



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 1928 OF 1981

JANE MUTHONI NG'ANG'A (Deceased) 1ST
PLAINTIFF

KIMANI NG'ANG'A 2ND
PLAINTIFF

versus

NG'ANG'A KIARIE (Substituted in Place of Hannah Wangui Kiarie–Deceased)
DEFENDANT

JUDGMENT

This case was on 14th June 2007 assigned to me only for the purpose of writing and delivering judgment based on the evidence already recorded by other judges. Filed in 1981 the delay of 26 years will be blamed on the court as usual because the court is always there to be blamed even when, properly, other people should be blamed, for the thinking generally is that those who are served by the court, and they include advocates and the society in which the court operates, never do anything wrong and therefore whenever anything wrong happens in connection with the services the court gives, that wrong is always the act of the court and the court must always be blamed wholly for all such actions because, in Kenya, those being served in court remain clean and blameless a hundred percent. Of course I do not concur.

However, strictly concerning this suit, the position is that one year after the suit had been filed Mr. Justice M. Cocker, as he then was, on 29th July 1982 entered an *ex-parte* judgment as prayed, the relevant decree drawn thereafter and extracted; execution thereof granted whereby the Deputy Registrar of this court was ordered to execute all the relevant and necessary documents for and on behalf of the Defendant to effect the sub-division and transfers the Plaintiffs are still claiming in this suit. But the Plaintiffs who had advocates throughout can hardly explain to-day why execution never went through in respect of land parcels KABETE/KARURA/197 and KABETE/GATHIGA/T.11 and ten years later the Defendant was able to file her defence and defend herself. Execution in respect of KABETE/GATHIGA/T.10 took place two years after the *ex-parte* decree was issued.

It is not easy in the circumstances to deal properly with an old case like this one from hands of several other people some of the documents having been mutilated or otherwise being difficult to read. But trying my best, this is what I am seeing:

The Plaintiffs in this suit are a mother and son and the original Defendant was the mother's daughter-in-law and the son's sister-in-law. The original defendant Hannah Wangui Kiarie has passed away and has been substituted by one of her sons the present defendant. Hannah Wangui was wife to Kiarri (Kiarie) Ng'ang'a who died on or about 4th October 1972 leaving her with six sons and two daughters. Kiarri Ng'ang'a, according to Jane Muthoni Ng'ang'a the First Plaintiff, was her elder son.

The evidence on record shows that following the death of Kiarri Ng'ang'a in those years before the Law of Succession Act, Cap. 160 Laws of Kenya, was enacted, the Land Registrar applied to the court for a certificate of succession under the then Section 120 of the Registered Land Act, Cap. 300 Laws of Kenya. The case was succession Case No. 16 of 1976 in the District Magistrate's Court at Kikuyu.

From court proceedings which took place before Mr. P. K. Kariuki, District Magistrate II, on 23rd July 1976, it is not clear the parcels of land they were concerned with. But the magistrate's judgment dated 28th July 1976 specifically mentions two parcels of land, namely, "KABETE/KARURA/197 and T.10". It suggests that T.10 is also at KABETE/KARURA but the Plaintiffs in their plaint in this suit, with reference to T. 10, write "KABETE/GATHIGA/T.10" and those are the particulars the relevant certified copy of the land register from the Land Registrar has. I will go by the latter particulars.

I should explain here that during that time what used to be done under Section 120 (now repealed) of the Registered Land Act was determination of the heirs to parcels of land left by a deceased person. Things like petitioning for a grant of letters of administration were not there and therefore the title, like the "Administrator of a deceased person's estate", did not exist. "Grant of Letters of Administration" did not exist. **The Applicant used to be the Land Registrar** and beneficiaries or relatives were only summoned to go to court for hearing. The court would decide the heirs and do the distribution of the land and thereafter issue **a certificate of succession** with which the heirs went back to the Land Registrar to effect the transmission on the land register and that was all. An aggrieved person had the right to appeal to a Resident Magistrate's court as normally those cases were handled by District Magistrates III. Where the matter, like in this case, were handled by a District Magistrate II, the appeal would have been to the High Court.

The Deceased Kiarri had died intestate and his widow and his children claimed inheritance of the pieces of land that were registered in his name arguing that he owned those pieces as an absolute proprietor and disputing the claims to share advanced by the Plaintiffs who were then present and were allowed to argue their case and cross examined witnesses as they were also cross examined, the Second Plaintiff playing the leading role for the Objectors, who claimed that although the pieces of land were registered in the name of Kiarri, he had bought them jointly with his mother Muthoni. They therefore wanted the pieces to be shared between the widow of Kiarri and Muthoni at 2.3 acres and 1.5 acres respectively, concerning KABETE/KARURA/197 and in addition claimed the whole of KABETE/GATHIGA/T.10.

In his judgment the Magistrate held that the claim Kimani Ng'ang'a and his mother were making was a claim he could not entertain because Section 159 of the Registered Land Act prevented him from doing so. He advised Kimani Ng'ang'a and his mother to file a case in a court of competent jurisdiction. He however went ahead and decided the heir or successor to the two parcels of land giving both of them to Hannah Wangui Kiarie to hold it for herself and for the children. The Magistrate stated:

"The claim raised by Muthoni and Kimani cannot be traced by this court as we are ordered under Section 159 of the Registered Land Act. If Muthoni feels that she had a right over the estate, she ought to file her suit in a competent court which is empowered to hear and determine such cases.

Our concern in this application is to determine who should inherit the estate of the deceased. As the widow is still surviving, she ought to be registered. I therefore grant a certificate of succession to Hanna Wangui wife of Kiarie in respect of the land and the town plot.

Right of appeal within 28 days."

From that decision the Plaintiffs did not appeal. Instead they filed this suit and they included in the suit

a plot known as KABETE/GATHIGA/T.11. They prayed for judgment against the Defendant for:

"(a) A declaration that the Defendant holds the suit premises upon trust for herself and the Plaintiffs herein in proportions set out in paragraph 5 hereof;

(b) An order that the Defendant do transfer 1½ acres out of Title Number KABETE/KARURA/197 and the entire of Title Number KABETE/GATHIGA/T.10 to the Plaintiffs' names."

The Plaintiffs prayed further for costs of this suit and for any other relief this court may grant.

Paragraph 4 of the plaint states:

"Prior to his death Kiarie Ng'ang'a (Deceased) was the registered proprietor of ALL THOSE LANDS KNOWN as KABETE/KARURA/197, KABETE/GATHIGA/T.10 and KABETE/GATHIGA/T.11 (hereinafter jointly referred to as "suit premises" and singly as the First, Second and Third premises respectively), to hold the same upon trust for himself and the Plaintiff."

Paragraph 5 of the plaint referred to in prayer (a) above states:

"In or about 1959 upon registration aforesaid the Plaintiffs, the Defendant and Kiarie Ng'ang'a (Deceased) took possession thereof and the Plaintiffs are still in possession of 1½ acres of first premises and the entire of the second premises and have effected extensive developments therein."

Paragraphs 6 and 7 of the plaint are important as they come out as the main basis upon which the Defendant's title is being challenged the Plaintiffs stating as follows:

"6. Upon the death of Kiarie Ng'ang'a (Deceased) the suit premises were registered in the Defendant's name upon the express and/or implied term that she would continue to hold the suit premises subject to the trust aforesaid.

7. In breach of the aforesaid trust the Defendant now claims to be the absolute proprietor thereof."

There are three things I do note from those three paragraphs from the plaint. The first thing is that the Plaintiffs lived with Kiarie Ng'ang'a for years after the alleged joint acquisition of the suit pieces of land without getting him transfer to them their share, if there were any such shares. They first let him register all the three pieces in his name. Thereafter they stayed with him for years until he died. No evidence of a trust held by him for the Plaintiffs. No evidence of any claim by the Plaintiffs for ownership of any share from Kiarie. It is difficult to believe the Plaintiffs. All the three, that is the Plaintiffs and Kiarie Ng'ang'a, were adults at the time of the alleged joint purchase and there was no reason why each could not get a separate title especially since the purchase is alleged to have taken place during land demarcation and registration in the area.

The second thing I note is that in Succession Case No. 16 of 1976 in the District Magistrate's Court, Kikuyu, it was the First Plaintiff Jane Muthoni Ng'ang'a only who claimed to have purchased the pieces of land jointly with Kiarie Ng'ang'a. But during the hearing of this suit, and that was after the First Plaintiff had died in 1990, the Second Plaintiff, who was now calling himself "**Geoffrey Kimani Wang'ang'a**" as at 22nd May 2003, told the court he also was a joint purchaser together with his mother and his brother and that he was therefore entitled to a separate share a part that of his mother. That shows inconsistency in the Plaintiff's case.

Thirdly, no effort was made by the Plaintiff during the hearing of this suit, to adduce evidence in support of paragraphs 6 and 7 of the plaint quoted earlier in this judgment. Where was evidence of "**the express and/or implied term that**" Hannah Wangui Kiarie was registered heir of KABETE/KARURA/197 and KABETE/GATHIGA/R.10 as trustee for the Plaintiffs? She was registered upon the judgment of the District Magistrate's Court quoted above which clearly did not impose any trust upon her in relation to the Plaintiffs and no evidence had proved before the Magistrate that Kiarie held a trust in favour of the

Plaintiffs. In fact the effect of that judgment was that the claim which was being made by both Plaintiffs was rejected by the Magistrate. The proper thing to do after that would have been for the Plaintiffs to appeal against the Magistrate's judgment, and not to have followed the Magistrate's comments blindly to file this suit. The Magistrate was not their legal adviser and they ought to have obtained proper and better legal advice before filing this suit. I note they filed the suit through an Advocate.

They had gone before the District Magistrate as beneficiaries or heirs in the estate of Kiarie Ng'ang'a and that was a similar interest Hannah Wangui Kiarie was claiming. If they failed to present their case properly resulting in the rejection of their claim they way the magistrate did it, they are themselves to blame as they ought to have tried their chance on appeal instead of coming to institute this suit where they treat the succession case as if it were of no legal effect. Yet it declared Hannah Wangui Kiarie the heir on her own behalf and on behalf of her children. To-day the Plaintiffs come back to court as purchasers. Did they purchase the land from, or jointly with, Hannah Wangui Kiarie or from the present Defendant in this suit? If they purchased the suit premises, Kiarie Ng'ang'a they claim to have purchased the premises with, died without the Plaintiffs having claimed any share from him. How then do they qualify to make this claim to-day when the Defendant inherited the absolute proprietorship held by Kiarie Ng'ang'a?

Having said the above, let me add that piece of land KABETE/GATHIGA/T.11 was not in the Succession Case No. 16 of 1976. But this suit is based on what happened in the succession case as can be seen from paragraphs 6 and 7 of the plaint. The Plaintiff's case relating to that piece of land cannot, on that basis, stand even if all other things were equal. Furthermore, I am with anxiety noticing something of concern about that plot.

KABETE/GATHIGA/T.11 was registered in the name of Kiarie Ng'ang'a under the Registered Land Act on a first registration on 24th March 1959. The relevant date should have been shown, but on an undisclosed date, the

"TITLE" was "CLOSED ON SUB DIVISION NOW SEE TITLES 11 A AND 11 B"

and that transaction was apparently done by Kiarie Ng'ang'a himself – while still alive.

Title KABETE/GATHIGA/T.11 A shown to be a sub-division of KABETE/GATHIGA/T.11 was opened on 24th March 1959 in the names of Moses Muthemba and Kangethe Waruiru for a consideration recorded as "400/=". A similar situation obtains with regard to

Title KABETE/GATHIGA/T.11 B

except that it was registered on the same 24th March 1959 in the sole name of Moses Muthemba and no consideration is shown. The date of those two registrations suggests that the mother title was closed on the same 24th March 1959 for the two new titles to be born on that date.

As I have stated both new titles were each, according to the record, apparently, done by Kiarie Ng'ang'a or with his consent on 24th March 1959 before he died on 4th October 1972 in the 14th year following the transactions. If that was correctly so, and I do not find evidence to the contrary, then I do not see how on 13th April 1993, Hannah Wangui Kiarie lawfully came to be registered as the owner of each one of those two titles. The entry in favour of Hannah Wangui Kiarie dated 13th April 1993 on each title suggests it was effected because of a court order but having read through the evidence on record, I do not see the evidence relevant to those changes.

Which court order did Hannah Wangui Kiarie use on 13th April 1993 and how lawful was it in so far as it gave ownership of those two plots to Hannah Wangui Kiarie? I have said title No. KABETE/GATHIGA/T.11 was not one of the titles in the District Magistrate's judgment dated 28th July 1976 in Succession Case No. 16 of 1976 and from what I am now saying, that plot's exclusion was proper because it no longer belonged to Kiarie Ng'ang'a in law and the Applicant Land Registrar must have seen it that way at the time he filed in court the application for a certificate of succession in respect of the

pieces of land which were then registered in the name of the Deceased Kiarri Ng'ang'a. But even if it were found that that title were included in the Magistrate's judgment, to that extent, that judgment could not have been lawfully valid to lawfully affect the legal titles held by Moses Muthemba and Kangethe Waruiru in respect KABETE/GATHIGA/T.11A and KABETE/GATHIGA/T.11 B; first because it could not undo what was done by Kiarri Ng'ang'a himself before he died 14 years earlier and secondly because de-registration of Moses Muthemba and Kangethe Waruiru will have been done in contravention of Sections 27 (1), 28 and 29 of the Registered Land Act concerning the indefeasibility or the absolute ownership of the title of a registered proprietor of land and thirdly and further to the foregoing, the said de-registration would have been done in contravention of the principle of natural justice there being no evidence that Moses Muthemba and Kangethe Waruiru had been party and lawfully defeated in the case in which the court order relied upon to de-register them was obtained.

It follows that the validity of all subsequent entries after the one in favour of Hannah Wangui Kiarie dated 13th April 1993 in each one of the two title registers ought to be questioned as they appear to originate from Hannah Wangui Kiarie's questioned entries of 13th April 1993.

Otherwise, Kimani Ng'ang'a having said in his evidence that the *ex-parte* judgment he and co-Plaintiff obtained in this suit was subsequently set aside, and that must have been so to allow the subsequent filing of the defence which was filed for the *interpartes* hearing in which Kimani Ng'ang'a was giving evidence to take place, I do not see how he remains the registered owner of KABETE/GATHIGA/T.10 at the entry dated 11th September 1990 seen on PW1 Exhibit 2 unless a certified copy of the whole of the relevant land register was not produced so that only a portion of it is the one filed. I do note the Defendant has made no counter-claim. I therefore do leave that issue the way it is the defence dated 5th May 1994 having been filed sometime in 1994, and hearing of the suit having closed on 8th March 2003 apparently the Defendant seeing no problem about the presence of that entry dated 11th September 1990 – to-date.

Finally and bearing in mind the foregoing, the Plaintiff's suit against the Defendant be and is hereby dismissed with costs to the Defendant.

Dated this 31st day of July 2007.

J. M. KHAMONI

JUDGE