



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 259 of 2002

JANE WANJIRU KIARIE.....1ST PLAINTIFF

ESTHER NJOKI KIARIE.....2ND PLAINTIFF

VERSUS

MARIA WANJIKU.....1ST DEFENDANT

ISAAC KIARIE.....2ND DEFENDANT

JUDGMENT

Jane Wanjiru Kiarie and Esther Njoki Kiarie (*1st and 2nd plaintiff*) are daughters of Isaac Kiarie the 2nd defendant. The plaintiffs instituted this suit against their father and step-mother. They have sought for orders that a permanent injunction restraining the 1st and 2nd defendants from selling, disposing or leasing or in any way altering *LR. No. Nyandarua/Olaragwai/1980* until the hearing and determination of the suit. They also applied for an order that the 1st and 2nd defendants be ordered to settle to them on *LR. No. Nyandarua/Olaragwai/1980* or on a proportion of land that this court will deem fit to grant. Simultaneously with the filing of the suit, the plaintiffs filed an application under Order XXXIX of the Civil Procedure Rules seeking for interim order of injunction pending the hearing and determination of the suit. Those orders were granted on 24th March 2003, to remain in force until the suit is determined.

On 25th February 2005, the defendants filed a defence and counterclaim. They denied the plaintiffs claim and contend that the plaintiffs have illegally put structures and continued to occupy the 1st defendant's parcel of land without any color of right. In their counterclaim, the defendants sought for orders that the plaintiffs be evicted from the suit premises.

The plaintiffs gave evidence in support of their claim. They testified that they are daughters of the 2nd defendant and his first wife Julia Wangoi who passed away in 1989. According to the plaintiffs, when their mother passed away, they were occupying the suit land. A subdivision had been done in which three of their siblings were given land and some land was left for the rest of the members of the family who were not given land. The plaintiffs constructed their dwelling houses and lived on the premises. They contended that their father married the 1st defendant, a much younger woman, after the death of their mother. They alleged that the 1st defendant influenced their father, an old man to dispossess them of their beneficial interest in the suit land. The 1st defendant caused the whole parcel of land to be transferred to the 1st defendant in order to defeat the plaintiff's claim and thereby leaving the

plaintiffs destitute at the mercy of the 1st defendant.

The plaintiffs further testified that the 1st defendant had subjected them to systematic harassment and threatened them with eviction. The plaintiffs reported the matter before the District Officer, The area Chief and a panel of elders. The D.O wrote a letter to the district surveyor and brought to his attention the decision of the panel of elders. The elders met on 2nd April 2002. They deliberated on the dispute between the plaintiffs and defendants over their occupation of the suit land. It was resolved that the plaintiffs would give their father a goat and the defendants would allocate the plaintiffs one acre each next to their mother's grave. The plaintiffs also relied on the evidence of Francis Kamau a neighbour, who participated in the deliberations on 2nd April 2002. Francis is the one who reduced the agreement which was reached before the elders in writing and he produced the document as an exhibit.

The two defendants also gave evidence. Isaac Kiarie the 2nd defendant an old man who is perhaps also slowed down by age, had difficulties in giving evidence. He testified with great difficulties that the plaintiffs got married a long-time ago; therefore they belong to where they are married. His first wife passed away and he married the 1st defendant to whom he transferred all his land to hold in trust for her children. Before his first wife died, he subdivided his land among their children *i.e.* Kamande, Ndegwa and Wanjiku. He contended that he had no land available to give to the plaintiffs.

During cross-examination, the 2nd defendant could not tell the court who the husbands of the plaintiffs were, or when they got married. He told the court that he had never been to the plaintiff's marital homes. He testified that the 2nd plaintiff was married in Kabete and only returned home with grown up children. He admitted that there was a land dispute before the Chief with the plaintiffs, but he insisted that the plaintiffs were married to men like him; they should seek for land from where they are married.

Maria Wanjiku the 1st defendant also testified that she married the deceased after his 1st wife passed away. She had five children. She contended that the plaintiffs were married women with children. The 2nd defendant subdivided the land and allocated to the children who were not married, they were given 5 acres each by the 2nd defendant. She was given 9¹/₂ acres to hold in trust for her five children. She contended that if the plaintiffs were serious with their claim, they should have sought compensation from their other siblings who were holding a total of 15 acres between them. She urged the court to dismiss the plaintiffs' suit and allow her counterclaim, that the plaintiffs be evicted from her parcel of land and she is paid damages.

During cross-examination the 1st defendant admitted that she is 44 years old and the 2nd defendant is over 80 years old. She however said she could not remember the date when she married the 2nd defendant but it was after the death of the first wife. She also admitted that she was a friend of the plaintiffs and that they were in school together. By the time she married the 2nd defendant, the title for the suit premises was in his name. She agreed that she had never seen the husbands of the plaintiffs but seven years ago, the husband of the 1st plaintiff came to visit the 2nd defendant. Both counsel for the plaintiffs and defendants filed written submissions. However counsel did not conduct any research, they did not put forward any authorities which could have helped in the determination of this complex matter.

Counsel for the defendants submitted that the court is dealing with a registered title. The 1st defendant is the registered absolute proprietor; therefore the claim by the plaintiffs has no legal basis. Secondly, the prayers in the plaint do not involve the cancellation of title issued to the 1st defendant and the order sought is not capable of being implemented. Counsel also challenged the letter written by the D.O. who indicated that the title to the 1st defendant was irregularly obtained because the D.O was not called as a witness.

Finally counsel submitted that the circumstances under which title can be cancelled was not pleaded. There was no allegation of fraud or mistake. Moreover the 2nd defendant distributed his land to his three children who were available, if the plaintiffs were available at the time; they too would have gotten a

share of their father's land. The plaintiffs have come too late to court when the title was already transferred to their step-mother. He urged the court to allow the counterclaim which in any event was not defended.

Counsel for the plaintiffs submitted that her clients had proved their case that the defendants agreed and promised to give them one acre each. The defendants would not have made such a promise if there was no land available. When the 1st defendant married the plaintiffs' father, she found them living in their father's land where they have beneficial interest as children of the 2nd defendant and their late mother. The title was obtained subsequently when the plaintiffs were in occupation of the land without regard to their interests.

This case brings out interesting points of law that touch on matters of public policy, on land ownership and occupation by members of the family. The court is called upon to adjudicate on a land dispute between daughters and their parents. The matter also raises issues of the application of the law to determine issues of social and economic justice. The determination of whether the children's beneficial interest over their parents' parcel of land is a valid legal claim. Whether the registration of the 2nd defendant as the absolute proprietor of the suit premises dispossessed the plaintiffs of their beneficial interests to occupy the suit land, and whether the court should allow the defendant's counterclaim and order for the plaintiff's eviction from the suit land.

The plaintiffs are daughters of the 2nd defendant with his first wife who passed away in 1989. It is not clear when the 1st defendant got married to the 2nd defendant. What is not in dispute is that she married him after the death of his first wife. The plaintiffs allege that they were occupying their father's parcel of land as at the time the 1st defendant got married to their father. They alleged that their father was misled by the 1st defendant to transfer the whole parcel of land in order to dispossess them of their beneficial interest to their father's land.

On the part of the defendants, legalistic argument were put forward, that the plaintiffs claim cannot be founded in law because the land title is registered under the Registered Lands Act, Cap 300 which vests absolute ownership to the registered owner. My own reading of Section 27 and 28 of the Registered Lands Act the property is held by the registered proprietor subject to the overriding interest provided for under Section 30. Section 30 (g) of the Registered Land Act provides as follows:

“unless the contrary is expressed in the register all registered land shall be subject to such of the following overriding interest as may for the time being subsist and affect the same without their being noted on the register – (a) ... (g) the rights of a person in possession or actual occupation of land to which he is entitled in rights only of such possession or occupation save where enquiry is made of such person and the rights are not disclosed.”

The 1st defendant's title was transferred to her by the 2nd defendant in April 1997. The plaintiff's mother passed away in 1989. From the evidence on record I find that by the time the title was issued to the 1st defendant the plaintiffs were in occupation of the suit premises. If as at the time, the title was issued to the 1st defendant, the registrar of titles had conducted an inquiry over the persons in occupation of the suit premises, certainly he would have discovered that the plaintiffs who are daughters of the 2nd defendant were in occupation of the suit premises and perhaps their interest would have been noted in the title.

This explains why the D.O. North Kinangop wrote a letter on the 17th July 2002 notifying the District Surveyor Nyandarua of the plaintiffs' predicament. However this letter was too late because the title had been transferred to the 1st defendant in 1997.

Another way of looking at this matter is that the plaintiffs, who felt threatened by the defendants, filed a complaint before the elders. There was an agreement reached before the elders which was signed by the elders and the defendants and it was agreed that the plaintiffs would be given one acre each from the suit premises. In return the plaintiffs would pay a goat or Kshs 1,000/- to the 2nd defendant. Armed with that

agreement, the plaintiffs proceeded to lodge a caution over the suit premises forbidding any registration of dealings with the suit premises until their claim was determined. The plaintiffs then filed the present suit to pursue their claim according to the agreement reached with elders.

Having established the above facts are the plaintiffs entitled to the orders sought? I would respond to the above in the affirmative. Based on the above findings the plaintiffs have a beneficial interest over the suit premises being the daughters of the first registered proprietor and his late wife. This is the only home the plaintiffs knew. It is alleged that they were at one time married but the defendants could not tell who had married them. The fact is that they are living at the suit premises and they are children of the defendants. The defendants are categorical that the plaintiffs should be evicted. In my humble view this would be unconscionable and against the letter and spirit of the law that guarantees fundamental rights to life. Evicting the plaintiffs from their father's original parcel of land which was transferred while they were in occupation perhaps to defeat their claim will not only perpetuate an injustice but contribute to the increase of poverty.

The plaintiffs also have a legitimate expectation that as children of the defendants, they have beneficial interests over the family land. That explains why the panel of elders decreed that the plaintiffs be given one acre each. The plaintiffs' prayers are simple, they are bound by their pleadings I will grant the orders that they have prayed for. If the orders are not capable of implementation the plaintiffs will be at liberty to apply. For the time being I grant prayer No. (b). Prayer No. 1 has already been spent *i.e.* an order that 1st and 2nd defendants be ordered to settle the plaintiffs on one acre of land each out of LR. No. Nyandarua/Olaragwai/1980. The defendants' counterclaim is disallowed. This being a family matter each party shall bear their own costs of this litigation.

Judgment read and signed on 28th day of July, 2008

M. KOOME

JUDGE