



**Ndegwa v Ndegwa (Environment & Land Case 26'B' of 2015)
[2022] KEELC 15284 (KLR) (9 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15284 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 26'B' OF 2015**

JO OLOLA, J

DECEMBER 9, 2022

BETWEEN

SUSAN WAIRIMU NDEGWA PLAINTIFF

AND

JAMES GICHERE NDEGWA DEFENDANT

JUDGMENT

1. This matter was initially instituted on April 12, 2012 as High Court Miscellaneous Civil Case No 66 of 2012 before it was transferred to this Court.
2. By the Originating Summons dated April 5, 2012 Susan Wairimu Ndegwa (the Plaintiff) brings this suit against James Gichere Ndegwa (the Defendant) claiming ½ of the Parcel of land known as Magutu/Gatei/507 and urges the Court to determine the following questions:
 - (a) Whether parcel No Magutu/Gatei/507 was registered in 1959 in the names of James Gichere Ndegwa in trust as a son to Peter Ndegwa Gichere and for the Plaintiff herein as an unmarried daughter of Peter Ndegwa Gichere;
 - (b) Whether the Plaintiff has been in occupation and utility of the subject land since childhood to now, physical[ly] and/or constructively;
 - (c) Whether Land Parcel No Magutu/Gatei/507 just like the other properties of Peter Ndegwa Gichere (Deceased) should be shared equally between the two houses/households of the late Peter Ndegwa Gichere;
 - (d) Whether the two households of Peter Ndegwa Gichere (Deceased) have always lived and made utility of the land and developments thereon without let or hindrance from the Defendant since time of demarcation in 1959;



- (e) Whether the continued trust should be determined with the Defendant being ordered by the Court to transfer half of the land to the Plaintiff who should hold the land in trust for the 1st house of Peter Ndegwa Gichere (Deceased), and in lieu of such transfer the Deputy Registrar of this Court do execute all documents of transfer and the Land Registrar be at liberty to dispense with production of old titles; and
 - (f) Whether the Defendant should bear the costs of this suit.
3. The Originating Summons is supported by an Affidavit Sworn by the Plaintiff wherein she avers that the Defendant is her brother and that they have lived in the suit land ever since she was born but the Defendant has since the death of their father become hostile and sought her removal from the land.
 4. In his Replying Affidavit sworn on June 14, 2012, the Defendant avers that the questions posed in the Originating Summons ought to be answered as follows:
 - (a) That LR No Magutu/Gatei/507 was registered in his name absolutely and not in trust as a son of Peter Ndegwa Gichere and for the Plaintiff herein as an unmarried daughter of Peter Ndegwa Gichere;
 - (b) That the Plaintiff has not been in occupation and utility of the said land since childhood;
 - (c) That LR No Magutu/Gatei/507 did not constitute the estate of Peter Ndegwa Gichere (Deceased) and the issue of sharing it equally between his two houses does not arise;
 - (d) That the suit land belongs to the Defendant absolutely and the two houses of the deceased have no suitable claim thereon;
 - (e) That there is no trust on LR No Magutu/Gatei/507 capable of being determined; and
 - (f) That the Plaintiff having brought a frivolous suit should be condemned to pay the costs of this suit.
 5. The Defendant avers that his father the late Peter Ndegwa Gichere had his different estate comprised of LR No Magutu/Gatei/236 and Plot No 490 Makutano which estate was the subject of Nyeri Resident Magistrate Succession Cause No 98 of 1994 wherein the property was equally distributed to his wives Sara Nyawira Ndegwa (the Plaintiff's mother) and the Defendant's mother Jane Kiuko Ndegwa.

The Plaintiff's Case

6. At the trial herein the Plaintiff called a total of three (3) witnesses who testified in support of her case.
7. PW1 – Susan Wairimu Ndegwa is the Plaintiff herein and a businesswoman in Kangochi, Mathira Division. PW1 told the Court she operates a hotel situated on the suit land and that she started working in the hotel when she was in Primary School and the hotel was being run by her father Peter Ndegwa Gichere.
8. PW1 testified that the Defendant is his step-brother. PW1's mother is Sara Nyawira Ndegwa while the Defendant's mother is Jane Hiuko Ndegwa. PW1 told the Court when her father died, his property was shared equally between his two wives. The suit property Magutu/Gatei/507 was however not shared as it was registered in the name of the Defendant. PW1 told the Court the Defendant was registered as the owner of the land in 1959 when the Defendant was about 12 or 13 years old and was incapable of owning land.



9. PW1 further testified that her mother gave birth to girls while the Defendant's mother brought forth two (2) sons and two (2) daughters. The Defendant is the second born in the mother's household but was the first born son to the late Peter Ndegwa Gichere. The suit land has developments including a butchery and a hotel that were built by PW1's deceased father.
10. PW1 further told the Court that since his father passed away in 1983, the family of Jane Hiuko Ndegwa operates the butchery while their own household operates the hotel on the land. There is also a portion of the land that is being utilized by the whole family for cultivation. PW1 told the Court the Defendant stays on a different piece of land on which PW1 had also recently put up two shops. She told the Court the suit land was registered in the name of the Defendant as a trustee as it was not possible then to have her father's name registered on the two parcels of land that he owned.
11. On cross-examination, PW1 told the Court her mother gave birth to six daughters one of whom had since passed on. The Defendant's mother had also passed on. PW1 conceded that while she sought half of the land to be given to her mother's house, she had not brought any authority from the family members including her mother to file the suit.
12. PW1 told the Court her father had another Plot No 236 in which the family stays. That parcel of land was divided equally and shared between the two families.
13. PW2 – Samuel Nyoike Ndekene is a resident of Kangochi. He told the Court the Defendant is his classmate and that he knew his father Ndegwa Gichere. The Defendant's father had two wives. PW2 further told the Court the suit property was purchased in 1957 by the Defendant's father who then proceeded to construct a hotel thereon. PW2 told the Court he used to rent the butchery on the land from the Defendant's father and that at the time, the Defendant was a child of tender years.
14. PW2 testified that the suit property is sub-divided. One side has a hotel and some houses while the other side has a butchery and some houses. The side with a butchery is utilized by the 1st wife while the side with the hotel is used by the 2nd wife. The Defendant's mother (the 1st wife) passed away while the Plaintiff's mother is alive but frail. PW2 told the Court the families have used the land as divided for a long time and that the land does not belong to the Defendant.
15. On cross-examination, PW2 told the Court the Plaintiff's father could not be allocated two parcels of land during the period of demarcation and hence his decision to register the land in the name of his son.
16. PW3 – Wachira Rigi Wakomongi is a resident of Gatei Sub-location in Mathira. PW3 told the Court he knew Ndegwa Gichere and that he passed away around 1983-84. The deceased had two parcels of land in Gatei one of which was Magutu/Gatei /507. PW3 told the Court that when Ndegwa died, the elders sub-divided the land and gave one wife the hotel while Ndegwa's other wife was given the portion having a butchery.
17. PW3 further told the Court the Defendant was present during the elders meeting and that he did not object to the decision sharing the property. When the elders met, they did not discuss about the land but the businesses which the deceased was running on the land. The wives were asked to continue with the same.

The Defence Case

18. On his part the Defendant testified as the sole witness in his case. Testifying as DW1, he told the Court his father had two wives. Sara Ndegwa, the mother to the Plaintiff was the 1st wife while Jane Ndegwa, his mother, was the second.



19. DW1 testified that his father owned land parcel No Magutu/Gatei/236 measuring 4 acres. His father's elder brother Gichubu Gichere had two parcels of land including the suit land herein which he gave to DW1 as DW1 was taking care of his farm. DW1 told the court he started working for his uncle when he was about 16 years old having been born in 1946.
20. DW1 further told the Court that when land consolidation was done in 1959, his uncle Gichuba caused Parcel No 507 to be registered in his (DW1's) name. DW1 was later issued with a title deed in 1983. After DW1's father died, his land was sub-divided between his two wives through a Succession Cause filed in court in 1984. Otherwise land Parcel No 507 solely belongs to DW1 and he does not hold the same in trust for anyone.
21. On cross-examination, DW1 conceded that his identification card shows that he was born in 1952 and that by the time the land was registered in his name, he was 7 years old. He however told the Court he registered for identification card later and gave the wrong age.
22. DW1 told the Court that he had always lived on the suit land and that his father had not constructed any permanent buildings thereon. There are however currently some permanent homes which were put up by DW1. DW1 told the Court he has leased out the butchery and some rooms. He had however agreed with his father that the father would use the hotel as a business s premise. Currently the Plaintiff uses the hotel.

Analysis and Determination

23. I have carefully perused and considered the pleadings filed by the parties, the testimonies of the witnesses and the evidence adduced at the trial. I have similarly perused and considered the submissions placed before me by the Learned Advocates for the Defendant. The Plaintiff did not file any closing submissions.
24. By the Originating Summons dated April 5, 2012, the Plaintiff has urged the Court to determine whether the parcel of land known as Magutu/Gatei/507 was registered in the name of the Defendant in trust as a son to Peter Ndegwa Gichere and for the Plaintiff as an unmarried daughter of the said Peter Ndegwa Gichere. She further urges the Court to determine the trust and to have the suit property shared equally between the two households as represented by the two wives of Peter Ndegwa Gichere.
25. In support of that position, the Plaintiff told the Court that the Defendant is her step-brother and that he was registered as proprietor of the suit property in 1959 as the first born son of Peter Ndegwa Gichere (now deceased) to hold the land in trust for the rest of the family. The Plaintiff told the Court that after their father died in 1984, the Defendant became hostile and has been making attempts to evict them from the suit property on which she has lived ever since she was born.
26. On his part, the Defendant denies that the land belonged to his father and/or that he was registered as proprietor in trust for the rest of the family members. According to the Defendant, the suit property was gifted to him by a brother to his father one Gichubu Gichere as a reward for taking care of the uncle's farm. It was the Defendant's case that it was his uncle who had caused his name to be registered as proprietor of the land during land consolidation in 1959 and that he had only allowed his father later on to carry on business on the land.
27. From the material placed before me it was apparent that the suit property was registered in the Defendant's name on 30th February, 1959. Going by the official Identification Card he produced in Court during cross-examination, the Defendant was born in the year 1952 and would have been about 7 years old when the land was registered in his name.



28. Given his tender years at the time, it was difficult to believe the Defendant's contention that he had been taking care of his uncle's farm at the age to warrant his being given the 1.1 acre piece of land. While the Defendant told the Court that he was actually born in 1946 and that he had falsified his age during the period of registration for the identity card, there was nothing to demonstrate that he was actually born some 6 years earlier than the year shown in his identity card. Nor was there anything to demonstrate that the suit property previously belonged to his uncle and/or that he had worked for him as he states.
29. It was also telling that while the Plaintiff stated in her pleadings that their late father had constructed business premises on the parcel of land, the Defendant does not, in his Replying Affidavit filed herein on June 15, 2021, refute that contention. Nor does he state anywhere in his pleadings that he had constructed any structures on the land.
30. As it were, the Defendant was unable to clearly explain why his father whom he says had two other parcels of land elsewhere came to conduct business on the suit land. Asked in cross-examination how his father and the Plaintiff came to be on the suit property, the Defendant responded as follows:
- “I have always lived on the suit land but my father had not constructed any permanent building on the suit land. There are currently some permanent houses on the land built by me. I have leased out the butchery and some rooms. Regarding the hotel, we had agreed with my father that he would use it as a business premise. Currently the hotel is being used by the Plaintiff.”
31. From the testimonies of the Plaintiff's witnesses, it was apparent that prior to his death in 1984, the late Peter Ndegwa Gichere was running a butchery and a hotel on the suit property. The family of the deceased's second wife Jane Ndegwa operated the butchery while that of the deceased first wife Sara Nyawira Ndegwa operated the hotel. That fact explains why the plaintiff operates the hotel business on the suit land to-date.
32. From the evidence adduced herein, the late Ndegwa's first wife gave birth to six (6) daughters and had no son. The Defendant herein as the second born child of the second wife was the late Ndegwa's first born son. That would explain why despite his tender years, everyone else was by-passed and the Defendant's name was entered in the register as the proprietor of the land when he was barely seven (7) years old. That would also explain why the late Ndegwa's family continued to freely utilize the land over the years until his demise in 1984 after which the Defendant started claiming ownership of the entire parcel of land.
33. In the circumstance herein I was satisfied that the Plaintiff had established to the required standard that the suit property was registered in the Defendant's name in trust for the entire Peter Ndegwa Gichere's family.
34. Accordingly, the questions posed by the Plaintiff in the Originating Summons are hereby determined and answered as follows:
- (a) LR No Magutu/Gatei/507 was registered in 1959 in the names of James Gichere Ndegwa in trust as a son to Peter Ndegwa Gichere and for the Plaintiff herein as an unmarried daughter of Peter Ndegwa Gichere;
 - (b) LR No Magutu/Gatei/507 like the other properties of Peter Ndegwa Gichere (Deceased) should be shared equally between the two households as represented by the two wives of the late Peter Ndegwa Gichere;



- (c) The trust is hereby determined and the Defendant is forthwith directed to transfer one half of the said LR No Magutu/Gatei/507 comprising the portion surrounding the hotel erected thereon to the Plaintiff who should hold the land in trust for the First Household of Peter Ndegwa Gichere (Deceased);
- (d) In the event the Defendant fails to execute the transfer documents as directed under Order 'c' above within 45 days from the date hereof, the Deputy Registrar of this Court shall henceforth execute all documents of transfer and the Land Registrar shall be at liberty to dispense with production of the old title;
- (e) Each Party shall bear their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 9TH DAY OF DECEMBER, 2022.

In the presence of:

Ms Miriti holding brief for Karweru for the Plaintiff

No appearance for the Defendant

Court assistant - Kendi

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J. O. Olola

JUDGE

