



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO. 134 OF 2007

MARY KWAMBOKA ONGERI.....APPLICANT

-VERSUS-

TERESIA NYAMOITA MORARA.....RESPONDENT

JUDGMENT

By an originating summons (**OS**) dated 20th December, 2007 and filed in court on the same day through **Patricia Nyaundi**, Advocate of Fida-K, **Mary Kwamboka Ongeri** (“*applicant*”) sought the following orders against **Teresa Nyamoita Morara** (“*Respondent*”):-

- “1. *The defendant be restrained from selling, transferring Or otherwise disposing of LR no. West Mugirango/Siamani/5270 pending the hearing and determination of this suit.*
2. *A declaration that the defendant holds the parcel LR.No.West Mugirango/Siamani/5270 in trust for the plaintiff.*
3. *A determination by the court of the plaintiff’s beneficially (sic) share in L.R.no. West Mugirango/Siamani/5270*
4. *Adirection by the court that the Land Registrar, Nyamira do transfer LR.No. West Mugirango/Siamani/5270 and issue title to the plaintiff as per prayer 2 above.”*

The grounds on which the **O.S.** was made were that the applicant had resided on **Lrno. West Mugirango/Siamani/5270** (“*the suit premises*”) since birth. Her claim was founded on Kisii custom and that although the suit premises is registered in the name of the respondent, she held the same in trust for the applicant. Earlier the applicant had filed **Kisii HCCNo. 48 of 1995** against the respondent’s husband and a consent was recorded acknowledging the applicant’s interest in the suit premises.

In support of the **O.S.**, the applicant swore an affidavit in which in the main she deponed that she was a sister in law to the respondent who is the wife of her deceased brother, **Ondieki Mayoyo**. The respondent was the registered proprietor of the suit premises, which initially formed part of land parcel **West Mugirango/Siamani/3239**. That land belonged to her father and that her late brother was subsequently registered as proprietor of the same in trust of for all the children of their deceased father. She had filed suit against his said brother being **Kisii HCCC.NO. 48 of 1995** in which a consent order was recorded. In said consent her said brother conceded that he held the suit premises in trust and undertook to transfer portions thereof to his respective siblings. However he passed on before executing the consent. She had resided on the suit premises since birth and despite repeated requests, the respondent had refused to give her, her portion aforesaid.

The respondent was on 13th February, 2008 duly served with the **O.S** going by the affidavit of service on record by one, **Isaac Nyangena Kemari**, a process server. She failed to enter appearance nor file any papers in opposition to the **O.S.** However on 6th January, 2009, she appointed **Messers Nyabera Omari & Co. advocates** to act for her in the matter. Prior to that on 24th November, 2008, the **O.S.** had come up for directions before **Musinga J.** The Judge directed that the **O.S.** be treated as *plaint* and *viva voce* evidence be taken.

On 22nd April, 2010 the hearing commenced before me. However **Mr. Sagwe**, learned counsel for the respondent sought adjournment to enable him belatedly file a replying affidavit. Being dissatisfied with the reasons advanced for failure to file the replying affidavit in time, I denied him the luxury of adjournment. Thereafter **Mr. Sagwe** applied to withdraw from further acting for the respondent. He was granted the request. Thereafter the case proceeded to hearing. Only the applicant testified as the respondent was even absent from court. Her testimony was a replica of the affidavit in support of the O.S. that I have already set out elsewhere in this judgment. I need not therefore reproduce the same here. Suffice to add that following the consent recorded in Kisii HCCC NO. 58 of 1995, the deceased brother had proceeded to subdivide the suit premises and the resultant title ranged from 3903 to 39012 respectively. Her land was meant to be 3911. However it was registered in the name of the respondent. Since then she had refused to part with the applicant's portion thereof. If anything she had proceeded to subdivide further 3911 into 5083 and 5084. Later on she subdivided 5083 into 5270 and 71. What is now left in her name is 5270.

The respondent was registered as the proprietor of the suit premises in trust for herself and the applicant. She was now claiming $\frac{1}{2}$ share out of 5270. She had never been married. Hence she prayed to the orders in the O.S.

That marked the close of the applicant's case.

Mrs Asati learned counsel, for the applicant requested that she be allowed to put in written submissions. The request was granted. Subsequently, she filed written submissions which I have read and considered albeit carefully.

Upon review of the unchallenged evidence adduced by the applicant in this case, the gist of the dispute is the applicant's claim to a portion of the suit premises. Indeed she claims $\frac{1}{2}$ of the same. There is evidence that the applicant is indeed in occupation of a portion of the suit premises that she is now claiming. There is also a valid court order **Kisii HCCC.NO. 48 OF 1995** to the effect that: ***"The defendant is the registered owner of parcel No. West Mugirango/Siamani 3239 in trust for his brothers and sisters including the plaintiff (step sister).***

The defendant consents to subdivide the land and give to the plaintiff her rightful share and transfer it to the plaintiff. In default the executive officer of this court be authorized to execute all the necessary documents....."

It is instructive that the plaintiff in the above suit is the applicant herein whereas the defendant was the respondents' husband. It would appear however, following the subdivision in terms of the aforesaid consent order, the respondent instead of registering the suit premises in the name of the applicant, had the same registered in her name. From the foregoing, there can be no doubt at all that the respondent holds the suit premises on behalf of the applicant. There is no dispute that the applicant was a step sister to the respondent's husband. There is also no dispute at all that the respondent's husband was registered as the proprietor of the suit premises to hold the same in trust for his brothers and sisters. It is common ground that the applicant is unmarried stepsister of the respondent's husband. There is no evidence to controvert the applicant's assertion that she is, and has always been, even during the lifetime of her late father unmarried and has been in occupation of the portion of the suit premises. The totality of the foregoing is that the applicant has on the balance of probabilities been able to establish her claim to the suit premises on account of a family trust.

Besides and as stated by **Mutungi J.** in **Joyce Wanjiku Kagwara .v. George Mburu & another (2005) eKLR** ***"....there is another source of law in support of the plaintiff's claim and entitlement to the suit land in this case. That is section 30(g) of the registered Land Act, Cap. 300 Laws of Kenya which provides as under:-***

" Unless the contrary is expressed in the Register, all registered land shall be subject to such of the following interests as may for the time being subsist and effect the same without their being noted on the register the rights of a person in possession or actual occupation of land to which he is entitled in right only such of possession or occupation, save where inquiry disclosed made of such person and the rights are not disclosed....."

The same situation obtains here. The evidence is galore that the applicant has resided on the suit premises since she was born. She is unmarried. No contrary evidence or averment challenged that factual position.

It is for this reason that I must now enter judgment in favour of the applicant as against the respondent in terms:-

(i) ***I declare that the respondent holds half ($\frac{1}{2}$) of the parcel of land known West***

Mugirango/Siamani/5270 in trust for the applicant.

(ii) The District Land Registrar, Nyamira shall cause the said land parcel to be subdivided into 2 equal portions and transfer and Register in the name of the applicant, one portion thereof

There shall be no orders as to costs.

Dated, signed and delivered at Kisii this 17th Day of June, 2010.

ASIKE-MAKHANDIA

JUDGE