



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 60 OF 2008

EDITH WANGARI WANDUNA.....PLAINTIFF VERSUS
JOSEPH KINYUA MUKIRI.....1ST RESPONDENT
CHRISTOPHER GATHUA MUKIRI.....2ND RESPONDENT

RULING

Edith Wangari Wanduna, the Plaintiff herein, took out the Originating Summons dated 12th February 2008 in which she sought for the following reliefs:

- 1. That this Honourable Court do issue a declaration that Land Parcel No.Kirimukuyu/Ngandu/438 registered in the name of the 1st Respondent and which was subsequently subdivided into Parcels Nos.Kirimukuyu/Ngandu/615 and 616 now registered in the names of the 1st and 2nd Respondents respectively, is held by the Respondents in trust for the Applicant.**
- 2. That this Honourable Court do issue a further order compelling the Land Registrar, Nyeri District to cancel the titles to Land Parcels Nos. Kirimukuyu/Ngandu/615 and 616 now registered in the names of the 1st and 2nd Respondents respectively and in their place to cause an entry to be entered in the register of Land Parcel No. Kirimukuyu/Ngandu/438 giving absolute proprietorship of the said parcel to the Applicant.**

When served with the Summons, **Joseph Kinyua Mukiri** and **Christopher Gathua Mukiri**, the Defendants herein, filed a replying affidavit to resist the Plaintiff's application. This court gave directions to the effect that the Originating Summons be determined by oral evidence.

The Plaintiff's case is supported by the evidence of two witnesses. Edith Wangui Wanduna (P.W.1) told this court that she is the widow of Felix Muriithi Gathanwa, deceased, who was the beneficial owner of the parcel of land known as **L.R. NO. KIRIMUKUYU/NGANDU/438**. It is her evidence that during the 1959 Land demarcation and consolidation exercise, the family agreed that since her deceased husband was in detention, his parcels of land should be consolidated and registered in the name of Mukiri Kanyiri, the deceased's first cousin and or his sons to hold in trust for the deceased. P.W. 1 also alleged that, that is how Mukiri Kanyiri came to be registered as the owner of the parcel of land known as **L.R. KIRIMUKUYU/NGANDU/438**. She further averred that the late Felix Muriithi Gathanwa died while in detention. Mukiri Kanyiri is said to have refused to transfer the land to the deceased's family but instead caused the land to be subdivided and given to his sons. Upon subdivision **L.R. NO. KIRIMUKUYU/NGANDU/438** is said to have been closed giving rise to **L.R. NO. KIRIMUKUYU/NGANDU/615** and **L.R. NO. KIRIMUKUYU/NGANDU/616** registered in the names

of Joseph Kinyua Mukiri and Christopher Gathua Mukiri respectively. P.W.1 urged this court to grant her the orders sought in the Originating Summons. The evidence of P.W.1 were corroborated by the evidence of Lydia Ngima (P.W.2) a sister of P.W.1's husband. P.W.2 confirmed that P.W.1 and her brother Felix Muriithi Gathanwa were married before Felix Muriithi Gathanwa was detained.

The Defendants' case was supported by the evidence of four witnesses. **JOSEPH KINYUA MUKIRI** (D.W.1) told this court that **L.R. NO. KIRIMUKUYU/NGANDU/438** was closed upon subdivision. He claimed the land was originally registered in his name during the consolidation and demarcation period of 1957/8. D.W.1 further confirmed that the land was subdivided giving rise to two titles i.e. **L.R. NO. KIRIMUKUYU/NGANDU/615** and 616 on 14th April 1980. He produced copies of title and searches to the aforesaid parcels as exhibits in evidence. D.W. 1 denied knowledge of the marriage between the Plaintiff and the late Felix Muriithi Gathanwa. He further claimed that he had not personally seen the late Felix Muriithi Gathanwa though he had heard of him being a son of his step-grandfather. D.W. 1 said that he got registered as the proprietor of **L.R. NO. KIRIMUKUYU/NGANDU/438** in the period 1956/7. D.W.1 averred that his father called Mukiri was not sued by the Plaintiff before he died in 1992. D.W.1 denied knowledge that there was a trust between the late Felix and his late father to have the land in dispute registered in his name in trust for the deceased. In cross-examination D.W. 1 showed this court his identification card showing that he was born in 1950. He claimed that the land in dispute was registered in his name when he was only age 7 years. D.W. 1 also admitted in cross-examination that the late Felix Muriithi Gathanwa was a brother to his grandfather called Ngara. He also admitted that the land in dispute was ancestral land. **Christopher Mukiri** (D.W.2), adopted the evidence of his brother D.W.1. He claimed he only came to know about the Plaintiff in 2001. He also claimed that he obtained his title in 1980. **Paul Wachira Gikonyo** (D.W.3) said he was the Land Consolidation supervisor in the area the land in dispute is situated between 1956 – 1958. He said when the land was registered in the name of Joseph Kinyua Mukiri (D.W.1) no complaint was raised. D.W.3 claimed the land was given to D.W.1 by the clan since age did not matter. Joseph Nderitu Ndumia (D.W.4), claimed he was the clan chairman. He said the Plaintiff had lodged a claim on behalf of her late husband but she failed to prove the same. D.W.4 admitted that the Plaintiff filed a complaint before the Land Disputes Tribunal which complaint was heard and determined in favour of the Plaintiff. However, the same award was set aside by order of certiorari for want of the tribunal's jurisdiction.

At the close of the evidence, learned counsels were permitted to file written submissions. I have considered those submissions plus the evidence tendered by both sides. There is no dispute that the Plaintiff's suit is that based on trust. Basically it is the Plaintiff's submission that the parcel of land known as **L.R. KIRIMUKUYU/NGANDU/438** which gave rise to **L.R. NO. KIRIMUKUYU/NGANDU/615** and **616** upon subdivision was registered in the names of the Defendants in trust for the Plaintiff. The Plaintiff clearly stated that she is the widow of one Felix Muriithi Gathanwa, deceased. She claims to bring this suit as a widow of the deceased a beneficial owner of the suit land **L.R. NO. KIRIMUKUYU/NGANDU/438**. Two preliminary questions have arisen viz:

- (i) Whether or not the Plaintiff has proved he is the widow of Felix Muriithi Gathanwa?
- (ii) Whether or not the Plaintiff has locus to file this suit.

Let me start with the first issue. The Plaintiff has testified and tendered the evidence of her sister-in-law to show that she was married to the deceased before he was taken to detention where he died. The Defendants have contended that she was not the deceased's widow. On intense cross-examination the 1st Defendant (D.W.1) admitted that he knew the late Felix Muriithi Gathanwa was a brother of his grandfather. He also admitted that the land in dispute was originally owned by their grandfather hence it was clan land. Looking at the available evidence, I am convinced that the Plaintiff was married to the late Felix Muriithi Gathanwa. This conclusion brings me to the second issue as to whether or not the Plaintiff had the necessary locus to file this suit. It is obvious from the pleadings and the evidence that the Plaintiff's claim is being brought on behalf of the Estate of Felix Muriithi Gathanwa, deceased. There is no doubt that the Plaintiff was required to have taken out letters of administration to enable her bring such proceedings on behalf of the Estate and the beneficiaries. In **IRONISTIK UNION INTERNATIONAL & ANOTHER =VS= MRS JANE MBEYU & ANOTHER C.A. NO. 145 of 1990** (unreported), the

Court of Appeal held *inter alia* that no person has legal authority to bring a suit in respect of a deceased's person's estate before taking up letters of administration. If a person like in this case files a suit without such letters, then the suit is rendered incompetent. With respect, I am of the view that the Plaintiff had no *locus standi* to file the action. The best I can do in the circumstances is to order the suit to be struck out ad no more. I do not want at this stage to determine the case on its merits because doing so may prejudice the Plaintiff's future steps in pursuing her late husband's rights.

In the end this suit is ordered struck out for being incompetent having been filed by a person without authority. Costs to be met by the Plaintiff.

Dated and delivered at Nyeri this 20th day of May 2011.

**J. K. SERGON
JUDGE**

In open court in the presence of Macharia for the Defendants No appearance for Waithaka Wachira for Plaintiff with Notice.