



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

MISC. APPLI. 263 OF 1994

PHILOMENA WANGARI & 2 OTHERS..... PLAINTIFFS

VERSUS

MARIA NJERI CHEGEDEFENDANT

JUDGMENT

By an originating summons dated 18th March 1994, and filed in court on 3rd March 1994, the 3 applicants namely

(a) Philomena Wangari

(b) Rakeli Nduta and

(c) Kezia Wanjiru, all sisters, sued Maria Njeri Chege, also their sister, seeking a

declaration from court that Maria Njeri Chege holds land No. GATAMAIYU/NYANDARUA/55, measuring approximately 6.30 acres, in trust of them as beneficial owners. The applicants also prayed for damages.

The Originating Summons was supported by the affidavit of Philomena Wangare, also known as Anastasia Wangari.

According to the affidavit at para 4, the girls' deceased mother, Wanjiku Maribi, inherited the suit premises from her husband who was their father. They were the only children of Wanjiku Maribi who intended to subdivide land to all the four, and even applied to Githunguri Land Control Board for consent to sub-divide the land to all 4 of them. The application form is however, undated.

She continued to say that their mother died before the land was subdivided, and Maria Njeri who was registered before their mother died, has now refused to sub-divide the land to the 3 sisters, who conceded that Maria would be entitled to a bigger portion because she looked after their late mother before she died.

Maria Njeri Chege filed a replying affidavit and stated as follows in para 5 thereof,

“That the deceased did not transfer the land to me to defeat the claim of relatives but she did so in express compliance with the elders award and judgment of the court in Kiambu RMCC No. 26 of 1983. It was not transferred to me to hold in trust of the applicants who are not entitled, anyway”.

In court during the hearing of the O.S, Philomena speaking on behalf of her 2 other sisters complained that the respondent Maria Njeri Chege, has refused to transfer the land belonging to their late mother who

in turn inherited it from her late husband. Philomena produced an abstract of title, i.e. the green card as an exhibit in court. She also produced as Ex.2 proceedings of a case No. 18 of 1986 before the D.O's office.

Philomena was married but her husband died in 1970 and she returned to the land to live with her mother. Her sister Maria Njeri Chege lives on the land together with her husband and their ten children.

According to Philomena, their mother was sued over this land by John Kimani in Case No. 3 of 1983 before the D.O Lari. Philomena maintained that her mother's wish was to subdivide the land to all her four daughters, that is why she completed a consent form to the Land Control Board to that effect, however, the consent form is not dated.

Philomena sued her sister Maria over this land. The case was heard before the D.O., Lari. Thereafter the case went to the Magistrate's court in Kiambu. There was an award which Maria challenged and Philomena's lawyer withdrew the case in Kiambu and filed a case in this court.

One John Wainaina Ndung'u is Philomena's son, with her late husband Ndungu. Both herself and her son have the right to get land from her late husband's share of family land but there is a dispute over that land in terms of distribution.

Rakeli Ndutal, too, is a daughter of the late Wanjiku Mamba, and a sister to both Maria Chege and Philomena, who was the last born child of their mother.

She described the land in dispute as their late mother's which she inherited from their late father. Rakeli is married and lives with her husband in Kiambu, but she cultivates a portion of her late mother's land, about one acre, given to her by her late mother before she died.

Her 2 sisters, Philomena Wangare and Mary Njeri, live on the suit premises. She confirmed that the land was not sub-divided by their late mother, so they did not have separate title deeds, but her wish was that her 4 daughters should share the land. Rakeli was present as their late mother expressed this wish. She also confirmed that their late mother went to Kiambu Land Control Board to sub-divide the land. She referred to a case filed against their mother in Kiambu over this land, where it was decided that the land belonged to their mother and she could dispose of it as she wished.

Rakeli confirmed that Mary Njeri became registered on the land after their mother got sick, and all of them decided to have the land registered in Mary's name. None of them imagined that Mary Njeri would refuse to share land with them. Rakeli recalled that both Njeri and Philomena lived on the land with their late mother. Njeri's husband lives with her on this land presently.

Several questions were put to Rakeli to which she confirmed that there was a case in Lari where her late mother had been sued by John Kimani, and a decision was made in her favour, that the land belonged to her. Maria said that the elders said that she should be given the land because no dowry was paid for her and she was therefore considered as "not married".

Maria produced a copy of the elders award as Ex. A, as the case went upto Kiambu Magistrate's court to confirm the award. Maria contended that her mother gave her the land as a gift whilst she was still alive. That further, the land was transferred to her by her mother after the court case, and soon thereafter they went to the Land Control Board where consent to transfer was given. None of her sisters were present. They were not aware, either that land was going to be transferred.

Maria confirmed that this land measures 6 acres. That she uses four acres, whilst Rakeli, uses one acre, which she is willing to give her. To further questioning by Mr. Munene, Maria answered, "my mother wanted all her daughters to share land but the clan refused because I was married". Maria is not willing to give land to any of her sisters apart from the one acre which Rakeli cultivates. She is willing to give this to her. Maria called her son, John Kamau Chege alias Mariba, as a witness.

He confirmed that her grandmother Wanjiku Mariba died in October 1984. That prior to her death, she lived in the suit premises. Kimani too was living in the suit premises as well as his mother Maria and brothers and sister, ten in number. Kimani recalled that in May, 1983, there was a case involving the suit

premises, Gatamaiyu/Nyanduma/55. That his cousin John Kimani filed a suit against his grandmother, to stop her from sub-dividing the land. That the case was at the D.O's office in Lari and was heard by the elders who decided that Maria Njeri should be given land as she was not married in accordance with Kikuyu customary laws. That the award from the elders was filed in Kiambu court who in turn confirmed the award, and thereafter gave 30 days for appeal, but nobody appealed. Thereafter the late Wanjiku Maribi transferred land to Maria Njeri, and nobody objected to this. Kimani went to Kiambu lands office to get the title to this land in November 1993, a year after the death of his grandmother.

Kimani also recalled that Philomena filed a case No. 18 of 86, asking for the subdivision of the land. The court decided that she be given 2 acres of land. Maria appealed against the decision by Philomena withdrew the suit, and filed the present one. At the conclusion of the oral evidence, the advocates representing the parties herein did by consent file detailed submissions, which now form part of the proceedings of this case.

Counsel for Maria Njeri Chege, in his submissions attacked the pleadings filed by the 3 applicants as being "incurably", defective in that what purports to be an Originating Summons is actually a Chamber Summons, and does not conform to Form 13 or 13A of Appendix B, and further more, that the "Originating Summons does not seek determination of any questions as required by the Originating Summons". Counsel for the defendant referred to the Grounds of Opposition filed on 30th March, 1994, and received the evidence of all witnesses, then made submissions on the law.

Mr. Munene advocate for the plaintiffs also made detailed submissions basing them on the evidence adduced in court and the law.

According to the Counsel for the plaintiffs, their claim "is based on their mother's intention to apply to Land Control Board to subdivide the land to her daughters; but the intentions was obstructed by kinsmen..."

The counsel then went through the evidence on record, the case before the elders and the Magistrate's court, and the legal position relating to title to land, as enunciated in the decision of MWANGI vs MWANGI 91986) KLR p.328, where it was held, inter alia,

"the registration of a title to land is a creation of the law and one must look into the considerations surrounding the registration in order to determine whether it was envisaged that a trust should be created....."

I have considered the oral evidence adduced, as well as the written submissions by both learned counsel.

Though the defendants had indicated in the grounds of opposition filed on 30.3.94, that,

"the application is both incompetent and incurably defective and the respondent will apply for it to be struck off at a preliminary stage".

The defendant/respondent, however, failed to argue the point at the preliminary stage, but instead made it part of submissions. From this, I came to the conclusion that he had abandoned the preliminary point, more so because on 22.5.2000, both advocates did by consent, take directions as to the hearing of the originating summons, as follows:-

"By consent, the suit to be heard by "viva voce" evidence for 2 days".

When the hearing eventually started before me, the 3 plaintiffs and the defendant, plus her witness gave oral evidence. No mention was made of the point which was to be argued preliminarily. I have therefore decided to overrule that point, coming at this late stage.

Having said that, I want to note that the land in question L.R No. Gatamaiyu/Nyandua/55, was registered in Maria Njeri's name, whilst her mother was still alive, so it did not devolve on her by succession, but

that notwithstanding, Maria Njeri's evidence both orally and in the replying affidavit was that she became registered after the land case which was determined by the elders, and the award subsequently confirmed in the Magistrate's court.

The proceedings of this land case was produced in court. All parties to the suit were in agreement that one John Kimani, their cousin, sued their mother over this land, trying to stop her from sub-dividing it to her daughters. The suit premises is land registered under Registered Land Act, Cap 300, Laws of Kenya. The award by the elders shows quite clearly that it was "title" of the suit land that they were dealing with.

Part of the award reads,

"There is no dispute that the land is registered in the name of the respondent and according to Statute Law, it is hers. But she cannot give it to somebody outside the clan. If she wills she could give it to Njeri her unmarried daughter or one of the sons of her co-wives. Consequently the panel rules that the land cannot be transferred to the daughters of Wanjiku".

As I have already stated that this was land registered under a statute (R.L.A.) I find that the elders had no jurisdiction to deal with the matter of transfer of title to this land to anybody.

It was the elders award which was confirmed by the Magistrate's court in Kiambu, and according to Maria Njeri, her late mother transferred the land to her, following the award. There is another elders award in the court file, arising from land case No. 18 of 1986, where the elders "unanimously awarded that the land under dispute Gatamaiyu/Nyanduna/55 should be divided among Maria Njeri, Philomena Wangari, Rakeli Nduta and Kezia Wanjiru, who are all married daughters of Wanjiku Maribi as follows

1. Maria Njeri - 2.50 acres
2. Philomena Wangare - 1.50 acres
3. Rakeli Nduta - 1.30 acres
4. Kezia Wanjiru - 1 acre"

This award was as a result of a case filed by Philomea Wangare.

Because I have found that the elders had no jurisdiction to deal with title to registered land, I move to set aside their decisions as shown in the 2 cases already quoted.

Having done that, I now have to look at the Act under which the land is registered, that is the Registered Land Act, which provides as follows at Sec. 29 on voluntary transfer, ***"Every proprietor who has acquired land, lease or a charge by transfer without valuable consideration shall hold it subject to any unregistered rights or interests subject to which the transferor held it***".

Mary Njeri, according to the abstract of title to the suit land had land transferred and registered in her name as a "gift". I consider this to have been "voluntary transfer" as there was no valuable consideration, hence the word "gift".

Going by Section 29 of R.L.A quoted above, I would pose the question as to whether there were any "unregistered rights or interests subject to which the transferor, in this case, the late Wanjiku Maribi, held the land?

My answer to the question is "yes", because Wanjiku Maribi had 4 children, her 4 daughters who would have been entitled to inherit from her.

The claim that her daughters were married and therefore could not inherit land is a claim under customary

law as shown in a text from Chapter Two of COTRAN's book, the "*Restatement of African Law*," quoted by Mbigi Njuguna, advocate. Here, we are dealing with land registered under a statute. I find that Wanjiku Maribi held land subject to the unregistered rights and interests of her four children.

Evidence on record also showed that the late Wanjiku Maribi was sued, and when she "won the case", so to speak, the land was immediately registered in Maria Njeri's name, to "protect" it from John Kimani, or any other male relatives as Wanjiku Maribi had no sons, and under Kikuyu Customary Laws it was believed that the girls had no right of inheritance to the land, unless they were unmarried.

Going back to the decision of MWANGI vs MWANGI 1986 K.L.R p.328, once more, I find that the registration of title to land in Maria Njeri's name was "a creation of Law", and looking into considerations surrounding the registration, as evidence on record shows, I find that such evidence "*envisaged that a trust should be created*".

I therefore proceed to declare that Maria Njeri Chege holds land known as L.R GATAMAIYU/NYANDUNA/55, measuring 6.30 acres in trust for her sisters Philomena Wangare, Rakeli Nduta and Kezia Wanjiru.

I make no order as to damages, though prayed for but not proved.

Finally, I award costs to the Originating Summons to the 3 plaintiffs.

Dated at Nairobi this 8th day of June, 2005 at Nairobi.

JOYCE ALUOCH

JUDGE