



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Case 63 of 1992

DAVID GICHIA MUNGAI.....PLAINTIFF

VERSUS

FLORENCE NYAKIO MUNGAI.....DEFENDANT

JUDGMENT

The plaintiff filed suit against the defendant seeking declaratory orders of this court that the defendant held parcel No. **Nyandarua/Matindiri/28** (*hereinafter referred to as the suit land*) in trust for the plaintiff and other beneficiaries of his father – Danfred Mungai Gichuhi who is now deceased (*hereinafter referred to as the deceased*). The defendant filed a defence denying that the plaintiff was a child of the deceased. She denied that the plaintiff was entitled to a portion of the suit property. She further denied that she held title to the said parcel of land in trust for the plaintiff. She averred that if there were any issues as regard who the beneficiaries of the deceased were, then the issue ought to have been litigated in the succession proceedings. She urged this court to dismiss the plaintiff’s suit with costs. Preliminary issues having been settled, this case was fixed for hearing before this court.

The plaintiff called four witnesses. He testified as PW1. He testified that the deceased was his father who died in 1976. The defendant was his step-mother. He testified that the defendant was married by his late father when their mother died. He testified that his late mother gave birth to two children, himself and Frederick Kinyanjui Mungai (PW2). He recalled that his late father initially used to live in Kiambu but later relocated to Nyandarua when he purchased the suit land from the Settlement Fund Trustees. He testified that when his father died, he was residing on part of the suit land. After the death of his father, the defendant obtained letters of administration to administer the estate of the deceased. He testified that he did not object to the defendant being issued with the said letters of administration because at the time, their relationship was good. He testified that the suit land was about 45 acres. When the defendant obtained the confirmation of grant of letters of administration, the plaintiff was shocked when to realise that the defendant had excluded him and his brother from the distribution of the estate of the deceased.

He testified that he was left occupying 1¹/₂ acres of the suit land while his step-brothers were allocated land measuring between five and seven acres. He further testified that the defendant had sold part of the suit land to several people without taking into consideration his interest on the said parcel of land. He urged this court to order that the said parcel of land be subdivided in accordance with the Kikuyu customary law that require that the parcel of land in question be subdivided into two equal portions between the two families of the deceased. He reiterated that he took possession of part of the suit land when his father showed him where he was to occupy. He conceded that his father had left a will and indicated how his property was to be distributed. He testified that his father had willed that his property should be distributed amongst his children. He conceded that at the time of his death there was a loan due to Settlement Fund Trustees in respect of the suit land. He however testified that the said loan was to be repaid when the cows which he left behind were be sold.

PW1 denied that the loan was paid exclusively by George Mungai – his step-brother. He admitted that he had objected to the issuance of letters of administration to the defendant but his objection was overruled by the subordinate court. He reiterated that the defendant had subdivided the suit land among her children to the exclusion of the plaintiff and his brother. He denied the suggestion put to him on cross-examination that the deceased was not his father. He reiterated that the deceased was his father. He further stated that the deceased had authorised him to occupy the suit land. He denied that the deceased had written in his will that the suit property would be divided in accordance with the efforts that would be made by the sons in repaying the loan. He reiterated that this court should order the suit land to be fairly distributed.

PW2 Frederick Kinyanjui Mungai testified that the deceased was his father. His mother died after she gave birth to two children namely himself and PW1. He testified that the defendant was his step-mother. He recalled that after the death of his father, the defendant subdivided the suit land and excluded PW1 and himself. He further testified that the defendant had obtained letters of administration to administer the deceased's estate without seeking his consent. He recalled that when he learnt that the defendant had subdivided the land among her children and sold a portion of it, he filed a caution on the suit property at the Nyandarua Land Registrar's Office. He produced the caution as *plaintiff's exhibit No. 1*. He recalled that when the present suit was filed, the plaintiff obtained an injunction restraining the defendant from selling any portion of the suit land. However the defendant had disobeyed the orders of this court and sold the land to five other people after the issuance of the said court order.

PW2 reiterated that the deceased had married his late mother called Mary Wanjiru Mungai who died when he and his brother (PW1) were young. He urged this court to order the suit land to be divided between the two families of the deceased. He denied the suggestion put to him on cross-examination that he was not a child of the deceased. He reiterated that he lived with the deceased at Kiambu before the deceased relocated to Nakuru and thereafter to Nyandarua when he purchased the suit land. He reiterated that he had not objected to the defendant being issued with the letters of administration as long as she took into account his interest and that of his brother, the plaintiff. He conceded that the deceased had written a will but denied that the will had disinherited them. He admitted that the said will had stated that the suit land would be distributed after the loan due to the Settlement Fund Trustees had been repaid. He testified that after the death of his father, the defendant became hostile and even refused him and his brother permission to construct a house on the suit land. He denied the suggestion that the defendant had sold part of the suit land to educate her children. He reiterated that at the time the defendant sold part of the suit land, all the children of the defendant had already completed their schooling. PW2 further reiterated that it is the defendant who brought him and his brother up when their mother died after she was married by the deceased.

PW3 James Mugwanja Kinyita testified that he was a neighbour to the defendant and the plaintiff at Matindiri Settlement Scheme. He testified that he knew the deceased. He recalled that on the 16th of August 1988, a dispute between the plaintiff and the defendant was referred for arbitration to the District Officer Ol Kalou. He attended the arbitration proceedings and recalled that it was decided that the plaintiff was to occupy five acres of the suit land pending the full payment of the loan that was then due and owing in respect of the suit land to the Settlement Fund Trustees. The minutes of the meeting held at the District Officer's office Ol Kalou were produced as *plaintiff's exhibit No. 2*. He recalled that after the proceedings, the defendant did not allow the plaintiff to occupy the said five acres hence the plaintiff's decision to file this suit. He reiterated that he knew the plaintiff to be the son of the deceased and recalled seeing him with the deceased when the deceased was still alive. He testified that he did not know if the loan was repaid or not. He further did not know what transpired on the suit land after the said decision by the District Officer.

PW4 Peninah Njeri Mungai testified that she was the aunt to the plaintiff and his brother, PW2. She testified that the deceased was his elder brother. She recalled that the deceased had married two wives. The first wife called Wanjiru died after giving birth to the plaintiff and PW2. She recalled that the deceased originally lived in Kiambu before he moved to Dundori when he purchased the suit property. She recalled that when the deceased first moved to Nakuru where he was working, he took with him his two young sons. He recalled that the deceased later married the defendant. She denied that the deceased

had disagreed with the mother of the plaintiff before her death. She recalled that after the death of the deceased, a dispute arose between the plaintiff and his brother on one hand and the defendant on the other hand on how the suit land was to be subdivided. She urged this court to order that the suit property be subdivided in accordance with the Kikuyu customary law which provided that the suit land should be subdivided in accordance with the two families of the deceased. She recalled that after the funeral of the deceased, the family met and agreed that the cattle of the deceased were to be sold off to offset the loan which was then due to the Settlement Fund Trustees. She conceded that she was aware that the deceased had written a will in a black book. However she did not know the contents of what the deceased wrote in the said book. The plaintiff then closed his case.

The defendant called two witnesses in support of her case. She testified as DW1. She stated that she was married to the deceased in 1947. When she got married, she already had a daughter by another relationship. She was blessed with ten children with the deceased. One child however died. She testified that she was married by the deceased under the Kikuyu customary law but their marriage was later formalised in 1972 when they got married at P.C.E.A. Church Matindiri. She testified that they used to live at Kiambu before they relocated first to Nakuru and later to the suit land after purchasing the same. She testified that she had contributed to the purchase of the suit land from her savings. She testified that after the deceased died in 1976, she took over the payments of the loan that was then outstanding to the Settlement Fund Trustees. She recalled that she obtained letters of administration to administer the estate of the deceased after the objection by the plaintiff was dismissed (*proceedings of the succession cause produced as defendant's exhibit No. 5*).

She testified that she paid part of the debt owing in respect of the suit land. The other balance was settled by George Mungai, her third born son (*bundle of receipts produced as defendant's exhibit No. 3*). She recalled that she had struggled to settle the debt owing after which she sub-divided the suit land among her sons and one daughter. She admitted that she had sold a portion of the suit land to five people when she experienced financial difficulties while she was educating her children. She testified that the plaintiff was a stranger to her late husband. She testified that the plaintiff had been allowed by the deceased to temporarily occupy part of the parcel of land. She denied that the plaintiff was a son to the deceased. She testified that the fact that the plaintiff was not named after the father of the deceased meant that he was not a son to the deceased.

She testified that the deceased had not subdivided the suit land before his death. She testified that the deceased had given her authority to subdivide the land and distribute it among the deceased's children as she deemed fit. The wishes of the deceased were contained in a black book which was produced as *defence exhibit No. 2*. She testified that the plaintiff had not assisted the deceased when he was sick. She reiterated that the plaintiff was therefore not entitled to inherit part of the suit land and should instead be evicted from the $2\frac{3}{4}$ of an acre that he was currently occupying. She testified that she had already subdivided the entire parcel of land and distributed to her children and the persons who had purchased part of the suit land from her. She conceded that when she applied for the letters of administration before the Nyahururu magistrate's court she did not name the plaintiff and his brother as the beneficiaries of the deceased's estate.

She conceded that some of the pages in the black book which she produced as *defendant's exhibit No. 2* had been plucked while some writings which were allegedly written by the deceased were written in different pages without any particular consistency. She reiterated that she had sold part of the suit land to enable her educate her children and to support herself. She conceded that she had transferred a parcel of land at Kiambu which was registered in the name of the deceased to the deceased's brother called Damiano Waruinge as in accordance with instructions of the deceased. She testified that she was unable to settle the debt due and owing to the Settlement Fund Trustees by selling the cows because the said cows died soon after the death of the deceased.

PW2 Francis Maina Kihuku testified that the defendant was his mother in law. He had married the daughter of the defendant. He testified that he knew the deceased well during his lifetime. He testified that he had been a friend to the deceased from 1963 when they first met. He testified that he knew that the deceased was married to one wife – the defendant. He testified that he first saw the plaintiff when the

deceased died. He denied that the plaintiff was a son to the deceased. He recalled that when the deceased died, he left behind some of his children who were very young. He conceded that he could not have known whether the deceased had any other wives because he was not an age mate of the deceased. He further conceded that the plaintiff had resided on a portion of land which was owned by the deceased for a very long time. He admitted that he did not know when the plaintiff took possession of the portion of land that he was currently occupying. He testified that he did not know PW4 but knew the deceased had one brother called Waruinge who was living in Kiambu. He recalled that after the death of the deceased, the book which the deceased had written his wishes was read at the chief's office. He however admitted that he was not present when the deceased wrote his wishes in the said black book. He testified that he had married the daughter of the defendant called Beatrice Wamboi in 1966. The defendant then closed her case.

I have considered the evidence that was adduced by the parties to this case. I have also considered the written submissions that were filed by the parties in this case. The issue for determination by this court is whether the plaintiff was the son to the deceased and whether he is entitled to inherit a share of the deceased's estate. The other issue for determination is whether the plaintiff has established that he is entitled to a portion of the suit land. In the instant case, it was the plaintiff's case that the deceased married his mother under the Kikuyu customary law. The deceased and his mother lived in their farm at Kiambu. The deceased and the plaintiff's mother were blessed with two children namely the plaintiff and PW2 Frederick Kinyanjui Mungai. The plaintiff's mother died when the plaintiff and his brother were young. Later the deceased relocated to Nakuru with his young children and thereafter relocated to Dundori where the suit land is situated. According to the plaintiff, the deceased allowed him to construct a house on the suit land where he has resided with his family for a period of over forty years.

It was his testimony that when the deceased died, the defendant (*who is his step-mother*) subdivided the suit property among her children and excluded him. He further testified that the defendant had sold a portion of the suit land to five persons without putting into consideration the share that he ought to have inherited. The plaintiff called PW4 Peninah Njeri Mungai, the sister of the deceased, who confirmed that the deceased was married to the mother of the plaintiff and PW2. She further confirmed that the mother of the plaintiff and PW2 died when the two were very young. According to the plaintiff and PW4, the suit land should be sub-divided equally between the two families of the deceased in accordance with the Kikuyu customary law.

On the other hand, the defendant testified that she was the administrator of the estate of the deceased and had been issued with the letters of administration which were confirmed. She testified that although the plaintiff had objected to the issuance of the said letters of administration to her, his objection had been overruled by the subordinate court sitting at Nyahururu. She testified that the plaintiff was not a child of the deceased. She testified that the plaintiff was a trespasser on the suit land and should therefore be evicted therefrom. It was her further testimony that her two sons and herself had paid off the loan which was owing to the Settlement Fund Trustees in respect of the suit land. She therefore urged this court to find that the plaintiff's suit lacked merit and should be dismissed with costs.

I have evaluated the evidence that was adduced by the plaintiff and the defendant. Although the defendant claims that the plaintiff was not a son to the deceased, after considering the evidence adduced, I do hold that the plaintiff has established on a balance of probabilities that he was a son to the deceased. I found the evidence of PW4 Peninah Njeri Mungai to be pertinent to the issues in dispute. It was compelling evidence. PW4 is the sister to the deceased. I believed her testimony when she testified the deceased was married to the mother of the plaintiff and PW2 under the Kikuyu customary law. I further believed her testimony when she testified that the mother of the plaintiff and PW2 died when the two were very young. She testified that after the death of the mother of the plaintiff, the deceased relocated with his said two children to Nakuru and thereafter to Dundori when he purchased the suit land. The deceased later married the defendant who bore him ten children. There is evidence that the defendant, the plaintiff and PW2 resided on the suit land peacefully before the death of the deceased.

After the death of the deceased in 1976, it is apparent from the evidence adduced in this case that the defendant developed designs to own the entire suit property to the exclusion of the plaintiff and his

brother PW2. She obtained letters of administration to the deceased's estate but failed to disclose the fact that among the beneficiaries of the deceased were the plaintiff and his brother PW2. She could however not transfer the suit land to her name because she had not repaid the loan that was owed to the Settlement Fund Trustees. Although the defendant testified that she had repaid the said loan due to the Settlement Fund Trustees using her own resources and with the assistance of her two sons, upon evaluating the evidence, I hold that the defendant paid the said loan by selling a portion of the suit land to the five purchasers who are currently in occupation of part of the suit land sold to them. I further hold that the defendant sold to three purchasers after 1994 in contempt of the orders of this court which had restrained her from selling the suit land pending the hearing and determination of this suit.

Having found that the plaintiff and his brother (PW2) were the sons of the deceased, I do hold that they are entitled to a portion of the suit land. While it is conceded that the issue of inheritance ought to have been ideally decided in the succession cause, this court is not barred in law from making a determination that will meet the ends of justice. The plaintiff urged this court to order that the suit property be divided equally between the two families of the deceased. However upon considering the evidence that was adduced, it is clear that the deceased intended the suit land to be divided among his beneficiaries irrespective of the circumstances of their birth. I will therefore grant the plaintiff and his brother (PW2) a portion of the suit property having taken into consideration the parcel of land that had been distributed to the plaintiff's step-brothers by the defendant.

I will therefore enter judgment for the plaintiff as prayed in his plaint by making the following declaration;

I hereby declare that the defendant is holding a portion measuring ten acres in parcel number **Nyandarua/Matindiri/28** in trust for the plaintiff and his brother Frederick Kinyanjui Mungai. I further order that the said ten acres shall be surveyed and excised from the suit land so that the said ten acres can be transferred to the plaintiff and his brother. The said ten acres shall be excised so that it shall encompass the parcel of land that the plaintiff is currently occupying. The defendant stated that she had subdivided the suit land among her children and purchasers. I order that the said ten acres shall be excised from the parcels of land that were transferred to the children of the defendant. In the event that the defendant would be unwilling to execute the conveyancing documents transferring the said ten acres to the plaintiff and his brother (PW2), the Deputy Registrar of this court is hereby authorised to execute the said conveyancing documents on behalf of the defendant. I will award the costs of this suit to the plaintiff.

It is so ordered.

DATED at NAKURU this 14th day of July 2006.

L. KIMARU

JUDGE