



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 920 of 2004

MOSES MBUGUA.....PLAINTIFF

-VERSUS-

MARY NYAMBURA NGETHE.....DEFENDANT

JUDGMENT OF THE COURT

The Plaintiff brought a suit against the Defendant by way of a Plaint dated 28th August 2004, and filed in Court on 30th August 2004. The Plaintiff is seeking the following substantive orders in the said Plaint:

1. A declaration that the Defendant does not have, and never had a legitimate claim to any portion of the Plaintiff's land reference number Gatamaiyu/Kagaa/146.
2. A permanent injunction restraining the Defendant, her agents or employees from trespassing on land reference number Gatamaiyu/Kagaa/146 (hereinafter referred to as the suit property).
3. Costs

Summons to enter appearance were duly issued on 31st August 2004, and Mang'erere Ngisa & Co. Advocates entered appearance for the Defendant in a Memorandum of Appearance dated 16th September 2004 filed on the same date. The Plaintiff's claim is that he is the registered owner of the suit property which comprises of 6.72 acres, and that on 3/3/04 the Defendant trespassed onto the suit property and laid claim to 2 acres of land which she claims had belonged to their grandmother Lucy Wanjiru, and has threatened to invade the said land and disrupt the Plaintiff's proprietary rights and possession of the land.

The original Plaintiff herein died on 17th June 2008, and Patrick Gituro Mbugua, the deceased personal representative, applied to be substituted as Plaintiff and for the suit herein which had abated to be revived in a Chamber Summons dated 6th July 2009. Orders of substitution and revival of the suit as prayed were granted by Honourable Lady Justice Sitati on 16th November 2009.

The Defendant filed a defence dated 16th September, 2004, which was later amended on 7th June 2010 denying the Plaintiff's claim. The Defendant counterclaimed and avers that the suit property belonged to their grandmother Wanjiku, and that the Plaintiff being one of the sons of Wanjiku held the land in trust for the other three sons. Further, that the Defendant being a wife of one of the sons had a right to acquire the respective share of her husband.

The suit was heard on 2nd February 2012 and 30th April 2012. The Plaintiff's personal representative testified and called one witnesses to give evidence on the Plaintiff's behalf. The witnesses in addition filed statements dated 13th October 2011 and 15th October 2011 respectively. The Defendant also testified

and called one witness, and both of them also filed witness statements filed on 8th November 2011 and 2nd February 2012 respectively. All the witnesses gave oral evidence during the hearing.

The Plaintiff's Case:

The Plaintiff's case was presented in the testimony by Mr Patrick Gituro Mbugua (PW1), a son of the Plaintiff who was substituted for the deceased Plaintiff on 16th November 2009, and Micheal Chege Mbugua (PW2), another son of the Plaintiff. The Plaintiff's learned Counsel, Mr Mwicigi Kinuthia, also filed submissions dated 14th May 2012.

PW1 stated that the Plaintiff was the owner of the suit property and he produced the title to the suit property and a certificate of official search dated 27/4/2010 as Plaintiff's Exhibits 1 and 2 respectively, which showed that Moses Mbugua was registered proprietor of the suit property on 25.9.58. It was PW1's evidence that the Defendant entered the suit property on 02.03.04 where she laid claim for 2 acres of the land, and that when she was not given the land she proceeded to see the chief who summoned the Plaintiff to appear before him. The summons by the Chief of Kamburu Location dated 2/08/2004 was produced as Plaintiff's Exhibit 4. Further, that the Plaintiff appeared before the said chief and refused to give the Defendant the land, and thereafter filed this suit.

PW1 informed the Court that he was 65 years old, and further testified that he has always known the suit property to belong to his father. He stated that the Defendant has stayed in Ol Kalou for many years and has not built in the Plaintiff's home area. The witness also testified that his father had three brothers namely Ng'ethe, Munene and Kagu, none of whom asked his father for land as they were each allocated their land. Further, that Munene and Kagu stayed at Kagaa Shopping center before their demise in 1972 and 1991 respectively.

PW1 also stated that the Defendant's husband, Nge'the Gituro moved to Olkalou before the time of demarcation and lived there until his death in 1991. Further, that during demarcation, Nge'the came and found that PW1's grandfather had divided the land, and that he sold his portion to a chief called Makimei so that he could be given dowry to pay as he had impregnated the Defendant, who later became his wife. PW1 testified that the Defendant's husband never laid claim to the suit property during his lifetime.

PW1 informed the court that he stays on the suit property together with his mother and brothers namely John Munene, Michael Chege, Peter Karanja, Samuel Mburu and Joseph Kagu Mbugua. He also stated that they have planted tea and carry out dairy farming on the suit property. He produced as evidence a verification certificate dated 16/6/98 issued by the Kenya Tea Development Authority showing that the Plaintiff had planted 8553 bushes of tea. The same was marked Plaintiff's Exhibit 5.

PW1 ended his testimony by stating that he has stayed on the suit property all his life and first saw the Defendant in 2004. Further, that there has never been any decision from the elders that his father was holding the land on behalf of the Defendant's late husband. PW1 also stated that his grandfather Gituro died in 1972 and his grandmother Wanjiku died in 1987. PW1 further stated that his grandfather was buried on the land of his 2nd wife named Njeri, while his grandmother was buried on the suit property. He denied that Moses Mbugua was holding the land on behalf of the family and urged the court to dismiss the Defendant's claim.

Upon cross examination, PW1 stated that he did not know the number of wives his great-grandfather who was called Kanyi had, and that his grandfather, Gituro Mbugua had two wives, namely Njeri who was the first wife and Wanjiku the 2nd wife. PW1 denied that his grandmother Wanjiku was one of Kanyi's wives, and was taken over by his grandfather because she could not have children. He stated that the suit property was inherited by his father from his parents who gave him a title deed. Save for knowing that the Defendant's husband land was sold to one Makimei, PW1 did not know the acreage sold or how much it was sold for, and that he became aware of the sale when Makimei started cultivating the land which was hitherto being cultivated by his two grandmothers.

PW1 further denied that Kanyi is the one who sold the land and stated that it was sold by the Defendant's husband (Ng'ethe) together with Kanyi. PW1 informed the court that the mode of payment of dowry he alleged was in accordance with their customs where one paid dowry either by themselves or the parents could pay. PW1 reiterated that Ng'ethe went to Ol Kalou a long time ago where he bought land from a white man he was working for, and that he did not know if there was any land registered in Ng'ethe's name.

PW2 then took the witness stand and testified that the suit property is known to him since that is where he lives with his brothers and mother. He produced as Plaintiff's Exhibit 6 photographs that he took of the suit property in July 2011 showing the houses built and farming taking place thereon. He also testified that the Defendant and her children came to the suit property without notice on 02.03.04, claiming 2 cares of the land as theirs, and that the parties were later summoned by the chief where his father denied having the Defendant's land.

The witness stated that he has never seen the Defendant on the suit property since he was born, and that he has never heard that his father was to hold the suit property on the Defendant's behalf. Further, that the Defendant stays in Ol Kalou where her husband also lived before he passed away on 1991, and that he never saw the Defendant's husband coming to their home to discuss the suit property. Lastly, that his father's other brothers were Munene and Joseph Kago, and that they never asked the Plaintiff for any land.

On cross examination, PW2 stated that the his father had told him that he inherited the land from PW2's great-grandfather known as Kanyi, and not from PW2's grandfather who was known as Gituro. Further, that he was not aware of how many wives Kanyi had and that Wanjiku, his grandmother, was married by Gituro and not Kanyi. PW2 also stated that Gituro Mbugua had one piece of land only, and that his father had told him that Munene and Ng'ethe were given land which Ng'ethe sold to Makimei. He informed that court that Moses Mbugua was the first born in their family, but denied that the land was registered in Moses Mbugua's name because the other brothers did not have identity cards. The Plaintiff closed his case at this juncture.

The Plaintiff's learned counsel in his submissions filed on 16th May 2012 argued that the Plaintiff is the registered owner of land reference number Gatamaiyu/Kagaa/146, and that his title was protected by section 27 of the Registered Land Act which provided that the registration of a person as the proprietor of the land shall vest in that person the absolute ownership of that land, together with all rights and privileges belonging or appurtenant thereto. The learned Counsel relied on the case of **Njiru Karanja vs Gichuhi Wa Wambui, HCC No. 1306/2006** wherein the Honourable Mbogholi Msagha J. held that section 27 of the Registered Land Act vest in the registered proprietor absolute ownership of the land. The Defendant therefore had no right whatsoever in respect of the land against the Plaintiff.

The Defendant's Case:

The Defendant (DW1) testified on her own behalf and called one witness, Stephen Gathuru Mbugua (DW2) who described himself as a farmer staying at Kinari. The Defendant's learned Counsel, Mr. Ngala also filed written submissions dated 5th June 2012.

The Defendant testified that she is the wife of the late Ng'ethe Gituro who was the 2nd born son to the late Gituro Mbugua and Lucy Wanjiku Gituro. Further, that her deceased husband and Moses Mbugua, Munene and Kagu were brothers, while Wanjiku who was their mother was married to Kanyi. She stated that Kanyi had five wives who were all given property, and that Wanjiku's property was registered in the name of Moses Mbugua (the Plaintiff) who did not give his brothers any share of the property.

It was the Defendant's testimony that Ng'ethe Gituro was not given any of Wanjiku's land, and denied PW1's assertion that Ng'ethe Gituro was given land and sold it and then went to live in Ol Kalou. DW1 urged the court to assist her in getting her husband's share of the land. She stated that she was now seeking three and a half acres which is a half share of the suit property, because Munene and Kagu who were buried in the suit property died without leaving any dependents.

The Defendant stated during cross-examination that she got married in 1957, and that her husband who died in September 1989 never cultivated nor built a house on the suit property between 1957 and 1989, during which period they lived in Ngurika at Ol Kalou. The Defendant denied that her husband sold the piece of land he got during demarcation to pay her dowry, maintaining that her husband never got any piece of land from Wanjiku's land. The Defendant further stated that her husband used to demand land from the Plaintiff from the time they married.

The Defendant also admitted during cross-examination that no court case for the suit property was filed by her late husband, and that there was no document to show that Wanjiku owned the suit property or that Moses Mbugua was holding the land for her husband. She attributed failure to sue for the land for 44 years on her husband's peaceful persona. The Defendant informed the court that her husband was buried in Ol Kalou where they were given five acres of land, and that her husband's brothers namely Kago and Munene who are dead also never lived on the suit property. It was the Defendant's evidence that she started cultivating the suit property in March 2004. On re-examination, the Defendant stated that when they went to the chief, Moses Mbugua agreed to give them the land but instead came to court.

On his part, DW2 testified that the Plaintiff and the Defendant were known to him but that he did not know Kanyi, who was his father's brother. He stated that Kanyi had five wives namely Njeri, Wambui mother of Gituro, Wambui Nguta, Gathoni and Wanjiku who was the mother of Moses Mbugua. DW2 also testified in an apparent contradiction that he belongs to the family of Kanyi and that his father was born from Wambui's house, which would then make his father Kanyi's son, and not Kanyi's brother as he stated earlier. He stated that Wanjiku's children were Mbugua, Ng'ethe, Munene and Kago and the rest were girls.

DW2 maintained that Wanjiku inherited land from Kanyi which was registered in the name of Moses Mbugua because the others did not have identity cards. DW2 was emphatic that the land of Moses Mbugua was given on behalf of Wanjiku's home and that Moses Mbugua did not want to subdivide the land or give his brothers their share. DW2 further testified that the defendant did not get her husband's share of the suit property which should be given to her, and that Munene and Kago who are not alive were buried in the suit property.

The Court noted some additional inconsistency in DW2's testimony. In his witness statement, DW2 states that before demarcation, part of Kanyi's land had been sold to Makimei where each of the five families had sold 2 acres to the said Makimei and the family of Wanjiku got Kshs 2,000. Further, that Gituro Mbugua sold three (3) Acres for Kshs 3,000 and gave Moses Mbugua Kshs 1,000 to open a butchery business and Kshs 1,000 was sent to Ng'ethe to pay dowry.

However in his evidence in court, DW2 stated that Gituro took over Wanjiku as his wife and that when Gituro died, Wanjiku took Mbugua Gituro to the chief who gave her a half acre which was sold for Kshs 800/= out of which Kshs 200/= was given to Moses Mbugua, Kshs 200/= given to Kagu and that Wanjiku remained with Kshs 400/=. This is also inconsistent with DW2's witness statement where DW2 states that out of the Kshs 800/=: Moses Mbugua got Kshs 200/=: Wanjiku Kshs 200/= and the balance of Kshs 400/= was kept at the chief's office for Kagu to put up a house which he never did, and that instead Moses Mbugua collected it.

On cross examination, DW2 stated that he was born in 1942 and admitted that he did not find some wives of Kanyi, namely Njeri, Wambui and Wambui Nguta alive, but that he saw Gathoni and Wanjiku who were by then very old. Further, that Wanjiku had 8 children who were Ng'ethe, Munene, Kago, Mbugua, Wambui, Wangui, Teresa and Muthoni. He admitted that no one took Moses Mbugua to court for the suit property before he died. On the land that had been sold, he informed the court that was done before the emergency in 1953 when he was eleven years old. He stated that it was upon the court to determine the size of land to be given to the Defendant. The evidence of DW2 marked the close of the defence case.

The Defendant's learned Counsel argued in his submissions filed on 5th June 2012 that the Defendant had called family members as witnesses who were categorical that the Plaintiff's father was registered as owner of all the land from Kanyi on behalf of Wanjiku's family; that the Plaintiff's father never gave the

other siblings their shares; that the Defendant's husband did not receive any share; and that he did not sell any parcel of land. The Defendant is therefore entitled to a share as counterclaimed since the Plaintiff was registered as trustee, and that he has to share out the parcel of other brothers.

The Issues for Determination and Findings:

I have carefully read and considered the pleadings, evidence and submissions by the parties. There are three issues for consideration. The first is whether a sufficient family relationship exists between the parties to raise the inference that the suit property was family land. The second issue is whether the Plaintiff Moses Mbugua held the suit property or any part thereof in trust for the Defendant. The third issue is whether the Defendant is time-barred from claiming under the said trust, if any.

On the first issue, although conflicting evidence was given as to whether the Wanjiku who was the Plaintiff's mother was married to Kanyi, the Plaintiff's grandfather, or to Gituro, the Plaintiff's father, it is not disputed that the Plaintiff namely Moses Mugo and the Defendant's deceased husband Ngethe Gituro were brothers, and were both the sons of the said Wanjiku. PW2 also confirmed in his testimony that the Plaintiff was the first born in their family, and it was not disputed that he had three brothers, Ngethe, Munene and Kago.

It is also not disputed that the Plaintiff is registered as owner of the suit property. The certificate of official search produced in evidence by the Plaintiff as Plaintiff Exhibits 1 and 2 show that the said registration was made on 25.9.58 in the name of Moses Mugo, and a certificate of title was issued to him on 8th April 1960. The Plaintiff's submission his title is protected by section 27 of the Registered Land Act (now repealed) which provided that the registration of a person as the proprietor of the land shall vest in that person absolute ownership cannot hold.

Faced with similar submission, the Court of Appeal in **Mumo –vs- Makau (2004) 1 KLR 13** held as follows:-

“Mrs Nzei further submitted that the appellant as the registered proprietor of the suit land had a good and indefeasible title which could not be challenged in Court. This argument, we think, is fallacious for two reasons.

Firstly, there is nothing in the Registered Land Act Cap 300 Laws of Kenya, (the Act) which precludes the declaration of a trust in respect of registered land, even if it is a first registration. Secondly, section 28 of the Act, which reads as follows:

" The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject - (a)to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b)unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register. Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee" contemplates the holding of land in trust. We reject this ground of appeal.”

It was also held by the Court of Appeal in **Kanyi v Muthiora (1984) KLR 712** that the registration of land under the Registered Land Act, whether as a first or subsequent registration, does not extinguish rights under Kikuyu customary law and neither does it relieve the registered owner of his or her duties or obligations under section 28 as a trustee. It is therefore the finding of this court that the relationship between the Plaintiff and Defendant doed indeed raise the inference that the suit property was family land.

This finding leads me to the determination of the second issue, which is whether the existence of this family relationship between the parties and the inference that the suit property was therefore family land,

coupled with the fact that the land was first registered in the name of the Plaintiff, is sufficient to raise the inference of a trust as known under Kikuyu customary law. The nature of a customary trust over land was discussed in **Gathiba v Gathiba (2002) 2 EALR 342** wherein Khamoni J. stated as follows:

“In the instant case, there is no instrument of trust as such, but there is evidence that the plaintiff was registered as the proprietor of the suit land through an undertaking between members of the family and in concert with the custom that being the second eldest son in the family, he was to be registered as the caretaker of the suit premises on his own behalf and on the behalf of the defendant. That family undertaking and tradition in itself was sufficient to result into an instrument of acquisition showing that the plaintiff was acquiring the suit parcels of land in a fiduciary capacity.”

It is clear from the above-quoted holding in **Gathiba vs Gathiba**, and it is also inherent in the concept of a trust that there is a third requirement to be met in addition to the mere existence of a family relationship and registration of the disputed property in the eldest or other son's name, for a customary trust over land to arise. This requirement is a family undertaking or understanding that such registration is made and held for the benefit of other family members. This understanding may be by way of express agreement, or implied for example by the beneficiaries living on or using the disputed property.

It is this third requirement that appears to be lacking in the present case after an examination of the evidence given by the parties. This finding is arrived at for various reasons. Firstly, the Defendants did not dispute PW1'S testimony that his grandfather Gituro died in 1972 and his grandmother Wanjiku died in 1987. The Defendant also admitted that she did not attend their funerals because she was not invited.

It is therefore the case that Gituro was alive at the time the suit property was being registered in the Plaintiff's name, and this begs the question why the suit property was not registered in Gituro's name. The Defendants did not dispute that Gituro did live with Wanjiku as husband and wife, and that he was the Plaintiff's and Defendant's husband's father. In their evidence the Defendants do state that Gituro inherited Wanjiku after Kanyi died because she did not have children. This evidence gives credibility to the Plaintiff's testimony that Gituro gave each of his sons their own parcel of land, and the Plaintiff's was registered in his own name.

Secondly, there is also corroboration of the Plaintiff's testimony that at some point in time there was some land belonging to their family that was sold, which PW1 claimed was the Defendant's husband's share of the family land. This corroboration is found in DW2's witness statement wherein he states that part of Kanyi's land was sold before demarcation, and that Gituro did send Kshs 1000/= to the Defendant's husband to pay dowry.

Finally, and most importantly the Defendant have failed to provide any evidence of any agreement or understanding that the land was to be held in trust by the Plaintiff. No evidence was brought of any claims made by the Plaintiff's brothers over the suit property, including the Defendant's husband. The Defendant also claimed that she has been cultivating on the suit property since 2004, but provided no evidence of such cultivation.

DW2 who claimed to know the Plaintiff's and Defendant's family admitted during cross-examination that he did not know some members of Kanyi's family and that he was eleven years old when the registration and transactions regarding the suit property were taking place. He also gave conflicting evidence as shown in the account of his testimony. His evidence cannot therefore be relied upon.

It is the finding of this Court that no customary trust can be inferred in favour of the Defendant in the circumstances. For the same reason this Court will also not proceed with a determination of the third issue of whether the Defendant is time barred from claiming under such a trust.

I therefore find from the foregoing reasons that the Plaintiff has proved his case on a balance of probabilities, and that the Defendant has not, and her counterclaim fails. I accordingly find judgment for the Plaintiff as against the Defendant and hereby declare the Plaintiff's personal representative to be the absolute owner of the land parcel known as land reference number Gatamaiyu/Kagaa/146, and that the

Defendant does not have a legitimate claim to any portion of the said land. It is accordingly also ordered that the Defendant, her agents or employees be and are hereby permanently restrained from trespassing on the land parcel known as land reference number Gatamaiyu/Kagaa/146.

Each party shall bear their own cost as the dispute herein was between family members.

Dated, signed and delivered in open court at Nairobi this ____17th____ day of ____October____, 2012.

P. NYAMWEYA

JUDGE