



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT NO.3385 OF 1986

PHYLIS GACHAMBI.....PLAINTIFF

VERSUS

JOHNSON NGANGA CUTHA.....1ST DEFENDANT
ELIUD NJUGUNA CUTHA.....2ND DEFENDANT

J U D G M E N T

1. This is an old suit having been filed in the year 1986 by Phylis Gachambi (hereinafter referred to as the plaintiff). She had brought the suit against Johnson Nganga Cutha and Eliud Njuguna Cutha (hereinafter referred to as the defendants). The two were the administrators of the estate of the late Peter Cutha Nganga (hereinafter referred to as the deceased). The plaintiff who is an unmarried step sister of the deceased, claimed that she was given a 1½ acre piece of land by her father, the late Nganga Munyi. Upon the death of her father, one acre of the land was consolidated with the deceased's land parcel No. Githunguri/Karia/420, while the other half acre was split into two plots and registered as Githunguri/Karia/T328 and Githunguri/Karia/T330. All the three titles were registered in the name of the deceased. The plaintiff maintained that the deceased was holding her one acre in Githunguri/Karia/420 and the other 2 plots in trust for her. The plaintiff further claimed that she has exclusively used and occupied the said properties from 1958. The plaintiff therefore prayed for judgment against the two defendants jointly and severally for:

- (a) A declaration that the defendant owed one acre out of LR No.Githunguri/Karia/420; LR No.Githunguri /Karia/T328 and LR No.Githunguri /Karia/T330 in trust for the plaintiff.
- (b) An order determining the trust.
- (c) An order for the defendants and each one of them to transfer one acre out LR No.Githuguri/Karia/420; Githunguri /Karia/T328 and Githunguri/Karia/T330 to the plaintiff.
- (d) Costs of the suit.

2. The defendants filed a defence denying the plaintiff's claim. In particular the defendants denied that the deceased consolidated any pieces of land belonging to the plaintiff or that any trust existed between the deceased and the plaintiff. The defendants contended that the plaintiff was given a piece of land to cultivate on humane grounds which did not give rise to any legal claim. The defendants further contended that the issues raised in the plaintiff's claim were res judicata having been adjudicated upon in Succession Cause No.745 of 1985. The court was therefore urged to dismiss the plaintiff's claim, as her plaint was frivolous and vexatious, and did not disclose any cause of action.

3. Hearing of the suit substantially proceeded before Hon. Mbito J. who took the evidence for the plaintiff and also partly heard the defence evidence. Unfortunately Hon. Mbito J retired before the suit was finalized and therefore the burden has fallen on my shoulders to finalize the hearing and deliver a judgment.

4. In support of her case, the plaintiff testified and also called Elizabeth Njeri Wacutha who is one of the wives to the deceased. Their evidence was that the deceased is a step brother to the plaintiff. Their father, the late Nganga Munyi had several wives. Nganga Munyi gave the plaintiff's mother 4.5 acres of land. The plaintiff was the only child in her mother's house. She started cultivating that land in 1933 when she was still unmarried. She got married in 1940. Her marriage broke down and she went back to her father's home. She went through a customary divorce in 1953. She continued living in her father's homestead cultivating the same land which was allocated to her mother.

5. In the year 1953, the plaintiff's father died. Later during demarcation, the land which had been given to the plaintiff's mother was partly consolidated with that of Cutha Nganga, and the other part converted into two village plots which were registered in the name of Cutha Nganga as Githunguri/Karia/T328 and Githunguri/Karia/330. The plaintiff continued occupying the said land even after demarcation. The deceased's wives including Elizabeth Njeri Wacutha were stopped by the deceased from cultivating the plaintiff's portion on Githunguri/Karia/420 as the deceased made it known that that portion belonged to the plaintiff. The plaintiff maintained that she was not aware of the succession proceedings, and only came to know about the succession matter when she was threatened with eviction. She denied having any land in her ex-husband's home maintaining that in Kikuyu custom after her divorce, she could not go back to her husband.

6. Eliud Njuguna Cutha is the one who testified on behalf of the defendants. He testified that following the deceased's death in 1968, they filed a succession cause No.102 in the Resident Magistrate's Court at Kiambu. A grant issued to the defendants was subsequently confirmed. The plaintiff filed an application for revocation of the grant but the application was dismissed. It was after the dismissal of her application that the plaintiff and her witness each filed separate suits against the defendants. The defendants maintained that Githunguri/Karia/420, Githunguri/Kaira/T328 and Githunguri/Karia /T330 were part of the deceased's estate. The properties have been distributed in accordance with the confirmed grant. The defendants maintained that the plaintiff was married and that she owns a plot registered as Githunguri/Karia/T158. The witness maintained that although the plaintiff was in occupation of plots Githunguri/Kaira/T328 and Githunguri/Karia/T330, these plots were distributed to the witness and his younger brother Albert Ngaruiya Cutha. The witness further maintained that the plaintiff was living as a tenant in the two plots and was paying rent to Elizabeth Njeri Cutha. The court was therefore urged to dismiss the plaintiff's suit.

7. The issues to be determined in this suit were agreed between the parties as follows:

- (i) Is the plaintiff an unmarried step sister of the late Cutha Nganga?
- (ii) Was the plaintiff given 1.5 acres of land by her late father?
- (iii) Was one acre thereof consolidated with Peter Cutha Nganga's land and registered in his name?
- (iv) Was 0.5 acres registered in two different plots namely Githunguri/Kaira/T328 and Githunguri/Karia/T330
- (v) Are the one acre and two plots named above held by the defendants in their capacity as administrators of the estate of the late Peter Cutha Nganga in trust for the plaintiff?
- (vi) Is the plaintiff entitled to a declaration of trust as prayed in the plaint?

(vii) Who is entitled to the costs of the suit?

8. Written submissions were duly filed by both parties. For the plaintiff it was submitted that the plaintiff was cultivating the 1½ acre portion, and was in possession of the two village plots. It was pointed out that the plaintiff's name was omitted when the probate and administration cause was filed in Kiambu Court. It was argued that it was open to the plaintiff to come to the High Court to have what was held on her behalf by the deceased removed from the deceased's estate. The court was urged to declare that the properties claimed by the plaintiff do not form part of the deceased's estate, but were held by the deceased in trust for the plaintiff.

9. For the defendants, it was submitted that the suit filed by the plaintiff and another filed by the plaintiff's witness Elizabeth Njeru Cutha, were deliberate attempts to circumvent the ruling of Justice Shields dismissing the application of the plaintiff and her witness, for revocation of the grant issued to the defendants. It was further submitted that the plaintiff's case was *res judicata*, as the issues she has raised in this suit were precisely the same issues she raised in the succession cause. It was argued that the issues had been conclusively determined in the previous proceedings.

10. With regard to the creation of a trust, it was submitted that the plaintiff did not adduce any evidence to demonstrate the existence of a trust created in her favour. It was pointed out that although the plaintiff's father Nganga Munyi had 30 offsprings, none of the siblings were called to adduce evidence in support of the plaintiff's case. It was argued that the evidence of the plaintiff's witness only confirmed that the plaintiff was given temporary sojourn upon return from her soured married. There was no evidence of any trust. Further, it was submitted that the plaintiff did not exercise her rights or register her alleged interests in the properties when land demarcation and consolidation was taking place. It was noted that the plaintiff's evidence concerning her alleged acreage was contradictory. The court was therefore urged to dismiss the suit for being incompetent and misconceived.

11. From the evidence, it is not disputed that the plaintiff was a step sister of the deceased. It is also not disputed that the plaintiff got married in the year 1933 and that she later disagreed with her husband. The question is whether she is divorced from her husband. From the plaintiff's evidence, it is apparent that she separated from her husband sometimes in the 1950s. The plaintiff has however conceded that notwithstanding her apparent separation from her husband, she had children thereafter, who were named after her husband's family members. This was clear recognition of the existence of the marriage notwithstanding her separation from her husband.

12. Moreover, although the plaintiff and her witness claimed that there was a customary divorce, the plaintiff did not call any elders who participated in the alleged customary divorce. In any case, the plaintiff is not claiming that she is entitled to the properties in her capacity as an unmarried daughter or sister. The plaintiff's claim is anchored on an alleged trust based on the premise that her father gave her 1½ acres of land prior to his death. In order to succeed, the plaintiff had to establish that she was actually given by her late father the 1.5 acres of land which she is claiming and that this land was being held by the deceased in trust for her. The plaintiff's evidence in this regard is however contradictory. She states that it is actually her mother who was given 4.5 acres by her father and that the plaintiff was only told to cultivate the land while she was still unmarried. It is not clear from plaintiff's evidence how the 4½ acres given to plaintiff's mother and which plaintiff was allowed to cultivate became 1.5 acres. Nor does the plaintiff explain what happened to the other 3 acres out of the 4.5 acres allegedly given to her mother.

13. Further, the plaintiff has not explained why she did not take any action to get the land from the deceased from 1958 when the demarcation was done to 1968 when the deceased died. Apart from the evidence of the plaintiff, there is no evidence showing that the land parcels Githunguri/Karia/420, Githunguri/Karia/T328 and Githunguri /Karia/T330, belonged to anyone other than the registered proprietor who was the deceased.

14. I am inclined to believe and accept the defence submissions that the plaintiff's allegation of a trust

was nothing other than an attempt to get a share in the deceased's estate after having been locked out of the succession cause. Indeed, the plaintiff's claim is based on substantially the same grounds as the objection which she raised in the succession cause. The only difference is that the plaintiff has now come wearing a different mantle which is that of a trust. However, having failed to establish the trust, the plaintiff suit must fail.

15. The upshot of the above is that the plaintiff suit is dismissed. In the circumstances of this case, I do not find it appropriate to award any costs. Each party shall therefore bear their own costs.

Dated and delivered this 27th day of May, 2011

H. M. OKWENGU
JUDGE

In the presence of: -
Advocate for the plaintiff absent
Kamau for the defendants
B. Kosgei - Court clerk