



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 1682 OF 2007 (OS)

FRANCIS MUNGA.....1ST PLAINTIFF
JOHANA NGUGI KAMAU.....2ND PLAINTIFF
NJEGA NGWIRI.....3RD PLAINTIFF
CHARLES KANGETHE KARORI.....4TH PLAINTIFF
CHARLES NGWIRI KUNYIHA.....5TH PLAINTIFF

AND

LUCY WAMBUI NG'ANG'A.....1ST DEFENDANT
ANTHONY MUIRURI NG'ANG'A.....2ND DEFENDANT

JUDGMENT OF THE COURT

This suit was instituted by way of an Originating Summons dated 25th October 2005. The Plaintiffs claim to be beneficiaries of the estate of Ng'ang'a Ngwiri and that they bring this suit on their own behalf and that of other beneficiaries for the determination of the following questions:

- a. Was the parcel of land known as L.R. No. Kiambaa/Kihara/499 an ancestral land belonging to the late Ngwiri Weru Muiruri?
- b. Was the said parcel of land registered in the name of Ng'ang'a Ngwiri during land consolidation and demarcation to hold the same in trust for the entire family of Ngwiri Weru pursuant to Kikuyu Customary Laws?
- c. Was the land registered in the name of Ng'ang'a Ngwiri on the basis of intergenerational equity for the benefit of succeeding generation?
- d. Does registration signify recognition by the Registered Land Act of the consequent trust with the legal effect of transforming from customary law to the provisions of the Registered Land Act?

The Originating Summons is supported by an affidavit sworn by Francis Munga Ngwiri dated 25th October 2005. The deponent stated that the dispute relates to a parcel of land L.R. No. Kiambaa/Kihara/499 (hereinafter referred to as the "Suit Property") which is an ancestral land for the

entire Ngwiri Weru family who passed away in 1940 and who was survived by four wives namely: Njoki Ngwiri, Nduta Ngwiri, Nyambura Ngwiri and Gathoni Ngwiri together with their children. It was his disposition that the suit property is an ancestral land and is sub-divided into four portions for the four widows of the deceased. He deposed further that each household has been cultivating on their portions and that his late mother and two other step-mothers have been buried in their respective portions.

The deponent stated that it was agreed by all the family members to have the suit property registered in the name of the Ng'ang'a Ngwiri (deceased) because of the cordial relationship he enjoyed with the Colonial Government for fear that their land would be repossessed if the same remain unregistered. The 1st Plaintiff deposed further that the ownership of the suit property has never been in question until 1985 when the deceased objected to the formalization of the surveying, sub-division and registration of the four portions of the suit property in the names of the heirs of each household. He deposed that this resulted to the matter being taken before the panel of elders who arbitrated and decided on 14th October 1985 that the suit property be sub-divided among the four households. He deposed that following this decision, the family sought to obtain Land Board Control Consent for the sub-division. It was his disposition that the deceased consented to the sub-divisions but declined to execute the transfers.

The deponent averred that they instituted a suit (PMCC No. 143/1989 (OS) to enforce the decision of the elders but that the same was referred back to the panel of elders. However, before the panel of elders could decide the matter, the deceased passed away in September 1991. The deponent avers that there is a pending Succession Cause (Succession Cause No. 1212/2001) and that apart from the family of the deceased, every other beneficiary has been left out of the estate.

The 2nd Defendant swore a Replying Affidavit in response to the Originating Summons and Supporting Affidavit. The Replying Affidavit is sworn on 7th December 2005. The 2nd Defendant deposed that the suit property is not ancestral land as alleged, neither is it sub-divided into four portions and no cultivation as stated by the Plaintiffs is ongoing. It was his disposition that Ngwiri Weru died in 1940 before demarcation was done and in 1958 the suit property was registered in the name of his father Ng'ang'a Ngwiri (now deceased) and annexed a copy of an official search, title and green card marked "AMN 1(a), (b) and (c)". The deponent averred that it was inconceivable how his father would be registered as a trustee of his father's property whereas he was not the eldest son yet his other brothers were still alive. The 2nd Defendant further deposed that the Plaintiffs were all given land in 1959 when his father Ng'ang'a Ngwiri was given the suit property. He deposed that the family members were given their parcels of land as follows:

- i. Karori Ngwiri – Husband of Njeri Karori – Kiambaa/Kihara/T.271
- ii. Johana Ngugi Kamau (alias Gatundu Ngwiri) – Kiambaa/Kihara/T.270
- iii. Njenga Njoroge (alias Murito Ngwiri) – Kiambaa/Kihara/T.65
- iv. Francis Munga Ngwiri (alias Kinye Ngwiri) – Kiambaa/Kihara/T.269
- v. Muiruri Ngwiri – Kiambaa/Kihara/T.64
- vi. Ndungu Ngwiri – Kiambaa/Kihara/T.272

The deponent annexed copies of the green cards of the aforementioned parcels marked "AMN 2 (a), (b), (c), (d), (e), and (f)." The deponent wondered why his late father (Ng'ang'a Ngwiri) was not registered as a trustee for the above mentioned parcels whereas the intention was to have Ng'ang'a Ngwiri as the trustee. He deposed further that where the intention was to register Ng'ang'a Ngwiri as the trustee, the same would be clearly stated in the green card or title. It was his disposition that Ng'ang'a Ngwiri paid for all the fees required to obtain a title and he annexed receipts marked "AMN3."

The deponent averred that the suit property belonged to his late father Ng'ang'a Ngwiri and that the Plaintiffs were taking advantage of his absence to take away what rightfully belongs to his family. The deponent stated that save for Njeri Karori whose husband died and was given a small portion to reside within the suit property, none of the Plaintiffs have ever resided on the said suit property.

Plaintiffs' Witness Statements

By consent of both parties, this matter was canvassed by way of affidavit evidence.

The 1st Plaintiff, Francis Munga Ngwiri swore a witness affidavit on 8th April 2010 wherein he stated that he is the son of the late Ngwiri Weru and that the late Ng'ang'a Ngwiri was his step-brother. He reiterated the contents of the Supporting Affidavit of the Originating Summons. It was his evidence that his father had several parcels of land which were occupied and used by the family members. It was his evidence that the suit property which by mutual agreement by all family members was registered in the name of Ng'ang'a Ngwiri, was informally sub-divided into four portions and each portion given to each of the four wives of Ngwiri Weru according to the Kikuyu Customs. He stated that members of the family have developed their portions of the property without interference from anyone including the family of Ng'ang'a Ngwiri which has also developed its portion.

It was his further evidence that the family of Ng'ang'a Ngwiri was aware that the suit property has not been formally sub-divided and that was the only step remaining to enable each household obtain title for its portion. The 1st Plaintiff stated that this matter began at the panel of elders in 1985 when Ng'ang'a Ngwiri objected to the formal sub-division of the suit property. It was his evidence that the panel of elders decided that the suit property be sub-divided into the four portions. He stated that following the decision of the panel of elders, they sought to obtain Land Control Board consent but that Ng'ang'a Ngwiri raised an objection to the sub-division and refused to execute the transfer forms. He stated that they filed a civil suit at Kiambu (PMCC No. 143/1989 O.S) but that the suit was returned back to the panel of elders. He stated before the panel of elders could decide on the matter, Ng'ang'a Ngwiri passed away in September of 1991. It was his evidence that the hearing of the dispute before the panel of elders was delayed until 1999 as a result of Ng'ang'a Ngwiri's death and that on 29/2/2000, the panel elders made a ruling wherein it advised the parties to file a succession cause.

The 1st Plaintiff stated that they filed a succession cause and that Ng'ang'a Ngwiri's family filed a cross-petition. It was his evidence that on 13/11/2000 the Court ruled that the matters be consolidated. The said matters were heard and a ruling delivered on 15/3/2001 wherein the Court held that the objection by Ng'ang'a Ngwiri is rejected and the Grant of Letters of Administration given to the 1st and 2nd Plaintiffs herein be confirmed and they then obtained a Certificate of Confirmation of Grant dated 15.3.2001. It is the 1st Plaintiff's evidence that the only reason for applying for Letter of Administration was so as to cause the sub-division of their late father's property (Ngwiri Weru), the suit property, in accordance with the law of succession.

The 2nd Plaintiff, Johana Ngugi Kamau also swore a witness statement dated 5th March 2010 giving evidence in detail of the Ngwiri family history and how they came to be in possession of the suit property at a time when Kenya was under the Colonial Administration. He also reiterated the averments made by the 1st Plaintiff.

Hannah Njambi Muiruri swore a witness statement dated 13th May 2010. Therein she stated that she is the wife of Muritu Ngwiri son of Nduta Ngwiri, the 2nd wife of Ngwiri Weru. She stated that she got married to Muritu in 1957 after the death of Ngwiri Weru. She stated that indeed the suit property is registered under the name of Ng'ang'a Ngwiri (her husband's step-brother). However, soon after registration, the suit property was sub-divided into 4 portions and given to each wife of Ngwiri Weru. She stated further that when her husband (Muritu Ngwiri) died he was buried in Nduta Ngwiri's portion of the suit property. It was her evidence that since 1958 each household has been tilling their respective portions apart from utilizing the same for other purposes.

Lilian Wambui Ngwiri filed a witness statement sworn on 24th June 2013 wherein she stated that she is the wife of the son of Willie Ndungu Ngwiri the brother of Ng'ang'a Ngwiri having gotten married in 1985. It was her evidence that her grandmother had three sons: Karori Ngwiri, Willie Ndungu Ngwiri and Ng'ang'a Ngwiri. She stated that the suit property belonged to the entire Ngwiri family and not Ng'ang'a Ngwiri. She stated that when she got married to the Ngwiri's, she found four households, each household cultivating on their respective portions.

Defendants' Witness Statements

The 1st Defendant, Lucy Wambui Ng'ang'a swore a witness statement on 12th May 2010. Therein she stated that she is the 2nd wife of Ng'ang'a Ngwiri and that she got married in 1958 during the emergency. It was her evidence that she moved to Tanzania with her husband in 1958 leaving the 1st wife Joyce Nyambura (now deceased) to till the suit property. She stated that they moved back in 1960 and got the same state of affairs. She stated that in 1975 her husband Ng'ang'a Ngwiri gave a portion of the suit property to the family of Karori Ngwiri when he died. She stated further that the rest of the family members were allowed to cultivate the suit property to enable them get some money to educate their children. This, the 1st Defendant says, was purely on humanitarian grounds. It was her evidence that the other family members were given plots which were more marketable than the suit property and further that her husband was not given any plot in addition to the suit property.

Peter Karori Ng'ang'a swore a witness statement on 12th May 2010 wherein he stated that he is the 2nd born son of Ng'ang'a Ngwiri and that he was born in 1965. He reiterated the contents of the Replying Affidavit of the 2nd Defendant and stated further that there indeed gravesites on the suit property but that his family agreed for the deceased members of the extended families to be buried on the suit property because the plots they were given were town plots and in their nature persons cannot be buried there.

Wilson Ndugi Karori swore a witness statement on 12th May 2010. Therein he stated that he is the son of Karori Ngwiri (now deceased) who is a step-brother of Ng'ang'a Ngwiri. It was his evidence that their family resided in Gachie in a plot belonging to his father until 1974 when his father died. He stated that in 1975 Ng'ang'a Ngwiri gave them a portion of land within the suit property where they built and settled. He stated further that other than their family, nobody else resides on the suit property and that as far as he is aware, the suit property belongs to Ng'ang'a Ngwiri and that the same has not been sub-divided.

Plaintiffs' Submissions

Parties filed submissions in support of their cases. The Plaintiffs filed submissions dated 10th April 2013 wherein they reiterated the contents of the Originating Summons, Supporting Affidavit and Witness Statements. The Plaintiffs submitted that the plots referred to by the 2nd Plaintiff is his Replying Affidavit were plots that were distributed amongst the 4 wives of Ngwiri Weru as follows: 2 Plots to the 1st wife, 2 Plots to the 2nd wife, 1 plot to the 3rd wife and 1 plot to the 4th wife. They submitted that the Defendants' family has not instituted proceedings to have the rest of the family members evicted or to stop the members of the extended family from burying their kindred in their respective portions of the suit property.

The Plaintiffs contended that the suit is ancestral land and that the late Ng'ang'a Ngwiri held it in trust for the extended Ngwiri family. In support of their case, the Plaintiffs cited the case of **Gatiba v Gatiba KLR (E&L) 404** where the Court held,

“The Registered Land Act does not recognize a trust whether evidenced through an instrument of acquisition or not. That Act recognizes express as well as implied trusts.....”

The Plaintiffs also cited the case of **Gituanja v Gituanja KLR (E &L)** where the Court held,

“The succession of land belonging to a deceased Kikuyu man with more than one wife is by houses. The land is equally divided among the houses and each house shares equally amongst the male children.....”

The Plaintiffs also referred the Court to Section 28 of the Registered Land Act (now repealed) stating that the Customary Law Doctrine of Trusts has been recognized in the registration regime even when it is a first registration.

The Defendants filed submissions dated 19th March 2013 wherein they reiterated the contents of the Replying Affidavit and witness statements. The Defendants contended that the Plaintiffs have not proved any existence of a trust in respect of the suit property.

Determination

From the pleadings and submissions filed by the parties and outlined hereinabove, I find that the only issue for determination is whether the Plaintiffs/Applicants have established a customary trust. It is undisputed that Ngwiri Weru had four wives and several children. It is also undisputed that the suit property is registered in the name of Ng'ang'a Ngwiri (deceased). The dispute is whether the suit property belongs to Ng'ang'a Ngwiri or whether he holds it in trust on behalf of the Ngwiri Weru family.

According to the Plaintiffs, the suit property together with other plots (*referred to in the 2nd Defendant's Replying Affidavit*) all belonged to their father Ngwiri Weru. It is their claim that the plots were given to each of the 4 households as follows: 1st wife 2 plots, 2nd wife 2 plots, 3rd wife 1 plot and 4th wife 1 plot and that these plots were subsequently registered in the names of the son(s) of each household. The Plaintiffs contend that the suit property is family land and that Ng'ang'a Ngwiri is holding it in trust for them. The Plaintiffs submit that the said suit property is sub-divided into four portions and that each household has been carrying out farming activities as well as burying their dead in their respective portions. The Plaintiffs aver that the sub-division has occurred physically and their attempts to have it done formally have borne no fruit. The Plaintiffs aver that they commenced the process of formal sub-division in 1985 before the death of Ng'ang'a Ngwiri. The Plaintiffs stated that they took their matter before a panel of elders for determination because Ng'ang'a Ngwiri, being the registered proprietor, declined to execute transfer forms to pave way for sub-division and processing of individual titles for each household.

The Defendants, on the other hand, claim that Ng'ang'a Ngwiri is the registered owner of the suit property and that he does not hold the same in trust for his siblings and step-siblings. The 2nd Defendant stated that other than Njeri Karori wife of Karori Ngwiri who was given a portion within the suit property because her husband died, none of the other family members reside on the said property. The 2nd Defendant also claims that the other family members were given town plots which are of more value than what his late father was given. He maintains that it is inconceivable that his father would be the one to hold the land in trust for the family yet there were older siblings who were alive at the time. The 1st Defendant on her part claims that the other family members were allowed by her deceased husband to carry out farming activities on the suit property to enable them cater for their children. The 2nd Defendant also conceded that the dead family members were laid to rest on the suit property but only because they could not be buried in town plots. They contend that the suit property is not sub-divided as alleged by the Plaintiffs.

It is trite law that customary right is a matter of fact and must be proved by evidence. See ***Wambugi v Kimani (1992) 2 KAR 58***. It is noteworthy that Ngwiri Weru died in 1940 before the commencement of land consolidation and demarcation process. The Plaintiffs aver that this process began in 1958 when Ng'ang'a Ngwiri was registered as proprietor of the suit property and his registration is therefore the 1st registration. The Plaintiffs maintain that he was, by consent of the family members, chosen to represent the family as he enjoined cordial relations with the colonial administrators. The 2nd Plaintiff, Johana Ngungi Kamau, in his Witness Statement gave a detailed history of how their family was forced to move to Tanganyika and how they were forced out of their land by the colonialists, their houses burnt and the entire area becoming prohibited for Africans on the pretext of being part of the Mau Mau. It was his evidence that in 1956 the prohibited zones were reopened for the Africans and all the previous occupants allowed land. This was later revoked to pave way for consolidation and demarcation. The 2nd Plaintiff stated that in 1957 during the land demarcation process, the 2nd wife of Ngwiri Weru was identified as an owner of one of the parcels of land that belonged to Ngwiri Weru. It was his evidence that so as not to lose the unregistered land, it was decided that Ng'ang'a Ngwiri be registered as proprietor but that the same was on the understanding that he would be holding it in trust for himself and his siblings including

the step-siblings.

Aluoch J. (now a Judge at the International Criminal Court, Hague) in *David Mbugua Mbogo & 3 Others v Justus Mugweru Mbogo (2007) eKLR* said:

“I may wish to take Judicial Notice of the fact that during the period of emergency in Kenya, many families especially in the Central Province were affected and were either detained and or ran away from their homes to places of safety and when land demarcation and registration started, those “sons” who remained behind were registered to hold land on behalf of those who were not present at home. In this way “customary trusts”, were created. This point has been the subject of many court decisions. One such decision is the court of Appeal case of PHILICERY NDUKU MUMO V NZUKU MAKAU CIVIL APPEAL NO. 56 OF 2001 (Unreported).”

Looking at the evidence adduced by the Plaintiffs, against the backdrop when Kenya was in a state of emergency, I am convinced that the Plaintiffs are being truthful. It is my view that the evidence of customary trust in favour of the Plaintiffs is overwhelming. I find that a customary trust was established when the family consented to Ng’ang’a Ngwiri to be registered as proprietor of the Suit Property owing to the fact that he enjoyed cordial relations with the existing colonial administration at the time. This would explain why he was chosen notwithstanding the fact that he was not the eldest son of the first wife/house. In the case of *Njuguna vs Njuguna (2008) 1 KLR 889*, the court allowed the appeal holding that under Kikuyu customary law, the eldest son inherits land as a *muramati* to hold it in trust for himself and the other heirs; that the *muramati* has a duty to distribute the shares to the heirs in accordance with the wishes of the deceased or in accordance with the rules of intestacy and that the *muramati* is not entitled to any remuneration for his services because his duty is a moral obligation. Indeed, I find that the late Nganga Ngwiri was a *muramati* who held the Suit Property in trust for the entire family of the late Ngwiri Weru. This finding is also supported by the fact that the family is polygamous and the sharing of the other plots, each measuring less than 0.25acres, was done to each house in accordance with Kikuyu customs.

I therefore find in favour of the Plaintiffs and hereby declare that the parcel of land known as L.R. No. Kiambaa/Kihara/499 is ancestral land and the same was registered in the name of Ng’ang’a Ngwiri in trust for himself and the entire family of the late Ngwiri Weru. I therefore allow the originating summons.

In respect of costs, since this is a family dispute, I hereby direct that each party shall bear their own costs.

SIGNED AND DELIVERED AT THIS 20TH DAY OF SEPTEMBER 2013

MARY M. GITUMBI

JUDGE