



**Kiiru v Kiiru & another (Environment & Land Case 297 of 2014)
[2022] KEELC 4927 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 4927 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 297 OF 2014**

**L WAITHAKA, J
JUNE 16, 2022**

BETWEEN

THIGA NGENYE KIIRU PLAINTIFF

AND

WAMUYU KIIRU 1ST DEFENDANT

WANJIRU KIIRU 2ND DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated September 22, 2009 and filed on September 25, 2009, the plaintiff herein instituted this suit seeking an order to compel the defendants to move out of the parcel of land known as Gikondi/Thimu/327 (hereinafter referred to as the suit property).
2. The plaintiff's case is premised on the grounds that he is the registered owner of the suit property; that the defendants have since 1960 or there about been in use and occupation of the suit property; that the defendants use and occupation of the suit property has been on account of permission/licence given to them by him and that sometime in 2008 he gave the defendants notice to vacate the suit property which notice the defendants failed/refused to heed.
3. In reply and opposition to the plaintiff's suit, the defendants filed a statement of defence and counterclaim dated October 28, 2009.
4. In their statement of defense and counterclaim, the defendants have denied the contention by the plaintiff that their use and occupation of the suit property is pursuant to a permission or licence given to them by the plaintiff. The defendants have averred that the plaintiff's registration as the proprietor of the suit property is subject of a trust in their favour. On account of their long period of use and



occupation of the suit property, the defendants state that they have acquired title to the suit property by adverse possession.

Evidence

The plaintiff's case.

5. When the case came up for hearing the plaintiff availed five witnesses himself included, while the defendants availed three, inclusive of the 2nd defendant.
6. The plaintiff who testified as PW1 told the court that the defendants are wives to his father's brother. He stated that his grandfather had two parcels of land 327 and 973. During land consolidation he got registered as the owner of 327 and his cousin, Kiiri Mwiymburi (the defendants' husband) was registered as the proprietor of 973.
7. The plaintiff took possession of plot number 327 and began cultivating thereon and also constructed. Because his cousin's parcel of land, 973, was located in a forest, hence not good for settlement, his cousin requested him to allow him build houses for his two wives in the suit property.
8. The plaintiff stated that his cousin bought land elsewhere but was unable to complete payment. As a result, his cousin was chased away. When his cousin was chased away, he (the plaintiff) allowed him to transfer the coffee trees he had planted in the other parcel of land he was chased from to the suit property.
9. Maintaining that he allowed the defendants to occupy and use the suit property on understanding that they would leave if he required them to, the plaintiff informed the court that in 2008 he requested the defendants to move out of the suit property but they refused. Consequently, he filed this suit to compel them to move out.
10. The plaintiff produced certificate of official search showing that he is the registered owner of the suit property (Pexbt 1); Certified copy of green card in respect of the suit property (Pexbt 2) and the demand letters he issued to the defendants as Pexbts 3 and 4.
11. The plaintiff further informed the court that before 2008, he had severally requested the defendants to move out but they refused. Later, he discovered that his cousin had sold his parcel of land, 973.
12. The plaintiff denied the defendants' contention that he holds the land in trust for them and maintained that the defendants use and occupation of the suit property has been with his permission. Terming the defendants' stay in the suit property no longer welcome, the plaintiff urges the court to grant him the orders sought.
13. On why he allowed the defendants to live in and use the suit property the plaintiff stated that the defendants husband and he grew up together and were very close. For that reason, he could not deny his cousin the opportunity when he requested to stay on his land.
14. In cross examination, the plaintiff stated that he was born in 1938. His father was Ngenye Kiiru. He admitted that Ndegwa Mwenja (DW 2) is a member of his clan but stated that he was not the chairman of the clan in 1959.
15. The plaintiff admitted that the suit property has all along been used by the defendants; that he has never lived in the suit property; that the defendants' husband is buried in the suit property and that that he (plaintiff) lost three children and his wife and none of them is buried in the suit property but they are buried in another parcel of land near the suit property (328) bought by his daughter.



16. The plaintiff denied the allegation that the defendants' husband came to look for him in Laikipia but admitted that during burial preparation for the defendants' husband, he was present but did not raise the issue of ownership of the suit property that time. He further admitted that the suit property is divided into two distinct portions that are cultivated by the defendants entirely. He stated that by the time the defendants' husband died, in 1982, he had never requested him to vacate the suit property and confirmed that the defendants have been in occupation of the suit property since 1959.
17. In re-examination, the plaintiff stated that he utilized the suit property; that the suit property was given to him and that he was aware when the defendants started occupying the suit property (they occupied it with his permission and continued occupying it with his permission until 2008 when he asked them to leave). He maintained that the defendants' husband Kiiru did not at any time visit him to discuss the suit property.
18. Stephen Githiga Kuboba, stated that the suit property has been utilized by the defendants and that the plaintiff has never occupied or utilized it.
19. Gladys Wambui Kamotho, stated that parcel of land number 973 was sold by the defendant's husband. She does not know anything about the suit property.
20. Joseph Mwangi Kareri, stated that the plaintiff got the suit property during land demarcation, through ballot between him and the defendant's husband, Kiiru Mwiymburi. He however, could not tell how the defendants came to live in the suit property.
21. In cross examination, he stated that the plaintiff was brought up by the 2nd defendant, as a foster mother to him. He stated that during the demarcation exercise, he was employed by the surveyor who was carrying out the exercise. He admitted that during the demarcation exercise, the defendant's husband was living in Nairobi but stated that the defendants husband came home and participated in the demarcation exercise. He admitted that the defendants and their husband lived in the suit property and that the plaintiff has built on a different parcel of land that borders the suit property. He could not tell when the defendants' husband died.
22. Maintaining that the defendants' husband was present when the plaintiff was registered as proprietor of the suit property, he stated that the plaintiff was not registered as a trustee for the defendants and their family.

The defendants case.

23. The 2nd defendant, Wanjiru Kiiru who testified as DW 1, informed the court that she adopted the plaintiff when he was a small boy.
24. Concerning registration of the plaintiff as the proprietor of the suit property she stated that the plaintiff was registered as the proprietor of the suit property because her husband could not be registered as the proprietor of the two parcels that belonged to him, 327 and 973.
25. In cross examination, the 2nd defendant stated that the plaintiff was an orphan. Her husband brought the plaintiff to their home and asked her to take care of him.
26. The 2nd defendant informed the court that the plaintiff's father and the father to the defendants' husband were brothers.
27. The 2nd defendant stated that the suit property was bought by her husband. She further stated that the testimony of PW 4 that he participated in the demarcation exercise and that the plaintiff and her husband voted on who was to occupy which parcel of land between the suit property and 973 is not



- true. She maintained that the reason the plaintiff was registered as the proprietor of the suit property is because their husband could not be registered as the proprietor of the two parcels of land.
28. DW 2, Ndegwa Mwenja, stated that the plaintiff was registered to hold the suit land in trust for Kiiru and his family. He informed the court that the defendants have always used the land and that their portions were shared out between themselves by their husband.
 29. In cross examination he informed the court that the plaintiff was brought to live with the defendants' family before emergency when he was about 10 years. He stated that he was not aware whether the defendants' husband had another parcel of land; He was not aware whether the plaintiff and the defendants' husband voted to establish who would get which parcel. He stated that he learnt that the suit property was registered in the name of the plaintiff in a meeting he attended in the chief's office.
 30. At close of hearing, parties filed submissions, which I have read and considered.

Analysis and determination.

31. The sole issue arising from the pleadings, the evidence and the submissions, is whether the plaintiff's registration as the proprietor of the suit property is subject of any trust in favour of the defendants and subject to the outcome of that issue, whether the trust if any, should be determined and the suit property reverted to the defendants.
32. Concerning that issue, on behalf of the plaintiff it is submitted that the plaintiff's registration of the suit property is absolute and not subject of any trust in favour of the defendants. The use and occupation of the suit property by the defendants is said to have been on account of a license/permission granted by the plaintiff which license/ permission the plaintiff terminated in 2008.
33. In their submissions, the defendants have submitted that the plaintiff was but an adopted son of the defendants; that he was registered as proprietor of the suit property when of tender years and as such could not have been in a position to grant licence to his foster parents to cultivate and work on the suit property. It is submitted that the plaintiff was registered as the owner of the suit property because at the time, the defendants' husband could not be registered as proprietor of two parcels of land.
34. I have carefully read and considered the evidence adduced in this case. It is common ground that the plaintiff was adopted and brought up by the defendants' family. The defendants' family adopted the plaintiff when he was a young man. In cross-examination the plaintiff admitted that the defendants were living in the suit property before demarcation. He further admitted that he was staying with the defendant's mother. In that regard see the following extracts of his evidence:-

“I agree with what I recorded in my statement that I was staying with Wanjiru (Kiiru's mother) but Wamuyu was not living there then. In 1959, Kiiru Mwiwumburi was staying in Nairobi. At that time he was married to the 2nd defendant and we were staying in the same compound with the 2nd defendant because the land at that time was not demarcated...”
35. What I gather from that testimony by the plaintiff is that the defendants were in use and occupation of the suit property way before it was registered in his name. That statement does not sit well with the plaintiff's evidence that he allowed the defendant to live in the suit property after he was chased from the land he was buying.
36. The evidence adduced in this suit showing that the suit property has all along been used by the defendants, the developments the defendants have effected in the suit land; that when the defendants' husband died he was buried in the suit property without any objection by the plaintiff and that the plaintiff's three sons and wife were buried in an adjacent parcel of land bought by the plaintiff's



daughter can only lead to one inference that the defendants are and were the beneficial owners of the suit property.

37. At no time did the plaintiff use the land as an owner. He only began asserting his rights to the land in 2008, more than 40 years after he was registered as the owner.
38. From the plaintiff's conduct and the conduct of the defendants, I have no difficulty in finding that the registration of the suit property is subject of a trust in favour of the defendants.
39. The upshot of the foregoing is that the plaintiff's case is found to be lacking in merits and is dismissed with costs to the defendants.
40. The trust in the suit property is determined to pave way for registration of the defendants as the owners of the suit property, Gikondi/Thimu/327.
41. Orders accordingly.

DATED AND SIGNED AT ITEN THIS 30TH DAY OF MAY, 2022.

L. N. WAITHAKA

JUDGE

READ, SIGNED AND DELIVERED AT NYERI THIS 16TH DAY OF JUNE, 2022.

J. O Olola

JUDGE

