



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 810 of 1992

JOSEPH GITAU GITHONGO..... PLAINTIFF

VERSUS

VICTORIA MWIHAKI MUNYA..... DEFENDANT

JUDGMENT

The Plaintiff Joseph Githongo is the older brother of the Defendant Victoria Mwihaki Githongo who, according to the Defence filed herein on 4th March 1992 claims to have been wrongly sued as Victoria Mwihaki Munya. The Plaintiff filed this suit way back in 1992 seeking orders for the eviction of the Defendant from Land Parcel No. Ngenda/Kimunyu/181 in Kiambu District in respect of which he was registered as owner prior to the Defendant taking a portion of the same sometime in 1952.

The Plaintiff contends that the Defendant got married to one James Munya Rieu in 1948 but in 1952 moved back to the suit land which previously belonged to her father, then deceased, and which property was her home prior to the alleged marriage. The Plaintiff contends further that the Defendant's return to the suit premises was precipitated by a disagreement between the Defendant and her alleged husband and that the Plaintiff himself let her occupy the said portion of the land and to cultivate thereon awaiting her reconciliation with her said husband. In his evidence the Plaintiff says that he acted as the father to the Defendant and received dowry for her marriage but did not provide any independent testimony or other evidence in support of the alleged marriage and receipt of dowry.

In her defence the Defendant avers that she has lived on the suit land since birth save for a brief period in or about 1948 when she moved in with the man alleged by the Plaintiff to have married her and with whom she is said to have born six children. It is not clear from the pleadings or evidence adduced by either of the parties when or where the said children were conceived and/or born. The Plaintiff has stated that the first born Joakim Ndichu was born in 1948 and is named after the father of the Plaintiff and of course, the Defendant. Guided by the Kikuyu Customs as we know them this would mean that the said son was not fathered by the alleged husband. Traditionally, once a woman is married in the Kikuyu custom, the first son would be named, automatically, after the husband's father. The second of the Defendant's children, a daughter called Njeri, however bears the name of the alleged husband. Presumably therefore the said daughter is fathered by Munya. The reason given by the Defendant is that she named her daughter rightly after Munya's mother in the hope that she (the Defendant) would remain friends with the father (the alleged husband, and probably marry). According to the Defendant, the rest of the children are named after the Defendants relatives, clearly negating the possibility of the alleged marriage of the Defendant to James Munya Rieu. The Plaintiff claims the fifth child is known as Murigi Munya and says she is named after Munya's sister and does not remember the last child's name. He claims however that she is named after Munya's family. The Defendant on the other side states that her 5th child is named after her mother Bernadetta Wanjiku while the last one is called 'Agatha Murugi or

Wambui', after her (defendants') sister. Whatever be the names of the Defendant's children, or the person after whom they were named, it is clear to me that all the said six children could not possibly have been born between the year 1952 when the Defendant is alleged to have been married and 1948 when she returned to her "maiden" home. It is a known fact that two people can have children together or even cohabit in circumstances which, when taken into account may not give rise to a presumption of a marriage in law. In the absence of proof by the Plaintiff that the Defendant was indeed married to James Munya and it being apparent from the evidence adduced herein that the Defendant did not cohabit with the said James Munya long enough, I am unable to accept the Plaintiffs contention that the Defendant was indeed married to the said Munya.

The Defendant claims that the suit premises belonged to their late father who according to the evidence on record died in 1940 long before the land herein was demarcated and registered in the name of the Plaintiff. The Plaintiff has not denied the fact that the suit land belonged to their late father, was demarcated and registered in the Plaintiff's name in 1958 and that the Defendant lived therein as a family member save for the short time she moved in with Mr. Munya between 1948 and 1952. It is not disputed but indeed confirmed by the Defendant's exhibit A that in 1960 the Defendant sued the said Munya claiming a payment of Shs.900/=, for looking after his sister's children but the suit No. 8 of 1960 at the Gatundu African Court was dismissed. There is nothing in evidence to prove that the Defendant returned to her alleged husband anytime after 1952. The Plaintiff has told the Court that he was the only son in his mother's household. He had three sisters one of whom passed away before the declaration of Emergency. The other surviving sister does not live on the suit land.

There exists no doubt in my mind that the Kikuyu Customary Laws of Marriage and ownership of property do apply to the litigants herein. A most elaborate and well established system of marriage was in place during the time the Defendant is said to have entered into a marital union with one Mr. Munya with the Plaintiff acting as the father. The Plaintiff has not adduced evidence to the effect that the various processes necessary for a conclusive marriage contract did take place. These would have involved the various steps in signifying negotiations between his family and that of the groom, betrothal of the parties and actual marriage ceremonies and formalities. A father is deeply involved in the same particularly the negotiations stage and would be in a position to account in detail exactly what transpired. The Plaintiff herein only says he received dowry the amount of which he could not say with certainty and also that traditional liquor was given. In my considered view and in light of what is known of a Kikuyu marriage a marriage between the Defendant and James Munya cannot be inferred on the basis of such scanty evidence which in any event is not corroborated by independent testimony.

The Defendant admits having had a relationship with the said James Munya, that he was only a friend whom she hoped would marry her but who rejected her. I am more inclined to believe her testimony as truthful more so because she only named two of her children after the said Munya's relatives, his mother and sister. Her reason for this was she hoped they would remain friends. The Defendant produced before Court her identification papers showing that for all intents and purposes she has always remained a spinster, bearing her father's name. This evidence, clearly controverts the Plaintiff's testimony as relates to the identity and lineage of the Defendants family of 6 children. It clearly shows that all were born out of wedlock, whether some were fathered by the alleged husband or not. They have not been shown to have lived with him either. I hold therefore that the Defendant never got married as alleged by the Plaintiff but remained single and in occupation of the suit land.

As to how the Defendant and her children occupied the land, I have chosen to be guided again by the position under customary law of land ownership and occupation by a Kikuyu woman remaining unmarried and bearing children who live with her in her residence of birth and maidenhood.

It has become clear from the Plaintiff's evidence during cross examination that he inherited the suit premises from his father and was thereafter registered as owner of the same. The Defendant too says in her evidence that he was so registered as a young person during the consolidation and demarcation era. He has not denied this fact. In the absence of evidence to the contrary and having held that the parties are bound by customary law practices, I am inclined to find that the Defendant must have acquired the suit land as an heir to his father's land being an only son, and the first born at that. As clearly demonstrated in

the Court of Appeal decision in NJUGUNA –vs- NJUGUNA [1984] KLR 527 the eldest son under Kikuyu customary law inherits land as “Muramati” to hold in trust for himself and other heirs. There is ample authority to show that once so seized of property the “muramati” became the recognized beneficiary for registration purposes during the consolidation era. I have no hesitation in holding that the Plaintiff herein was so registered as trustee for himself and his sisters, including the Defendant. There is also ample authority in Kenya today to show that such a trust under customary law will be inferred even in the absence of its being noted in the register.

In the delivery of their judgment in the Njuguna Case, Madan, Law & Potter JJA expressed the legal position of the “muramati” as one carrying the obligation to distribute the estate as appropriate. Quoting from Eugen Cotran’s “Restatement of African Law (Kenya)” Vol 2 at pages 11, 12 and 13 his Lordships reiterated that

**“The Muramati has a duty to distribute the shares
to the heirs either in the way stipulated in the
deceased’s will or in accordance to the rules of
intestacy as directed by the muhiriga elders. He
is not entitled to vary this.....”**

The litigants’ father having died in 1940 without leaving any will the law of intestacy among the Kikuyu applies in their case. According to Eugen Cotran in “Restatement of African Law” Vol 2 at page 12, daughters customarily do not normally share in the inheritance but live with their mothers until they are married. However a daughter remaining unmarried may be allocated a piece of land by the “muramati” for use during her lifetime. On death or remarriage the portion would revert to the heir out of whose land the same was given, unless she has sons born out of wedlock (referred to as illegitimate children in the text) who would inherit the same in equal shares. I am led to believe that the three acres of land occupied by the Defendant were so intended and that the allegation by the Plaintiff that the same were given

**“in good faith.....to cultivate and construct
a temporary structure for living awaiting
their reconciliation with the husband....
(paragraph 6 of the Plaintiff)**

is an afterthought. In any event no such reconciliation ever occurred which means the condition upon which the land was to revert, if at all, never materialized. In his own words, which words portray the Plaintiff as a man who treats women derogatorily as chattels, the Plaintiff stated in his evidence (page 18 of the typed proceedings) that

**“I told the husband to come and collect
her from home. He did not collect her.”**

This is notwithstanding that the alleged husband was impliedly abusive and non-caring towards the Defendant.

From the above, it is clear that the Defendant occupies and is in possession of 3 acres of the suit premises as of right under customary law. The facts are such that she cannot be taken to be a trespasser as alleged by the Plaintiff in his desire to have damages awarded against her for trespass. P.G. Osborn in his

5th Edition of “A Concise Law Dictionary” defines a trespasser as

**“one who goes on land without invitation of any
sort and whose presence is either unknown to
the proprietor or if known is practically objected to.”**

I find that this is not the case with the Defendant and her occupation of the suit land.

I now turn to the issue of whether the Defendant’s claim of ownership of the said land by adverse possession is rightly brought as a counterclaim in the Plaintiff’s suit. Entitlement to land in adverse possession arises where a person has been in continuous, exclusive and uninterrupted occupation and possession of a specified piece of land for 12 years and over. The same is provided for in Section 38 (1) of the Limitation of Actions Act which provides as follows:

**“Where a person claims to have become entitled
by adverse possession to land registered under
any of the Acts cited in Section 37, or land
compromised in a lease registered under any of
those Acts, he may apply to the High Court for
an order that he be registered as the proprietor
of the land or lease in place of the person
registered as the proprietor of the land.”**

Order XXXVI Rule 3D of the Civil Procedure Rules provides for the mode of making such an application in the High Court and reads as follows:

- (1) An application made under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.**
- (2) The Originating Summons shall be supported by an affidavit to which a certified extract of title to the land in question has been annexed.”**

It follows from the above that the Defendant’s claim for ownership of the suit premises in adverse possession is not properly brought as a counter claim in the suit. I however find that the counterclaim succeeds in so far as it seeks a declaration that the Plaintiff holds the 3 acres occupied by the Defendant in trust for her and her children and also that the Plaintiff having not brought any action for the eviction of the Defendant within 12 years of the Defendant taking possession of the said 3 acres, the Plaintiffs suit, having brought 40 years afterwards, is statute barred under Section 7 of the Limitation of Actions Act.

In the circumstances I find that the Plaintiff has not, on the balance of probabilities, proven his case against the Defendant and his suit fails. On the other hand I do find that the Defendant has, on the balance of probabilities proven her counterclaim against the Defendant in the manner already explained herein. I therefore dismiss the Plaintiff’s suit against the Defendant with costs and allow the Defendants counterclaim as presented before this Court under paragraphs 10 and 12 of her Defence and Counterclaim dated 4th March 1992. Accordingly I enter judgment for the Defendant as follows:

- a) It is hereby declared that the Plaintiff Joseph Gitau Githongo holds 3 acres of Land Parcel**

No. NGENDA/KIMUYU/181 presently occupied by the Defendant VICTORIA MWIHAKI GITHONGO sued herein as Victoria Mwihaki Munya, in trust for the Defendant and her children.

b) The said land parcel No. NGENDA/KIMUYU/181 be subdivided and the Defendant be registered as proprietor of the said 3 acres thereof and the Plaintiff do retain the balance.

c) The Plaintiff, by himself, his personal representatives, servants or agents be and are hereby permanently restrained from harassing, molesting the Defendant, her children and other members of the Defendants' family, evicting or threatening to evict any of them from the said parcel of land.

d) The Plaintiff to sign all necessary documents and to do or cause to be done all and any acts as will be necessary to facilitate the subdivision and registration of the Defendants 3 acres of land as ordered under (b) hereof and in default the Deputy Registrar of this Court be and is hereby authorized and mandated to do so.

e) The Plaintiff do pay the Defendant costs of the suit as well as costs of the counterclaim.

Dated and delivered at Nairobi this 14th day of July, 2005.

M.G. Mugo

Judge

In the presence of:

Gitau h/b for Gathii for the Plaintiff

N/A for the Defendant