



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**Civil Case 3084 of 1992**

**WANJIKU NG'ANG'A .....PLAINTIFF**

**VERSUS**

**NJENGA NG'ANG'A.....DEFENDANT**

**JUDGMENT**

The plaintiff herein WANJIKU NG'ANG'A filed this suit by way of Originating Summons dated 8th June 1992 seeking orders:

- (1) That the defendant being the registered proprietor of all that parcel of land known as LR NO. NDUMBERI/TINGANGA/T.109 be declared registered as a trustee for the plaintiff in respect of the whole of the land parcel.
- (2) That the plaintiff be declared and registered as proprietor of the whole of that parcel of land known as NDUMBERI/TINGANGA/T.109.
- (3) That in the alternative and without prejudice to the foregoing, the defendant's title to the whole of all that parcel of land known as NDUMBERI/TINGANGA/T.109 to be deemed extinguished through the doctrine of Adverse Possession of the plaintiff and the plaintiff be registered as proprietor of the said parcel of land.

The defendant named herein died on 20th December 2003 and the plaintiff moved the court by way of Chamber Summons dated 20th September 2004 whereupon leave was granted to have Peter Kinyanjui Njenga and Hannah Wanjiku Njenga son and widow respectively substitute the defendant and an order to that effect was issued by Mugo J on 8th February 2005.

The plaintiff took the hearing date in the registry on 30th March 2005 and the defendants as legal representatives of the deceased defendants estate were served with the hearing notice and affidavit of service duly filed in court.

The defendants did not appear and the hearing proceeded exparte. It is the plaintiffs case that the defendant was blood brother whose common father was known as Njenga Nganga. The defendant was the eldest in the family and come 1958, as was the practice then during the period of land consolidation, demarcation and registration, the defendant as the eldest son in the family was registered as Trustee on behalf of the rest of the family in respect of LR NO.NDUMBURI/TINGANGA/T.109 and LR NO. NDUMBERI/TINGANGA/502, which two parcels belonged to their father. Around 1970 upon her husband's death the plaintiff with the assistance and consent of the defendant and their mother moved

into LR NO.NDUMBERI/TINGANGA/T.109 whereupon she joined her mother and established her home, and upon which she built a semi-permanent house, dug a borehole and continued to farm thereon with her 8 children and she has continuously and uninterruptedly lived thereon to date.

All along, the defendant who was living on LR NP.NDUMBERI/TINGANGA/502 together with his family could regularly visit the plaintiff and their mother on parcel NO.T.109. In essence the defendant was all along aware and indeed approved of the plaintiffs occupation and utilization of the said land. Their mother passed away in 1985 and soon thereafter the defendant sought to have the plaintiff vacate the suit land in spite of the fact that she had been in uninterrupted, continuous utilization for almost 20 years and all her children have matured on the suit land.

On the issue of Trusteeship Mr. Mureithi counsel for the plaintiff submitted that the plaintiff has established that a customary trust existed and referred the court to the principles governing customary trusts as expounded in the case of **MWANGI & ANOTHER VS. MWANGI [1986] KLR 328** in which Shah CA (as he then was) quoting Muli J (as he then was) in **HCCC NO. 1400 OF 1973** stated:-

*“I have given consideration to all issues raised by the parties and I am satisfied that these considerations are subject to the trust implied by law as well as created by the intentions of the parties that there would be such a trust under the Kikuyu Customary Law in common. Registration of titles are creation of law and one must take into consideration surrounding the registration of the titles to determine as to whether a trust was envisaged”*

Counsel also referred the court to the case of **GITWANJA VS. GITWANJA [1983] KLR 575** in which CHESON AG JA (as he then was) quoting **JOMO KENYATTA** in his book Facing Mount Kenya stated:

*“After the death of the father the land was passed on to his sons, the eldest son took his father’s place. At this juncture the system of land tenure changed a title, there was no one who could regard the land as “mine” all would call it our land. The eldest son who had assumed the title of Muramati (titular or trustee) had no more rights than his brothers, except the title; he could not sell the land without the agreement of his brothers who had the same full cultivation rights on the piece of land which they cultivated as well as those which were cultivated by their respective mothers.”*

Lastly Mr. Mureithi referred to the case of **MBUI MUKANGA VS. GERALD MUTWIRI MBUI** (unreported) Civil appeal No.281 of 2000 in which the Court of appeal at Nyeri, the court quoting

*“The position as I see it is therefore as follows: Correctly and properly, theregistration of land under the*

*Registered Land Act extinguishes customary land rights and rights*

*under customary law are not overriding interests under Section 30*

*of the Registered Land Act. But since the same registration recognizes*

*trusts in general terms as is done on the proviso to section 28 and Section*

*126(a) of the Registered Land Act without specifically excluding trusts*

*originating from customary law and since customary law in Kenya, generally,*

*have the concept or notion of a trust inherent in them where a person holding*

*a piece of land in a judiciary capacity under the customary laws has the piece*

*of land registered in his name under the Registered Land Act with the relevant*

*instrument of an acquisition, either describing capacity, that registration signifies*

*consequent trust with the legal effect of transforming the trust from customary to*

*provisions of the Registered Land Act because, according to the proviso to Section 28*

*of the Registered Land Act such registration does not “relief” a proprietor from any*

*duty or obligation to which he is subject as a trustee.Kikuyu Customary Law recognizes*

*the law of trusts and so does Registered Land Act under which this suit fails.”*

I have given consideration to all issues and I am satisfied that these considerations are subject to the trust implied by law as well as created by the intention of the parties that there would be such a trust which under most customary laws in Kenya is common. Registration of titles are creation of the law and having considered the surrounding circumstances which led to the defendant being registered as a proprietor of the suit land I am satisfied that a trust was envisaged.

I now turn to the issue of adverse possession. The plaintiff having conceded that she was in possession with the consent of the defendant there is no adverse possession.

In conclusion I make the following orders:

(a) A declaration that the defendant holds land reference NO. NDUMBERI/TINGANGA/T.109 in trust for the plaintiff.

(b) A declaration that the plaintiff is entitled to be registered as the proprietor of the suit land in place of the defendant.

(c) That the plaintiff be registered as proprietor of the whole of all that parcel of land known as NDUMBERI/TINGANGA/T.109.

(d) Each party bears his own costs.

Delivered and dated at Nairobi this 22nd day of September 2005.

**J.L.A. OSIEMO**

**JUDGE**