but this failure does not affect the evidence on record that the land in issue is family land. In the statement dated 30/7/2013 by the plaintiff, she states that the land belonged to her father who died in 1948 but her mother still lives on the parcel of land and has planted Tea and subsistence crops. There is no dispute that the plaintiff so far is in possession of one acre and that the defendant is willing to give her one acre but she prays for two acres. I do find that the plaintiff PW2, and PW3 have proved that the land herein was held by the defendant as a trustee for the family.

In **Karufi vs Muthiura** the court held that the registration of land in the name of one party under the RLA Cap 300 laws of Kenya (repealed) did not extinguish the right of the other parties who may be entitled to it under the Kikuyu customary Law.

The court finds that the land in dispute was registered in the defendant's name as a trustee as he does not tell the court how he obtained the 5.5 acres which has been occupied by the family for more than 50 years.

**M/s Kabethi** has proposed that the plaintiff be given 1 acre whilst the defendant obtains 4.5 acres perhaps because the plaintiff is a woman because she has not given any legal explanation or theory to her proposed manner of distribution. Doing so will amount to discrimination against women contrary to the provision of Article 27 (3) that provides for equality and freedom from discrimination. Women and men have the right to equal treatment, including the right to equal opportunity in political, economic, cultural and social aspects.

This court holds that each woman has a right with his male counterpart to equally inherit family property and to share the same equally as doing otherwise would be in breach of the constitution.

The plaintiff is a sister to the defendant and therefore they should share Land Registration No. RUGURU/KIAMARIGA/464 equally however, since the plaintiff has only prayed for 2 acres, she cannot be given more.

This court therefore enters judgment for the plaintiff against the defendant in terms that the defendant holds Land Parcel No. RUGURU/KIAMARIGA/464 in trust for himself and the plaintiff and the said trust should be terminated for the plaintiff to get 2 acres out of the suit land.

Since the other members of the family have not moved the court I do not say anything about them. Each party to bear its own costs.

**DATED AND DELIVERED AT NYERI THIS 11TH DAY OF DECEMBER 2014**

**ANTONY OMBWAYO**

**JUDGE**