



Gaita & another v Wairagu & another (Environment & Land Case 65 of 2014) [2022] KEELC 12646 (KLR) (30 June 2022) (Judgment)

Neutral citation: [2022] KEELC 12646 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 65 OF 2014**

JO OLOLA, J

JUNE 30, 2022

**IN THE MATTER OF PARCEL OF LAND L.R NO.
MWEIGA/GAKANGA/113**

BETWEEN

TITO THEURI GAITA 1ST APPLICANT

DAVID JAMES WAMBUGU THEURI 2ND APPLICANT

AND

GODHARD THEURI WAIRAGU 1ST RESPONDENT

EUTYCHUS MAREKIA WAIRAGU 2ND RESPONDENT

JUDGMENT

Introduction

1. The plaintiffs herein took up the summons dated March 31, 2014 for determination of the question as to whether they have acquired title to the parcel of land known as Mweiga/Gakanga/113 (hereinafter referred to as the suit land) by adverse possession and whether registration of the suit land in the name of Edward Wairagu (deceased) is subject of a trust in favour of the whole family of Theuri Thamuria (deceased).
2. The 1st plaintiff is a grandchild of Theuri Thamuria (hereinafter referred to as Theuri) while the 2nd plaintiff is a son of Theuri. The defendants are sons of Edward Wairagu, hereinafter referred to as Edward. Edward is a son of Theuri.
3. The plaintiffs suit is premised on the grounds that the suit property was exchanged with Tetu/Kabage/122 which belonged to Theuri under the Gakanga/charity exchange programme which was undertaken by the government of Kenya in 1981; that the plaintiffs and their families have been in use



- of their respective portions of the suit land since 1980 and that their use of the suit land has been open and peaceful.
4. It is the plaintiffs' case that Edward was given the title deed to Tetu/Kabage/122 by Theuri to secure a loan with a bank so that he (Edward) would acquire his own land; that Edward was required to return the title deed to the suit land upon payment of the loan advanced to him; that upon payment of the loan, Edward never returned the title deed, instead, he got title to the suit property registered in his name as a gift.
 5. Contending that registration of Edward as the proprietor of Tetu/Kabage/122 (note that Tetu Kabage/122 became Mweiga/Gakanga/113, the suit land upon the exchange programme referred to in paragraph 3 above), was procured by fraud and without the knowledge of Theuri, the plaintiffs claim that the registration of Edward as the proprietor of the suit property is subject of a trust in favour of the whole family of Theuri. The plaintiffs also contend that they have acquired title to the suit property on account of their occupation and use of the suit land for a long period of time, over 30 years.
 6. The plaintiffs' claim is opposed on the grounds that the suit property belonged to Edward absolutely; that the plaintiffs never lived in the suit property; that the 1st plaintiff's mother was given permission by Edward to live in the suit land; that the 1st plaintiff's mother promised Edward that neither she nor her sons would claim land from Edward; that the suit land was given to Edward by Theuri as a gift; that the defendants are in exclusive use and occupation of the suit land and that the plaintiffs' suit is bad in law. The following reasons are given for the contention that the plaintiffs' suit is bad in law:-
 - (i) There is no proof of grant of the consent of the land control board, yet that consent is a mandatory requirement of law for creation of a trust;
 - (ii) The plaintiffs' suit is time barred; and
 - (iii) That the plaintiffs have no capacity to sue as they don't have grant of letters of administration of the estate of Theuri or their deceased parents on whose behalf they claim to have brought the suit.
 7. Following directions issued on February 23, 2015, the originating summons filed in this suit were converted into a plaint and the replying affidavit into a statement of defence. The suit was then set doing for hearing by *viva voce* evidence.

Evidence

The plaintiff's case

8. When the suit came up for hearing, the plaintiffs availed five (5) witnesses themselves included. The defendant's case was urged by the the 2nd defendant, Eutyclus Marekia Wairagu.
9. The 1st plaintiff, Tito Theuri Gaita, who testified as PW1, reiterated the contention that the suit property belonged to Theuri; that the title deed for the suit property was given to Edward to secure a loan and that Edward was to return the title deed for the suit property upon repayment of the loan but failed to do so. Further, that Theuri and Edward entered into an agreement on how the suit property would be shared between Theuri's wives and children.
10. In cross examination, PW1 acknowledged that the green card for the suit land (Tetu/Kabage/122), states that the suit land was given to Edward as a gift; that the suit land was exchanged for Mweiga/Gakanga but he does not know the procedure followed; that he neither has the letters of administration for his grandmother's estate nor has he obtained authority from other family members to bring the



- case on their behalf; that he is aware of the letter written by his mother telling Edward not to evict them from the suit property until her children finished school; that he does not live in the suit property and that he does not know how Tetu/Kabage 122 was transferred from Theuri to Edward.
11. He admitted that Theuri died in 1990 and Edward in 2003 when he was 30 years old and that he had neither filed a suit nor reported a case of fraud in the transfer of the suit land to the police.
 12. denied having been motivated by greed in bringing this case and maintained that Edward took advantage of Theuri because he was illiterate.
 13. PW 1 informed the court that his mother did not file a case against Edward because there was a family meeting which prevailed upon her not to file any suit until her children finished school.
 14. Like PW1, David James Wambugu Theuri (PW2), informed the court that the suit land belonged to Theuri; that the title deed for the suit property was given to Edward to secure a loan and that Edward was supposed to return it after he repaid the loan. It is the testimony of PW2 that in 1962, Edward changed the title for the suit property to his name. In 1986, his father Theuri, wrote a will through which he gave the suit land to his four wives and gave him 1 acre. The court heard that they discovered the will of Theuri after Edward died. After they discovered the will, he (PW2) sought to know about the whereabouts of the subdivisions of the land as per the will. The defendants denied knowledge of the subdivisions prompting him to lodge a claim at the area chief's office. The chief advised him to call clan members, which he did and in a meeting held on August 11, 2007 attended by family members, the defendants herein included, the will was read.
 15. It is the testimony of PW2 that the defendants agreed to give the land to the beneficial owners but failed to honour their promise prompting them to make another report to the area chief. The area chief referred them to the district officer (DO who advised him to file a case before the land disputes tribunal, which he did. The tribunal made an award in accordance with his father's will and the award was later adopted as an order of the court. The court heard that during the hearing, the 2nd defendant agreed to give them the land once succession in respect of his father's estate was done.
 16. They filed a succession cause in respect of the estate of Edward. The succession court referred them to this court for determination of the question as to whether registration of Edward is subject of a trust in favour of Theuri's family.
 17. acknowledged that his father's will stated that the suit land was given to Edward but stated that he did not agree with the translation of the will in that regard. He stated that the right translation should be "take care" as opposed to "given". He stated that some of the parcels listed in the defendants list of documents do not belong to his father, Theuri.
 18. In cross examination, PW2 acknowledged that his father wrote a will in respect of the suit property but stated that it is not true that his father knew that the suit property was registered in the name of Edward. Despite the will stating that his father's wives were given life interest to cultivate the suit property, he stated that he did not agree with that fact. He further admitted that neither he nor the 1st plaintiff live in the suit property and that by the time they filed a suit at the land disputes tribunal, the defendants had not obtained letters of administration in respect of the suit property but were in occupation.
 19. PW2 further informed the court that in 2001, they wrote to the district commissioner informing him that their sister Bernice Kiama, should be allowed to cultivate parcel number 122. He admitted that at the time, the land had been exchanged with 113 but stated that they were still using it.
 20. PW2 informed the court that he is claiming for the 4 wives of his father but had neither produced any letters of administration for estates of his father and his four mothers nor filed authority to file the suit



on their behalf. He also admitted that he never sued Edward in his life time and that he brought this claim 52 years after Edward was registered as the proprietor of the suit property. He further admitted that they have not filed any documents in support of the pleaded trust.

21. PW2 further informed the court that when he lived in the suit property, the land belonged to his father and that he was living there with his brother's permission.
22. He stated that he is not aware that the 1st plaintiff's mother, Paula, had written to her brother, Edward, stating that she has no claim over parcel 113. He is also not aware that the 1st plaintiff has admitted his mother letter.
23. Maintaining that his father had through the will he left given his wives land, he stated that after the demise of the wives, their land was to be inherited by their children.
24. Bernice Wambui Kiama, informed the court that Tetu/Kabage/122 belonged to her father Theuri; that she was given permission by her brothers to farm part of the land; that her father, Theuri left a Will stating how the land would be subdivided; that after her father died, the clan met and adopted what was contained in the Will which she produced as Dexbt 2.
25. In cross examination, she acknowledged that the green card for Tetu/Kabage/122 was registered in the name of Theuri and transferred to Edward in 1962 as a gift but stated that her father left a Will through which he distributed his land amongst his wives and children. She stated that she did not believe the part of the will suggesting that her father had given Edward the land while at old Gakanga.
26. PW3 told the court that she is laying a claim to the portion given to her mother, Mugure. She admitted that she has no letters of administration in respect of her mother's estate and that she has not given her brothers authority to bring the suit on her behalf. She had never filed any suit against Edward.
27. PW4 Paula Wangui Gaita, admitted that she lived in the suit land but with the permission of Edward. In 1995, she wrote to Edward to allow her and her children to stay longer in the suit land in order for her children to finish school. She acknowledged that in the letter, she stated that neither her nor her children would bring any claim on Edward's land because he was not her father and could not give her land.
28. She informed the court that the 1st plaintiff is her son and that she has never filed any suit against Edward or his children and neither has she filed any authority in court allowing the plaintiff to file suit on her behalf.
29. PW4 informed the court that neither her nor the plaintiffs live on the suit land; that Edward chased her and her children from the suit property and also chased Theuri's second wife, Nyawira from the suit land. She is aware of the will written by her father-in-law in 1986 but stated she is not aware that the Will states that the wives were given life interest and that her father-in-law acknowledged that the title to the suit land was in the name of Edward.
30. PW5, Susan Muthoni Gitigai, told the court that he knows that the suit land belongs to her father Theuri. According to her, her father could not have given the land to Edward and excluded other family members from inheriting it. She stated that she is aware that her father wrote a will before her uncles but does not know what the contents of the Will are; that she has never filed a suit against Edward over the suit land; that she has not obtained letters of administration of her deceased mother's estate and has not given authority to the plaintiffs to bring this suit on her behalf.



The Defendant's Case

31. DW1, Eutyclus Marekia Wairagu, informed the court that he lives in the suit land with his brother, the 1st defendant herein; that the plaintiffs have never lived in the suit land; that the suit land was given to their father, Edward by their grandfather Theuri as a gift; that the 1st plaintiff's mother was invited by his father to live in parcel number 122 in order to support her children because she was widowed; that the 1st plaintiff's mother was chased by their father when her children started destroying trees therein and that it is not true that his father got registered as the owner of the suit land fraudulently.
32. In cross examination, DW1 admitted that the suit land was initially parcel number 122 in the name of Theuri; that in 1962, Theuri gave the land to their father, Edward as a gift as attested by Dextb 7 (will of Theuri) which states that his grandfather gave his wives land to cultivate until death but they could not sell the land because the title was not in their names. He admitted that in 2003, they held a family meeting over the suit land but they did not reach an agreement. He stated that the suit land has never been subdivided.
33. In re-examination, he acknowledged that 4 people were present when the will of his grandfather, Theuri was written. He stated that the will states that his grandfather's wives could not sell the land as he had given it to Edward. He stated that he is not aware of any conditions given to his father by his grandfather over the suit land. According to him, his father could use the suit land as he wished. He admitted that the dispute over the suit land had gone to the Land Disputes Tribunal (LDT) but at that time, he was not the administrator of his father's estate and did not participate in those proceedings.

Analysis and Determination

34. At close of hearing parties filed submissions, which I have read and considered. From the pleadings, the evidence and the submissions, I find the following to be the issues for the court's determination:-
 - (i) Whether the plaintiff's suit is bad in law?
 - (ii) Whether the registration of Edward was effected by fraud?
 - (iii) Whether registration of the Edward as the proprietor of the suit land is subject of a trust in favour of the family of Theuri?
 - (iv) Subject to the outcome of (iii) above who are the beneficiaries of the estate of the suit land?
 - (v) Whether the plaintiffs have acquired title to the suit property by adverse possession?
 - (vi) Whether the award of the Land Disputes Tribunal and the consequential orders in respect thereof should be set aside?
 - (vii) What orders should the court make?
35. Concerning the contention that the plaintiffs' suit is bad in law, reference is made to section 6 of the [Land Control Act](#), cap 302 Laws of Kenya, and submitted that since the suit property is agricultural land, the consent of the land control board was required to create a trust in favour of the plaintiffs. The plaintiffs are said to have failed to produce consent of the land control board for their area and submitted that the claim for trust fails on this account alone.
36. Whilst section 6(2) of cap 302 provides that declaration of a trust of agricultural land situated within a land control area is a dealing requiring the consent of the land control board for the area, under section 6(1) of the Act, I am of the considered view that section of the law is inapplicable in the circumstances of this case. In this case, the plaintiffs are seeking a determination of whether the suit property is subject



to a trust in their favour pursuant to the provisions of section 28 of the Registered Lands Act, cap 300 Laws of Kenya (now repealed) and by dint of section 107 of the Land Registration Act, 2012.

37. In my view the requirement of consent of the land control board would only apply in situations where the circumstances of trust are arising in circumstances other than those contemplated under section 28 of cap 300. For instance, where one seeks to create an express trust in agricultural land.
38. Based on section 20 of the Limitation of Actions Act, cap 22 Laws of Kenya which limits the time for bringing a claim based on breach of trust to six years from the date on which the cause of action accrued, and the time it took the plaintiffs to bring their claim, said to be over 52 years since Edward was registered as the proprietor of the suit property, it is submitted that the plaintiffs' case is time barred.
39. Being of the view that the time bar contemplated in section 20 of cap 22 is in cases of express trust, I find and hold that the section is inapplicable in the circumstances of this case, where it is the court to determine whether registration of the suit property is subject of a trust in favour of the plaintiffs based on the evidence adduced before it. In the case of Isack M'Inanga Kiebia v Isaya Theuri M'Lintari & another (2018) e KLR the Supreme Court stated: -

“We now declare that customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms...It is for the court to make a determination, on the basis of the evidence, as to which category of such a trust subsists as to bind the proprietor...”
40. The plaintiffs' suit is also said to be bad in law because the plaintiffs did not obtain letters of administration in respect of the persons whom their cases is premised. Based on the case of Troustik Union International & another v Jane Mbeyu & another (1993) e kLR where the Court of Appeal held that a party without a grant of letters of administration lacks capacity to sue. It is submitted that the plaintiffs have no capacity to sue in respect of the estates of the persons whose estate their case is premised.
41. Whilst it is a requirement of a law for a person bringing a claim in respect of the estate of a deceased person to obtain letters of administration in order for him/her to have capacity to sue, I find that requirement to be inapplicable in the circumstances of this case as the plaintiffs are merely seeking a declaration as to whether the registration of the suit property in the name of Edward is subject of any trust in favour of the family of Theuri. Although this issue has a nexus to administration of the estates of the persons said to be the beneficiaries of the pleaded trust, this case not being a case for administration of those estates, I am not persuaded that the plaintiffs required letters of administration of the estates of the beneficiaries in order to bring and prosecute this case. However, subject to the orders issued in this case, letters of administration may be required by persons seeking to administer the estates of the beneficiaries, if any, found to be entitled to the suit property. In the view of the foregoing, I return a negative verdict as to whether the plaintiffs' case is bad in law.
42. On whether the suit property was fraudulently registered in the name of Edward; whilst the green card for the suit property indicates that it was given to Edward as a gift, it is submitted that the defendants have not demonstrated how Edward was given the land. The defendants are said to have failed to produce application for consent of the land control board duly signed by Theuri; consent of the relevant land control board to transfer the suit land from Theuri to Edward; transfer form duly signed by Theuri and submitted that in the absence of the said documents, Edward obtained the suit property fraudulently.



43. With regard to that issue, it is trite law that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading and proved to a standard higher than on a balance of probabilities. In that regard, see the case of Demutilla Nanyama Pururmu v Salim Mobamed Salim (2021) e KLR where the Court of Appeal stated: -

“...The law is clear as buttressed in the case of *Vijay Morjaria v Nansigh Madhusingh Darbar & another* (2000) e KLR, where Tunoi, JA (as he then was) stated as follows:-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

As regards the standard of proof, this court in the case of *Kinyanjui Kamau v George Kamau* (2015) e KLR expressed itself as follows: -

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008)1 KLR (G & F) 742 where the court stated.... “Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

44. In the circumstances of this case, the plaintiffs alleged fraud against the defendants’ father, Edward, but neither provided particulars of the pleaded fraud nor provided evidence capable of proving it. In his testimony, the 1st plaintiff stated that he does not know how Edward was registered as the proprietor of the suit land. The will relied on by both the plaintiffs and the defendants as Pexbt 2 and Dexbt 7, shows that Theuri (1st plaintiff) was aware that the suit property was registered in the name of Theuri. For those reasons, I return a negative verdict to the question as to whether registration of Edward as the proprietor of the suit property was done fraudulently.

45. On whether registration of Edward is subject of a trust in favour of the family of Theuri, the plaintiffs have vehemently denied the contention that the suit land was given to the defendants’ father as a gift and submitted that under Kikuyu customary law, Theuri who was a polygamist could not have given his land to one of his sons, Edward alone. On their part, the defendants have maintained that the suit property was given to their father as a gift and based on the decision in the cases of Samuel Wafunafu Wachilonga v John Makokha Sakwa (2018) e KLR; Samuel Kihamba v Mary Mbaisi (2015) e KLR and Njenga Kimani & 2 others v Kimani K Wainaina (2017) e KLR and submitted that a gift by its nature is incompatible with the concept of trust.

46. In the case of *Njenga Kimani & 2 others v Kimani K Wainaina* (supra), it was stated: -

“There is therefore a presumption that when property is registered in the name of a child by his parent, the property is not held in trust but is property that is meant to be owned by the child...”

47. I have carefully considered the evidence adduced in this case, particularly, the evidence showing that the suit property was registered in the name of Edward in 1962 as a gift and the evidence that in 1986 Theuri wrote a will making known his wishes concerning the property. In that will, Theuri distributed



the property among his wives and sons. The will is acknowledged by parties to this suit. The parties only differ on whether through the will, Theuri acknowledged that he had gifted the suit land to Edward.

48. Whilst there is evidence to the effect that Edward was in 1962 registered as the proprietor of Tetu/Kabage/122 before it was exchanged with the suit property, as a gift, I find the act of Theuri of writing a will in respect of the suit property to be incompatible of the contention that the suit property was given to Edward as a gift. In his will Theuri asserted his interest in the suit property by distributing it to his family members thus: -

“ Thiuri has 4 wives; (i) mother to Wanjiku (Njoki); (ii) mother to Wacuhi (Mugure); (iii) mother to Wangechi (Nyawira); (iv) mother to Gaita (Thongori). The mother to Gaita has her inheritance; the mother to Wanjiku-Njoki has been given 2 acres; the mother to Wakuhi-Mugure, 1 acre; the mother to Wangechi-Nyawira, 1 acre. The land that the wives have been given, they are to cultivate until they die and they cannot sell it because the title does not belong to them.

Njoki will have more land than the rest because she is the eldest and has always stayed with and taken care of Thiuri.

The land of Thiuri was 7 acres. Because David and Gatonga being generous to their father, they were given land as follows: -

David Wambugu-1 acre

Alex Gatonga-2.1 acres.

Because of that, Thiuri has said that the land he gave Edward Wairagu while they were still at Gakanga and even at the time of sharing it, it is still in his name.”

49. As to who the beneficiaries of the proven trust are, subject to such orders as may be issued by the Succession Court in discharge of its mandate under the Law of Succession Act, I find the beneficiaries of the suit property to be: -

- i) The family of Njoki-2 acres;
- ii) The family of Mugure-1 acre;
- iii) The family of Wangechi-1 acre;
- iv) David Wambugu-1 acres and
- v) Alex Gatonga-2.1 acres.

50. For avoidance of doubt, I am not persuaded that the statement in the will to the effect that the wives were given a life interest means that their interest would revert to Edward or his next of kin upon their demise. If Theuri wanted the property to revert to Edward, nothing would have been easier than for him to expressly state so.

51. On whether the plaintiffs’ have acquired title to the suit property by adverse possession, the evidence adduced in this case shows that the use and occupation of the suit property by the plaintiffs, was either on account of permission given by Edward or the family of Theuri. The plaintiffs’ have not given any evidence capable of showing that they had the intention of dispossessing the registered owner of his



interest in the suit property. In the Case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* (2020) e KLR where it was inter alia held that: -

“For a claim founded on adverse possession to succeed, the person in possession must have a peaceful and un interrupted user of the land. Physical fact of exclusive possession and the *anumus possidendi* to hold as owner in exclusion to the actual owner in exclusion to the actual owner are important factors for adverse possession...”

52. In the case of *Wambugu v Njuguna* (1983) KLR 173 the Court of Appeal held that adverse possession contemplates two concepts: possession and discontinuance of possession. It further held that the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.
53. In applying the circumstances of this case, I find and hold that the plaintiffs have not proved a case of adverse possession.
54. On whether the award of the Land Disputes Tribunal issued in respect of the suit property and the consequential orders issued in respect thereof should be set aside, on behalf of the defendants, it pointed out that at the time the award was made, the estate of Edward had not been administered and submitted that the Land Disputes Tribunal acted without jurisdiction rendering its decision a nullity in law.
55. From the evidence adduced in this case, I entertain no doubt that the Land Disputes Tribunal had no power to entertain the dispute as it touched on registered land. The proceedings were also irregular in that the estate of Edward was not represented by its legal representative. It follows that, the Land Disputes Tribunal could not have made a valid award which the Magistrates Court could adopt. As anything done without jurisdiction is a nullity in law hence incapable of conferring any rights, I am satisfied that the defendants have made a case for setting aside the award of the Land Disputes Tribunal and all the consequential orders, which I hereby do.
56. As to what orders this court should order, having determined that the registration of the suit property is subject to a trust in favour of the persons named in paragraph 49 herein above, I hereby determine that trust to enable the subdivision and distribution of the property to beneficiaries.
57. The upshot of the foregoing is that the plaintiffs’ suit succeeds to the extent contemplated in this judgment.
58. This being a family dispute, parties shall bear their own costs of the suit.
59. Orders accordingly.

DATED AND SIGNED AT ITEN THIS 3RD DAY OF JUNE, 2022.

L. N. WAITHAKA

JUDGE

READ, SIGNED AND DELIVERED AT NYERI THIS 30TH DAY OF JUNE, 2022.

J. O OLOLA

JUDGE

